



## AUSTRALIAN HUMAN RIGHTS COMMISSION

### SEX DISCRIMINATION ACT 1984 (Cth), Section 44(1)

#### NOTICE OF DECISION ON APPLICATION FOR TEMPORARY EXEMPTION: LESBIAN ACTION GROUP

The Australian Human Rights Commission (the Commission) gives notice of its decision regarding an application made by Jean Taylor on behalf of the members of the Lesbian Action Group for a temporary exemption pursuant to s 44(1) of the *Sex Discrimination Act 1984* (Cth) (SDA).

#### 1 THE APPLICATION

- 1.1 The applicant, Jean Taylor makes this application on behalf of herself and the members of the Lesbian Action Group (the Application).<sup>1</sup>
- 1.2 The Lesbian Action Group comprises 8 individual members and describes itself in the Application as a not for profit, community based, 'lesbian born female' group, established to address the discrimination experienced by 'lesbians born female'.<sup>2</sup> The aims of the Lesbian Action Group include 'to organise events for the benefit of the Lesbian communities and be politically active on behalf of Lesbians whenever we are challenged and discriminated against'.<sup>3</sup>
- 1.3 The Lesbian Action Group makes this Application for a five-year exemption to hold regular lesbians born female only events, starting with a 'Lesbians Born Female Only' event to celebrate International Lesbian Day on 15 October 2023.
- 1.4 The event on 15 October 2023 was proposed to be held at the Victorian Pride Centre in St Kilda. The Victorian Pride Centre declined the booking on the basis that its exclusionary nature was inconsistent with the centre's fundamental purpose and its object of 'facilitating within the Victorian Pride Centre events in support of equality, diversity and inclusion for the LGBTIQ+ community within Australian society'. The Lesbian Action Group wish to proceed with the Application and intend to approach another venue to hold the proposed event if the exemption is granted.

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<sup>1</sup> The members of the Lesbian Action Group are listed at Schedule 1.

<sup>2</sup> Lesbian Action Group, *Application for Temporary Five Year Exemption under the Sex Discrimination Act for a Lesbians Born Female only Event to Celebrate International Lesbian Day*, page 9, available at <https://humanrights.gov.au/our-work/legal/exemption-applications-under-sex-discrimination-act-1984-cth>

<sup>3</sup> Ibid.

## **2 DECISION OF THE COMMISSION**

2.1 The Commission has decided not to grant the temporary exemption sought by the Lesbian Action Group:

- to host the proposed event on 15 October 2023 to celebrate International Lesbian Day and restrict attendees, organisers and advertising of the event to lesbians born female only
- thereafter to hold regular lesbians born female only events.

## **3 CONSIDERATION AND REASONS**

3.1 In reaching its decision, the Commission has considered the following:

- the Application and submissions by the Lesbian Action Group
- all further information provided by the Lesbian Action Group in relation to the Application
- submissions from individuals, organisations and interested parties in relation to the Application
- submissions from the Lesbian Action Group, individuals and organisations in response to the preliminary view issued by the Commission on 25 September 2023.

3.2 With the exception of the individual submissions, many of these documents are available on the Commission's website at: <https://humanrights.gov.au/our-work/legal/exemption-applications-under-sex-discrimination-act-1984-cth>

3.3 In reaching its decision, the Commission had regard to the following:

- the terms and objects of the SDA
- the Commission Guidelines: *Temporary Exemptions under the Sex Discrimination Act 1984 (Cth) 2009*.

3.4 The history of the Application and the reasons for the Commission's decision are set out below.

## **4 MEANING OF IMPORTANT TERMS**

4.1 Unless the contrary intention appears, any term used in this decision and in the SDA has the same meaning in this decision as it has in the SDA.

4.2 This decision involves consideration of the term 'sex' as a legal concept in the SDA. The Commission notes that the word 'sex' is not defined in the SDA. It should take its ordinary meaning, informed by its context (including previous

court cases and other Australian legislation) and the purpose of the SDA (particularly, to eliminate discrimination). The SDA was amended in 2013 by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (the Amending Act). The Amending Act introduced protections against discrimination on the ground of sexual orientation, gender identity and intersex status, and replaced references in the SDA to 'opposite sex' with 'different sex'. The explanation given for this in the Explanatory Memorandum for the Amending Act was that 'sex is not a binary concept'.<sup>4</sup> Importantly, for present purposes, the provisions of the SDA also suggest that a person's 'sex' can be changed.<sup>5</sup> This interpretation is consistent with the way 'sex' has been used as a legal concept throughout Australia,<sup>6</sup> including in legislation dealing with birth registers.<sup>7</sup>

4.3 The words 'man' and 'woman' are also not defined in the SDA. The Amending Act repealed the definitions of 'man' and 'woman' that then existed. Prior to the Amending Act, 'man' and 'woman' were defined in s 4(1) of the SDA as follows:

**man** means a member of the male sex irrespective of age.

**woman** means a member of the female sex irrespective of age.

4.4 The Explanatory Memorandum for the Amending Act (2013 EM) described the reason for this change in the following way (at [18]):

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<sup>4</sup> Explanatory Memorandum, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) at [15].

<sup>5</sup> The definition of 'gender identity' in s 4 includes the words 'with or without regard to the person's designated sex at birth'. If 'sex' in the SDA simply referred to a person's sex determined at birth by reference to biological characteristics, the definition could have simply said 'with or without regard to the person's sex'. That the legislature chose to specify the sex 'designated ... at birth' supports the idea that the concept of sex in the SDA is broader, and that 'sex' may change over the course of a person's lifetime.

<sup>6</sup> See *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 at 316-317 (Lockhart J, with whom Heerey J agreed), where his Honour considered foreign and South Australian legislation, recognising the nominated sex of 'post-operative transsexuals'. See also *Attorney-General for the Commonwealth v Kevin and Jennifer* [2003] FamCA 94; (2003) 172 FLR 300 at [348]-[358], where it was noted the trial judge had had regard to statutory recognition of gender reassignment of trans persons, and at [358] the Court concluded that these provisions provide 'considerable assistance in determining whether the contemporary everyday meaning of "man" and "marriage"' extended to a transgender man. See also at [379].

<sup>7</sup> All States and Territories have legislation in place that permits a person to change the entry of their sex recorded in the register (or, in Tasmania, to have a gender registered, or, in Western Australia, to have a 'recognition certificate' issued: see *Births, Deaths and Marriages Registration Act 1995* (NSW), Part 5A; *Births, Deaths and Marriages Registration Act 1996* (SA), Part 4A; *Births, Deaths and Marriages Registration Act 1999* (Tas), Part 4A; *Births, Deaths and Marriages Registration Act 1996* (Vic), Part 4A; *Gender Reassignment Act 2000* (WA), Part 3; *Births, Deaths and Marriages Registration Act 1997* (ACT), Part 4; *Births, Deaths and Marriages Registration Act 1996* (NT), Part 4A and *Births, Deaths and Marriages Registration Act 2003* (Qld), Part 4.

These items will repeal the definitions of 'man' and 'woman' from subsection 4(1). To the extent these terms appear in the Act, they will take their ordinary meaning. These definitions are repealed in order to ensure that 'man' and 'woman' are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA.

4.5 The repeal of the definition of 'woman', together with the comments in the 2013 EM, suggest that the word 'woman' in the SDA is intended to include a transgender woman.

4.6 The SDA defines 'sexual orientation' at s 4 of the SDA as:

a person's sexual orientation towards:

- (a) persons of the same sex; or
- (b) persons of a different sex; or
- (c) persons of the same sex and persons of a different sex.

4.7 The SDA defines 'gender identity' as 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth' (s 4 SDA).

4.8 Since 2013, it has been unlawful to discriminate against a person in the areas of public life covered by the SDA on the ground of the person's sexual orientation or a person's gender identity.

## **5 REVIEW OF DECISION**

5.1 Pursuant to s 45 of the SDA, and subject to the *Administrative Appeals Tribunal Act 1975* (Cth), an application may be made to the Administrative Appeals Tribunal for a review of the decision to which this notice relates by or on behalf of any person or persons whose interests are affected by the decision.

## **6 THE COMMISSION'S PROCESS**

6.1 Following receipt of the Lesbian Action Group's Application, the Commission published the Application on its website and commenced a two-week public consultation period. It did this by:

- publishing the Application and additional information on its website and calling for public submissions on its merits

- writing to the State and Territory anti-discrimination bodies and Equal Opportunity Commissions, inviting them to make submissions
- writing to a number of interested parties, inviting them to make submissions.

- 6.2 The Commission received 236 submissions during its initial public consultation, consisting of submissions from 31 organisations and 205 individuals.
- 6.3 Of the submissions from organisations, 15 were in favour of granting the exemption and 14 opposed granting the exemption, including a joint submission by 15 different organisations.<sup>8</sup> Two organisations did not express a view, either in favour of or in opposition to the exemption.
- 6.4 Of the submissions from individuals, 123 were in favour of granting the exemption and 82 opposed granting the exemption. The Commission notes that the individual submissions received both in support of and against the exemption, appear to reflect submitters from a variety of cultural backgrounds, ages, occupations, gender identities and sexual orientations.
- 6.5 With respect to State and Territory anti-discrimination and human rights bodies, the Commission received a submission from Equal Opportunity Tasmania, referring to the Tasmanian Anti-Discrimination Commissioner's decision to refuse an exemption application by Ms Jessica Hoyle and LGB Alliance Australia. The decision was confirmed on review by the Tasmanian Civil and Administrative Tribunal.<sup>9</sup> The Victorian Equal Opportunity and Human Rights Commission and Anti-Discrimination NSW declined to make submissions. No responses were received from the other State and Territory anti-discrimination bodies and Equal Opportunity Commissions.
- 6.6 On 25 September 2023, the Commission issued a preliminary view in this matter. The preliminary view was uploaded onto the Commission's website and the Commission gave interested parties the opportunity to respond to the Commission's preliminary findings.
- 6.7 The Commission received a further 262 submissions in response to the preliminary view, consisting of submissions from 20 organisations and 242 individuals. Of these submissions, 259 were in favour of the exemption. Many of these submissions were made by individuals and organisations that had made a submission in support of the Application. Save for 3 submissions, the organisations and individuals who opposed the exemption being granted did not make a further submission in response to the preliminary view.

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<sup>8</sup> A list of the organisations included in the joint submission is at Schedule 2.

<sup>9</sup> *Jessica Hoyle and LGB Alliance Australia (Review of Refusal of an Application for Exemption)* [2022] TASCAT 142.

Submissions were also received from other individuals, including men, women who identified themselves as heterosexual women and individuals from outside Australia who were in favour of the exemption.

- 6.8 A list of the submissions from organisations that agreed to the publication of their submission is contained in Schedule 2 to this decision. These submissions are available on the Commission's website.
- 6.9 The Commission has not published the individual submissions on its website, for reasons including their volume and the similarity of issues to those raised in the submissions from organisations.
- 6.10 The Commission has considered all the materials referred to above in reaching its decision in relation to the Application.

## **7 PROCEDURAL FAIRNESS CONSIDERATIONS**

- 7.1 Consistent with fundamental principles of procedural fairness, the Commission considers that the process outlined above has provided both the applicant and the public with an adequate opportunity to comment on this Application.

## **8 LEGISLATIVE REGIME AND THE COMMISSION'S POWER TO GRANT EXEMPTIONS**

### ***The SDA***

- 8.1 The SDA makes it unlawful to discriminate on the grounds of sex, sexual orientation and gender identity (amongst other grounds) in a range of areas of public life.
- 8.2 Most relevantly for the Application, the SDA makes discrimination unlawful in relation to the provision of goods, services and facilities. Section 22 of the SDA provides:

#### **Goods, services and facilities**

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, ... :

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

- 8.3 These prohibitions on discrimination apply subject to s 7D and subject to exemptions set out in Division 4, Part II of the SDA.
- 8.4 Section 7D of the SDA relevantly provides:

## **7D Special measures intended to achieve equality**

- (1) A person may take special measures for the purpose of achieving substantive equality between:
  - (a) men and women; or
  - (aa) people who have different sexual orientations; or
  - (ab) people who have different gender identities;
  - ...
- (2) A person does not discriminate against another person under section 5, 5A, 5B, 5C, 6, 7, 7AA or 7A by taking special measures authorised by subsection (1).

8.5 The SDA provides for a number of permanent exemptions to the SDA, including for voluntary bodies. Section 39 provides:

Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person's sex, sexual orientation, gender identity, intersex status, ... in connection with:

- (a) the admission of persons as members of the body; or
- (b) the provision of benefits, facilities or services to members of the body.

8.6 The permanent exemption under s 39 is limited to the admission of persons as members of the voluntary body and, relevantly, the provision of benefits, facilities or services to those members.

8.7 The Lesbian Action Group may fall within the definition of a 'voluntary body' under the SDA.<sup>10</sup> However, the Lesbian Action Group is not seeking an exemption to discriminate in connection with the admission of persons as members, or the provision of benefits, facilities or services only to its members, as permitted by s 39 of the SDA. Rather, the Lesbian Action Group seeks to hold events restricted to 'lesbians born female' and to advertise those events 'widely and publicly', beyond their membership base. The Commission is of the view that the s 39 exemption does not apply in these circumstances, where the provision of 'benefits, facilities or services' is proposed to extend to persons beyond members of the Lesbian Action Group.

### ***The Commission's power to grant exemptions***

8.8 Section 44 of the SDA provides the Commission with the power to grant exemptions by instrument in writing, from the operation of a provision of

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<sup>10</sup> Section 4, SDA.

Division 1 or 2 of the SDA as specified in the instrument. The power is enlivened on application by a person, persons or class of persons, as the case may be.<sup>11</sup>

- 8.9 An exemption may be granted subject to terms and conditions specified in the instrument, and may be expressed to apply only in particular circumstances, or in relation to particular activities, as specified in the instrument.<sup>12</sup> Exemptions are to be granted for a specified period not exceeding five years.<sup>13</sup> It is not unlawful for a person to act in accordance with an exemption while the exemption remains in force.<sup>14</sup>
- 8.10 In practical terms, the granting of a temporary exemption means that the activities or circumstances covered by it cannot be the subject of a successful complaint under the SDA.
- 8.11 Notwithstanding the few express limitations referred to above, the Commission's power to grant exemptions from compliance with the SDA is otherwise unconfined. Consistent with established principles of administrative law, the Commission's statutory discretion must be exercised in conformity with the subject matter, scope and purpose of the legislation under which it arises.<sup>15</sup>
- 8.12 The objects of the SDA are stated in s 3 to include:
- (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, ... in the areas of ... the provision of goods, facilities and services, ... ;  
...
  - (c) to eliminate, so far as is possible, discrimination involving sexual harassment, and discrimination involving harassment on the ground of sex, ... in other areas of public activity; and  
...
  - (d) to promote recognition and acceptance within the community of the principle of the equality of men and women; and

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<sup>11</sup> Sections 44(1) SDA.

<sup>12</sup> Sections 44(3)(a)–(b), SDA.

<sup>13</sup> Section 44(3)(c), SDA.

<sup>14</sup> Section 47, SDA.

<sup>15</sup> *R v Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1979) 144 CLR 45 at 49; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22], [31].



(e) to achieve, so far as practicable, substantive equality between men and women.

- 8.13 By conferring an exemption power on the Commission, the Australian Parliament has clearly contemplated that some discriminatory conduct might be justified and that, in certain circumstances, derogation from the terms of the SDA is permissible.
- 8.14 However, this exemption power must be interpreted in light of the objects of the SDA and the legislative scheme as a whole. The SDA defines discrimination and makes discrimination on the grounds of sex, sexual orientation and gender identity unlawful. The grant of an exemption pursuant to s 44 of the SDA has the effect of taking relevant conduct out of the SDA's prohibitions and denying redress to a person who is affected by that conduct for the period covered by the exemption. The effect of granting a temporary exemption is to qualify the norms of conduct that the SDA seeks to establish.
- 8.15 As the SDA already provides for permanent exemptions and defences that render any alleged discrimination not unlawful, and because the Commission's exemption power must be interpreted in light of the objects of the SDA, the Commission considers that temporary exemptions should not be granted lightly. In exercising its statutory discretion, the Commission must have regard to the circumstances of each individual case and balance the relevant factors. Given the significant legal consequences for potential complainants, the Commission must be satisfied that a temporary exemption is appropriate and reasonable, and persuasive evidence is needed to justify the exemption.
- 8.16 The Commission issued guidelines in 2009 concerning the way in which it proposes to exercise its power under the SDA. These provide that the Commission will consider:
- whether an exemption is necessary
  - whether granting an exemption would be consistent with the objects of the SDA
  - an applicant's reasons for seeking an exemption
  - submissions by interested parties
  - all relevant provisions of the SDA
  - any terms or conditions subject to which an exemption might be granted.

## 9 DECISION TO REFUSE EXEMPTION

### *The Application*

9.1 The Lesbian Action Group seeks an exemption from the SDA on the following terms:

- To only invite and include anyone who is a 'Lesbian Born Female' to the event to celebrate International Lesbian Day on 15 October 2023.
- 'To meet on a regular basis as Lesbians Born Female for our own well-being in order to exchange information, hold workshops around a range of issues pertinent to Lesbians and celebrate our many achievements.'
- 'To consolidate and expand our social and political Lesbian networks.'<sup>16</sup>
- 'To recognise that Lesbians have been building a strong and a specifically Lesbian culture and we have particular needs as Lesbians that need to be discussed and celebrated in a Lesbian born female only environment.'
- 'To be able to advertise widely and publicly in order to make it known to Lesbians who are socially isolated, particularly in rural areas, Lesbian with disabilities and Lesbians from linguistically diverse cultures that exclusive Lesbian events are being organised for their benefit.'<sup>17</sup>

9.2 The Application states the exemption would exclude anyone who was not a Lesbian Born Female, including, 'Heterosexual, Bisexual and Gay males, Heterosexual and Bisexual females, Transgender people and Queer plus people'.<sup>18</sup> The Lesbian Action Group has stated in their response to the preliminary view that 'transgender, bisexual and queer people who are born female and are lesbian would be welcome'.<sup>19</sup>

9.3 Details of the event proposed on 15 October 2023 include:

- 'an all day fun-filled culturally appropriate lesbians born female only event'
- 'entertainment provided by lesbian writers reading their work'
- 'speakers on a range of subjects'
- 'music, singing, skits, dancing, food and refreshments'.<sup>20</sup>

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<sup>16</sup> Lesbian Action Group, *Application for Temporary Five Year Exemption under the Sex Discrimination Act for a Lesbians Born Female only Event to Celebrate International Lesbian Day*, page 5.

<sup>17</sup> Ibid, page 6.

<sup>18</sup> Ibid, page 9.

<sup>19</sup> *Lesbian Action Group response to Australian Human Rights Commission Preliminary View* dated 3 October 2023, pages 3, 7 and 9.

<sup>20</sup> Above n 16.

- 9.4 The Application refers to exclusive lesbian events being held in the past since the early 1970s and provides some details of these. It states that ‘many thousands of lesbians benefited from the sense of pride, recognition and wellbeing that a large, well published, public lesbian specific gathering encourages in the participants’.<sup>21</sup>
- 9.5 The Application states that in 2003 the organisers of the ‘Lesbian Festival 2004’, faced opposition from the transgender community due to their gatherings being held exclusively for lesbians born female.<sup>22</sup>
- 9.6 An exemption was sought from the then *Equal Opportunity Act 1995 (Vic)* to enable the applicants to advertise and organise the National Lesbian Festival and Conference 2004 for lesbians born female only. The Victorian Civil and Administrative Tribunal granted the exemption on the basis of three attributes (sex, sexual orientation and gender identity) from sections 13, 15, 49 and 195 of the *Equal Opportunity Act 1995 (Vic)*.<sup>23</sup> Shortly afterwards, the exemption was revoked on application by the ‘Australian Woman Network’ to the Tribunal.<sup>24</sup>
- 9.7 The Lesbian Action Group states that since then only private lesbian meetings and gatherings have been held over the past 20 years to avoid legal challenges by the transgender community. They say that this is the reason why an exemption is necessary, to enable lesbians to advertise events and meet publicly without fear of litigation and discrimination.<sup>25</sup>
- 9.8 On 8 August 2023, the Commission requested further information from the Lesbian Action Group including the reasons why the exemption was reasonable and necessary.
- 9.9 On 9 August 2023, the Lesbian Action Group’s response included the following reasons:
- lesbians born female still experience discrimination, including in relation to sexuality
  - not wanting or not being able to discuss personal health-related issues in front of people who are not lesbians born female or sharing personal stories about domestic violence
  - ‘getting together with like-minded and like-bodied lesbians born female to celebrate our achievements’
  - to ‘meet freely and without being abused for wanting to do so’

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<sup>21</sup> Ibid, page 2.

<sup>22</sup> Ibid.

<sup>23</sup> Victorian Government Gazette No. G37 dated 11 September 2003, page 2382.

<sup>24</sup> Victorian Government Gazette No. G41 dated 9 October 2003, page 2596.

<sup>25</sup> Lesbian Action Group, *Application for Temporary Five Year Exemption under the Sex Discrimination Act for a Lesbians Born Female only Event to Celebrate International Lesbian Day*, page 4.

- ‘to participate in and listen to lesbian concerts, play and sing our Lesbian music, organise and attend workshops on a plethora of pertinent topics, talk with each other, exchange views, opinions, personal stories, laugh together and dance’
- a 5 year exemption was applied for to hold ongoing events for lesbians born female into the foreseeable future: ‘once the lesbians born female community are given an exemption to hold our own events, we won’t want to stop at one’.<sup>26</sup>

### ***Public consultation***

9.10 The Commission received 236 submissions in response to the Application. The Commission heard from both peak organisations and individuals on the issues raised by the Application.

9.11 The Commission received a further 262 submissions in response to the preliminary view. Many of these submissions were made by individuals and organisations that had made a submission in support of the Application. Save for 3 submissions, the organisations and individuals who opposed the exemption did not make a further submission in response to the preliminary view.

### ***Issues raised in submissions in favour of the exemption***

9.12 Most of the submissions in favour of granting the exemption emphasise the importance of preserving spaces for lesbian women only based on their biological sex – to be able to meet, assemble, speak and organise gatherings together.

9.13 These submissions state that transgender women cannot be women by virtue of their gender identity and accordingly cannot identify as lesbians.<sup>27</sup> They consider lesbians are women exclusively by virtue of their biological sex at birth who are ‘same-sex attracted’, and that same-sex orientation is also a protected attribute under the SDA.<sup>28</sup> They state that there are many other event and advocacy opportunities for transgender women.<sup>29</sup>

9.14 LGB Alliance Australia submitted:

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<sup>26</sup> Lesbian Action Group, *Additions to the Application for an Exemption 2023*, pages 1 and 2.

<sup>27</sup> LGB Alliance Australia, Lesbian Rights Australia, Visible Lesbian Group, Affiliation of Australian Women’s Action Alliances, Western Australian Women’s Action Alliance, Queensland Women’s Action Alliance.

<sup>28</sup> Women’s Rights Network.

<sup>29</sup> Affiliation of Australian Women’s Action Alliances.

It is very reasonable that lesbians would wish to rebuild a community in order to socialise and find partners and friends in a safe, welcoming, in-person space. ...

Lesbians are women who are attracted to other women only – i.e. female homosexuals. This attraction is experienced on the basis of sex; not on the basis of self-declared ‘gender identity’. A biological male, regardless of identity or legal status, is still a male, and therefore outside the romantic and sexual pool for lesbians. It should not be deemed ‘discriminatory’ or ‘hateful’ to recognise this fact. Lesbians should not be discriminated against because they do not hold male persons sexually compatible or attractive; this is a form of homophobia. ...

9.15 The submissions express concern that the protections against gender identity discrimination have threatened the ability of lesbians to gather and organise, enjoy a sense of community and hold ‘lesbian-only events’.<sup>30</sup>

9.16 Lesbian Rights Australia submitted:

Being unable to exclude males, heterosexuals and bisexuals from lesbian events has resulted in such events being overrun by these far larger demographics. ...

Regardless of whatever the Sex Discrimination Act’s purpose is these days, it’s actual effect has been to restrict lesbians from gathering, organising, finding community and knowing we’re not alone.

9.17 Some submissions say there is a risk of violence or abuse if events are not restricted as requested in the Application.<sup>31</sup> LGB Alliance Australia states:

Women who choose to socialise in a lesbian-only space are making it clear that they want to be around other females only, in an intimate environment: a space where a woman can seek a sexual partner or be openly affectionate with an existing partner. Entering such a space can be a vulnerable, deeply personal step for a woman. For some women - particularly those who are newly ‘out’ or who have suffered sexual abuse or domestic violence - it takes great courage to enter that environment. When a male knowingly intrudes into that lesbian space, he is behaving aggressively and crossing a clear boundary that women have set. In many instances, his behaviour could reasonably be considered an act of sexual harassment.

9.18 The submissions highlight that lesbians in Australia have faced structural and entrenched discrimination, both historically and in the present day.<sup>32</sup> In particular, a number of individual submissions were received from older

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<sup>30</sup> Feminist Legal Clinic, Lesbian Rights Australia, Lesbian Bill of Rights International, IWD Meanjin Brisbane, Affiliation of Australian Women’s Action Alliances, Victorian Women’s Guild.

<sup>31</sup> Lesbian Rights Australia, Affiliation of Australian Women’s Action Alliances and LGB Alliance Australia.

<sup>32</sup> Lesbian Rights Australia and Visible Lesbian Group.

lesbians who describe their experience advocating for lesbian rights in the past, their concern over the erosion of 'women's based rights' in favour of gender identity protections, and the need to support younger 'lesbians born female'.

9.19 The individual submissions also describe the lack of access to exclusive lesbian only spaces in the community compared with what they consider to be the ability of other groups such as gay men and transgender persons to meet exclusively without discrimination.

9.20 LGB Alliance Australia submitted:

The lesbian-only events of past decades enabled women to engage in a rich variety of cultural and political activities and to build an extensive, cohesive community. But recently, that vibrant Victorian lesbian community has virtually vanished. For lesbians who wish to gather nowadays, covert private friendship groups are the only option.

### ***Issues raised in submissions opposing the exemption***

9.21 Many of the submissions opposing the exemption (both from individuals and organisations) state that the Lesbian Action Group does not represent the majority of lesbians who are supportive of trans lesbians, bisexual and queer cisgender women and rights-based inclusion regardless of other intersecting identities. These submissions considered the Application to be divisive, seeking to create sub-categories of women.<sup>33</sup>

9.22 Q+Law submitted:

It is important to note that lesbians are not a homogenous group. The lesbian community as a whole is made up of intersectional experiences and diversities including but not limited to race, religion, socioeconomic background and gender. Q+Law supports rights-based inclusion and seeks to improve the well-being of lesbians regardless of other intersecting identities. ...

Q+Law assumes the exemption is sought to allow the applicant to discriminate against all people who are not cis-gendered women sexually attracted to only other cis-gendered women. Therefore, the exemption seeks the right to be able to differentiate between sub-categories of women.

Q+Law submits that there are no distinctions between subcategories of women in the CEDAW or the [SDA]...Women who have intersex variations and/or are transgender are women under both instruments. They are also the subcategory of women who experience the most discrimination, exclusion, and marginalisation within society... In the interest of preserving the Act's purpose, applications that seek to further discriminate against some sub-categories of women should not be granted an exemption.

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<sup>33</sup> Q+Law, Equality Australia joint submission, Melbourne Bisexual Network, Rainbow Rights Watch.

- 9.23 Most of the submissions say that it is not reasonable to make distinctions between women based on their cis or transgender experience, or among same-sex attracted women based on the exclusivity of their same-sex attraction for the type of event proposed to be held by the Lesbian Action Group.<sup>34</sup>
- 9.24 The joint submission received from Equality Australia on behalf of 15 organisations states:
- while we agree that it is important and beneficial for lesbians to be able to gather as a community to celebrate their culture and discuss issues that affect their community, it is not appropriate or necessary to exclude same-sex attracted women who are transgender, bisexual and queer in order to do so.
- 9.25 The submissions also say that the exemption would further perpetuate discrimination against same-sex attracted transgender women, a group that experiences high levels of discrimination, harassment and social exclusion.<sup>35</sup>
- 9.26 Some submissions state that it is unclear how the Lesbian Action Group proposes to make the distinctions at the proposed event in order to exclude persons that are not cisgender lesbians, or exclusively attracted to women. These submissions state that it is possible that the organisers may be required to interrogate the physical sex characteristics of an attendee or the exclusivity of a woman's sexual attraction to other women as a condition for participation in the event.<sup>36</sup>
- 9.27 Q+Law states:
- LAG has failed to explain how it intends to enforce the exemption. Whether or not a lesbian is cisgender, transgender, intersex, or gender nonconforming cannot be ascertained based on public physical presentation alone. Women who were assigned female at birth have diverse bodies, sex characteristics, voices, frames, statures and so on. It is impossible to tell who is 'born female' and who is not without intrusion on an individual's privacy, bodily integrity, and dignity.
- 9.28 The joint submission received from Equality Australia states that this may invite questions about a person that may involve conduct which could amount to sexual or sex-based harassment.
- 9.29 Individual submissions also raise the difficulty for transgender partners of cisgender lesbians who would also be excluded from attending the proposed event.

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<sup>34</sup> Q+Law, Equality Australia joint submission.

<sup>35</sup> Equality Australia joint submission, Rainbow Rights Watch.

<sup>36</sup> Q+ Law, Equality Australia joint submission, Rainbow Rights Watch, Victorian Trades Hall Council.

- 9.30 The submissions also identify the broad nature of the exemption applied for and point out that the Lesbian Action Group seek a temporary exemption for a 5-year period to hold further events, however the circumstances and activities intended to be covered are not specified in detail.

***Issues raised in submissions in response to the Commission's preliminary view***

- 9.31 The Lesbian Action Group provided a submission in response to the preliminary view. In this submission, the Lesbian Action Group state that they are not seeking to exclude transgender, bisexual or queer people who are born female and are lesbian from their events.<sup>37</sup>

- 9.32 The Lesbian Action Group also state that they do not intend to 'police' people at the door:

We have applied for this exemption so that we can publicly advertise and legally run events for lesbians born female. We hope that people would respect that. And respect us.

We acknowledge that if people choose to disrespect that, then we have little recourse to exclude them. We do not propose to employ security, to vet or question people at the door, to intrude on privacy or dignity, or harass.

- 9.33 In relation to the events the Lesbian Action Group propose to hold in the future, the Lesbian Action Group state:

We submit that we have given fulsome descriptions of the events we wish to organise in our original application, if not the fine details.

We have said we want to 'provide regular lesbian born female only events ... which will include entertainment provided by lesbian writers reading their work, speakers on a range of subjects, music, singing, skits, dancing, food and refreshments ... all of the lesbians involved... will be lesbians born female to provide an example to young lesbians ...'

- 9.34 The submissions received in response to the preliminary view reiterated the points raised in the submissions in response to the Application by those individuals and organisations in favour of the exemption (summarised above).

***Consideration and Reasons for Decision***

- 9.35 The Lesbian Action Group seeks an exemption for five years to hold regular publicly advertised 'lesbians born female only events' starting with a 'Lesbians Born Female Only' event to celebrate International Lesbian Day on 15 October

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<sup>37</sup> Lesbian Action Group response to Australian Human Rights Commission Preliminary View dated 3 October 2023, pages 3, 7 and 9.



2023. The Application states that the Lesbian Action Group is seeking to exclude from these events 'Heterosexual, Bisexual and Gay males, Heterosexual and Bisexual females, Transgender people and Queer plus people'. The Lesbian Action Group state in their response to the preliminary view that 'transgender, bisexual and queer people who are born female and are lesbian would be welcome.'

9.36 It appears that restricting access to a public event to celebrate International Lesbian Day (and similar public events in the future) in the manner now proposed by the Lesbian Action Group would amount to unlawful discrimination under the SDA on the ground of at least gender identity in the provision of goods and services (s 22 SDA). The permanent exemptions to the SDA do not appear to apply to these circumstances.

***Conduct that would likely be lawful under the SDA***

9.37 Holding an event to celebrate a particular community does not necessarily require the exclusion of the broader community in that celebration. However, some exclusions may nevertheless not amount to unlawful discrimination.

9.38 The Commission notes that the s 39 exemption for voluntary bodies in the SDA would likely permit the Lesbian Action Group to discriminate in connection with the provision of benefits, facilities or services to its own members. That is, the Lesbian Action Group would likely not be prohibited by the SDA from holding events for members of its group. The Lesbian Action Group would also not be prohibited by the SDA from holding events in private, as the SDA only regulates discrimination in certain areas of public life.

9.39 The Commission also considers that, in so far as an event to celebrate International Lesbian Day (and similar events in future years) seeks to exclude men and heterosexual women, these events may amount to a special measure within the meaning of ss 7D(1)(a) and 7D(1)(aa) of the SDA if they are for the purpose of achieving substantive equality between men and women, or between people who have different sexual orientations, respectively. Therefore the exclusion of men may not amount to sex discrimination under s 5 of the SDA, and the exclusion of heterosexual women may not amount to discrimination on the ground of sexual orientation under s 5A of the SDA.

9.40 As set out above, s 7D(1) provides that a person may take special measures for the purposes of achieving substantive equality between certain groups and s 7D(2) provides that a person does not discriminate against another person by taking special measures authorised by s 7D(1). The aim of achieving substantive equality recognises the existence of historical and entrenched equality. Some groups continue to face systemic discrimination and structural barriers to equal

participation in public life. In order to qualify as a special measure it must be done for the purpose of achieving substantive equality.

9.41 The Application and submissions received in support of the Application highlight that lesbians in Australia have faced structural and entrenched discrimination, both historically and in the present day. The Application and submissions state that lesbians have experienced intersectional discrimination on the basis of both their sex and their sexual orientation.<sup>38</sup> A submission that was made in many individual submissions states:

... a single-sex event on International Lesbian Day was an earnest effort to create a safe and affirming space for lesbians to celebrate their identity and connect with other lesbians who share similar experiences. It is essential to recognise that such events play a crucial role in fostering a sense of community and solidarity among marginalised groups.

Lesbians, like any other minority group, have faced systemic discrimination, social stigmatisation, and exclusion throughout history. Single-sex events, especially on an occasion as significant as International Lesbian Day, are really important to our community.

9.42 The submissions in favour of the exemption also refer to the particular experiences of lesbians, as distinct and different from other members of the gay, bisexual, transgender and intersex community.

9.43 The purpose of the event to celebrate International Lesbian Day (and similar events in future years) is stated to be to celebrate and 'rebuild' the lesbian community, 'make public and visible a place of support to young, socially isolated and other vulnerable lesbians', and 'foster a sense of pride and well-being amongst the lesbian community'.<sup>39</sup>

9.44 An event with these aims may be considered a special measure for the purpose of achieving substantive equality between men and women, and between lesbian women and heterosexual women. Accordingly, in so far as the Lesbian Action Group seeks to exclude men and heterosexual women, this conduct may be lawful under the SDA.

***Conduct that would be unlawful under the SDA and requires an exemption***

9.45 However, the Lesbian Action Group's Application seeks to exclude transgender women who are lesbians. This exclusion would likely amount to unlawful

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<sup>38</sup> Lesbian Action Group response to Australian Human Rights Commission Preliminary View dated 3 October 2023, page 4.

<sup>39</sup> Lesbian Action Group response to Australian Human Rights Commission Preliminary View dated 3 October 2023, page 4.

discrimination under the SDA on the ground of gender identity in the provision of goods and services (s 22 SDA).

- 9.46 The Commission has considered the applicant's reasons for seeking the exemption. The Commission has considered the submissions received both for and against the grant of this exemption. The balancing of the rights of minority groups that experience structural and entrenched discrimination is a complex issue where opinions are divided.
- 9.47 The Commission acknowledges that lesbians in Australia have faced significant structural and entrenched discrimination, both historically and in the present day.<sup>40</sup> The Commission agrees that it is important and beneficial for lesbians to gather together as a community to celebrate their culture and discuss issues of special relevance to their community.
- 9.48 The Commission notes that Parliament has signalled its intention to protect individuals from discrimination on the basis of both sexual orientation and gender identity.<sup>41</sup> Parliament has also signalled that transgender women can be women within the meaning of the SDA. Transgender women, as a group, also face significant structural and entrenched discrimination.
- 9.49 As set out above, the Commission considers that temporary exemptions should not be granted lightly. The grant of an exemption has the effect of taking relevant conduct out of the SDA's prohibitions and denying redress to a person who is affected by that conduct for the period covered by the exemption. The effect of granting a temporary exemption is to qualify the norms of conduct that the SDA seeks to establish.
- 9.50 In exercising its statutory discretion, the Commission must have regard to the circumstances of each individual case and balance the relevant factors. Given the significant legal consequences for potential complainants, the Commission must be satisfied that an exemption is appropriate and reasonable, and persuasive evidence is needed to justify the exemption.
- 9.51 The Commission has considered the nature of the exemption sought in this Application. The Lesbian Action Group seeks an exemption to hold an event to celebrate International Lesbian Day but to exclude transgender women who are lesbians for whom that celebration may be particularly significant. The Application sets out a range of reasons for seeking an exemption including:
- 'to participate in and listen to lesbian concerts, play and sing our Lesbian music, organise and attend workshops on a plethora of pertinent topics,

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<sup>40</sup> Lesbian Rights Australia and Visible Lesbian Group.

<sup>41</sup> *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

talk with each other, exchange views, opinions, personal stories, laugh together and dance'

- not wanting or not being able to discuss personal health-related issues in front of people who are not lesbians born female or share personal stories about domestic violence
- to 'meet freely and without being abused for wanting to do so'.

9.52 These reasons suggest that the event is intended to be a community social event, involving singing, dancing, celebrations and the discussion of ideas. It aims to build a sense of pride, recognition and wellbeing amongst the community.

9.53 The Commission received many submissions in support of the Application. The principal argument made in support of the Application is that transgender women cannot be women by virtue of their gender identity and accordingly cannot be lesbians. The submissions seek to preserve spaces for lesbian women based on biological sex at birth, and these submissions express concern that the protections against gender identity discrimination in the SDA have threatened their ability to do so.

9.54 The Commission also received many submissions against the Application. These submissions state that the Lesbian Action Group does not represent the majority of lesbians who are supportive of transgender lesbians and rights-based inclusion. The joint submission received from Equality Australia on behalf of 15 organisations states:

while we agree that it is important and beneficial for lesbians to be able to gather as a community to celebrate their culture and discuss issues that affect their community, it is not appropriate or necessary to exclude same-sex attracted women who are transgender, bisexual and queer in order to do so.

9.55 The Commission agrees with this submission. The Commission is not persuaded it is appropriate and reasonable to make distinctions between women based on their biological sex at birth or transgender experience at a community event of this kind, and to exclude transgender lesbians from a community event of this kind.

9.56 The applicant and many of the submissions made in support of the applicant focused on whether the exclusion of transgender lesbians would involve discrimination on the ground of 'sex'. Those submissions proceeded from the premise that a person's sex cannot be changed, including at law, and that trans women could not be either women or lesbians. The implicit reasoning was that if (cisgendered) men can be excluded from a lesbian event on the basis that it was a special measure to achieve substantive equality between women and

men, then trans women should also be able to be subject to a blanket exclusion. As noted in section 4 above, the underlying premises of this line of reasoning are contrary to the clear intention of the 2013 amendments to the SDA.

- 9.57 Importantly, the SDA prohibits both discrimination on the ground of 'sex' and discrimination on the ground of 'gender identity'. Even if a measure is a special measure on the ground of 'sex' it will not necessarily also be a special measure on the ground of 'gender identity'. The question, then, is whether an exemption from the prohibition against gender identity discrimination should be granted.
- 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.<sup>42</sup>
- 9.59 The Commission notes that a number of submissions in favour of the Application refer to the risk of violence or harassment if the event is not restricted as requested in the Application. The Commission acknowledges that these submissions contain anecdotal accounts of abuse and harassment experienced by lesbians perpetrated by both men and members of the transgender community. However, these submissions were not supported by persuasive empirical evidence to support the position that an exemption was necessary to ensure the safety of attendees at a public event in Australia to celebrate International Lesbian Day.
- 9.60 The exemption is sought for a period of five years to permit the Lesbian Action Group to hold a 'Lesbians Born Female Only' event to celebrate International Lesbian Day on 15 October 2023, and to hold similar events restricted to 'lesbians born female' in the future. The circumstances of these future events intended to be covered by the exemption are not specified in detail, although the Lesbian Action Group state:

We have said we want to 'provide regular lesbian born female only events... which will include entertainment provided by lesbian writers reading their work, speakers on a range of subjects, music, singing, skits, dancing, food and

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<sup>42</sup> Equality Australia joint submission, Rainbow Rights Watch, Melbourne Bisexual Network.

refreshments... **all of the lesbians involved... will be lesbians born female** to provide an example to young lesbians...' [Emphasis added]

9.61 On balance, for the reasons outlined above, the Commission's decision is that it is not persuaded that it is appropriate and reasonable to grant the exemption to the Lesbian Action Group.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Signed by the President, Emeritus Professor Rosalind Croucher AM on behalf of the Commission.

12 October 2023

## **SCHEDULE ONE**

The Lesbian Action Group is comprised of eight members:

Jean Taylor

Carole Ann

Nicole Mowbray

Sarah Yeomans

Jeanette Carrison

Elizabeth Matthews

Elizabeth Smith

Celia Sexton

## SCHEDULE TWO

### SUBMISSIONS RECEIVED

The Commission received submissions from the following organisations:

Name of Organisation	Submission in response to the Application	Submission in response to the Preliminary View
Affiliation of Australian Women's Action Alliances (AAWAA)	X	X
Aleph Melbourne	X	
Antypical Hair & Gallery	X	
Coalition of Activist Lesbians (CoAL)		X
Equal Opportunity Tasmania	X	
Euphoria Social	X	
Fair Game Australia	X	X
Feminist Legal Clinic	X	X
Incandescent Women		X
IWD Brisbane Meanjin	X	X
<p><b>Joint submission on behalf of the following 15 organisations:</b></p> <ul style="list-style-type: none"> <li>• Australian GLBTIQ Multicultural Council (AGMC)</li> <li>• Drummond Street Services</li> <li>• Dykes on Bikes Melbourne</li> <li>• Equality Australia</li> <li>• Human Rights Law Centre</li> <li>• LGBTI Legal Service Inc</li> <li>• Melbourne Bisexual</li> </ul>	X	



Name of Organisation	Submission in response to the Application	Submission in response to the Preliminary View
Network <ul style="list-style-type: none"> <li>• Midsumma</li> <li>• Parents of Gender Diverse Children</li> <li>• Rainbow Community Angels</li> <li>• Switchboard</li> <li>• Trans Justice Project</li> <li>• Transcend Australia</li> <li>• Transgender Victoria</li> <li>• Zoe Belle Gender Collective</li> </ul>		
Lesbian Action for Visibility in Aotearoa (LAVA)		X
Lesbian Bill of Rights (LBOR) International	X	X
Lesbian Rights Australia	X	X
LGB Alliance Australia	X	X
LGB Tasmania	X	
LGBTIQ+ Commissioner Victoria	X	
Mamma Chen's	X	
Melbourne Bisexual Network	X	
Northern Rivers Gender Critical		X
Q+ Law	X	
Queensland Women's Action Alliance	X	X
Radical Lesbian Feminist United!		X
Rainbow Rights Watch	X	
Renters and Housing Union	X	
Scottish Lesbians	X	X

Name of Organisation	Submission in response to the Application	Submission in response to the Preliminary View
Triple Bi-Pass	X	
Victorian Pride Centre	X	
Victorian Trades Hall Council	X	
Victorian Women's Guild	X	
VISIBLE Lesbian Group	X	X
Vixen	X	
West Australian Women's Action Alliance	X	X
Woman Up Queensland		X
Women's Rights Network Australia	X	X

Copies of all submissions (except where consent was not obtained) are available on the Commission website at: <https://humanrights.gov.au/our-work/legal/exemption-applications-under-sex-discrimination-act-1984-cth>