

AUSTRALIAN HUMAN RIGHTS COMMISSION

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

NOTICE OF PRELIMINARY VIEW ON APPLICATION FOR TEMPORARY EXEMPTION: LESBIAN ACTION GROUP

The Australian Human Rights Commission (the Commission) gives notice of its preliminary view 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).¹
- 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'.² 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'.³
- 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.

¹ The members of the Lesbian Action Group are listed at Schedule 1.

² 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>

³ Ibid.

2 PRELIMINARY VIEW OF THE COMMISSION

2.1 The Commission is of the preliminary view that it will not grant the temporary exemption sought by the Lesbian Action Group for a period of five years:

- 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 preliminary view, the Commission has considered the following:

3.1.1 the Application and submissions by the Lesbian Action Group

3.1.2 all further information provided by the Lesbian Action Group in relation to the Application

3.1.3 submissions from individuals

3.1.4 submissions from organisations and interested parties.

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 preliminary view, the Commission had regard to the following:

3.3.1 the terms and objects of the SDA

3.3.2 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 preliminary view are set out below.

4 THE COMMISSION'S PROCESS

4.1 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.
- 4.2 The Commission received 236 submissions during its public consultation, consisting of submissions from 31 organisations and 205 individuals.
- 4.3 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.⁴ Two organisations did not express a view, either in favour of or in opposition to the exemption.
- 4.4 Of the submissions from individuals, 123 were in favour of granting the exemption and 82 opposed granting the exemption.
- 4.5 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.⁵ 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.
- 4.6 A list of the submissions from organisations that agreed to the publication of their submission is contained in Schedule 2 to this preliminary view. These submissions are available on the Commission’s website.
- 4.7 The Commission has not published the individual submissions on its website due to their volume and the similarity of issues to those raised in the submissions from organisations. 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.
- 4.8 The Commission has considered all the materials referred to above in reaching its preliminary view in relation to the Application.

⁴ A list of the organisations included in the joint submission is at Schedule 2.

⁵ *Jessica Hoyle and LGB Alliance Australia (Review of Refusal of an Application for Exemption)* [2022] TASCAT 142.

5 PROCEDURAL FAIRNESS CONSIDERATIONS

- 5.1 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.
- 5.2 The Lesbian Action Group and the public will also be provided with a further opportunity to respond to this preliminary view before the Commission makes its final decision in this matter.

6 LEGISLATIVE REGIME AND THE COMMISSION'S POWER TO GRANT EXEMPTIONS

The SDA

- 6.1 The SDA makes it unlawful to discriminate on the grounds of sex, sexual orientation, gender identity and intersex status (amongst other grounds) in a range of areas of public life.
- 6.2 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;

- 6.3 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.

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

6.5 The Lesbian Action Group may fall within the definition of a 'voluntary body' under the SDA.⁶ 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 public 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

6.6 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 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.⁷

6.7 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.⁸ Exemptions are to be granted for a specified period not exceeding five years.⁹ It is not unlawful for a person to act in accordance with an exemption while the exemption remains in force.¹⁰

6.8 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.

6.9 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: *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].

⁶ Section 4, SDA.

⁷ Sections 44(1) SDA.

⁸ Sections 44(3)(a)–(b), SDA.

⁹ Section 44(3)(c), SDA.

¹⁰ Section 47, SDA.

6.10 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
- (e) to achieve, so far as practicable, substantive equality between men and women.

6.11 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.

6.12 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, gender identity and intersex status 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.

6.13 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.

6.14 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.

7 PRELIMINARY VIEW TO REFUSE EXEMPTION

The Application

7.1 The Lesbian Action Group seek 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.'¹¹
- '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.'¹²

7.2 The Application states the exemption would exclude anyone who was not a Lesbian Born Female, including, 'Heterosexual, Bisexual and Gay males,

¹¹ 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, available at <https://humanrights.gov.au/our-work/legal/exemption-applications-under-sex-discrimination-act-1984-cth>.

¹² Ibid, page 6.

Heterosexual and Bisexual females, Transgender people and Queer plus people'.¹³

7.3 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'¹⁴

7.4 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'.¹⁵

7.5 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.¹⁶

7.6 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).¹⁷ Shortly afterwards, the exemption was revoked on application by 'Australian Woman Network' to the Tribunal.¹⁸

7.7 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.¹⁹

¹³ Ibid, page 9.

¹⁴ Ibid.

¹⁵ Ibid, page 2.

¹⁶ Ibid.

¹⁷ Victorian Government Gazette No. G37 dated 11 September 2003, page 2382.

¹⁸ Victorian Government Gazette No. G41 dated 9 October 2003, page 2596.

¹⁹ 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, available at <https://humanrights.gov.au/our-work/legal/exemption-applications-under-sex-discrimination-act-1984-cth>.

- 7.8 On 8 August 2023, the Commission requested further information from the Lesbian Action Group including the reasons why the exemption was reasonable and necessary.
- 7.9 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'
 - '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'.²⁰

Public consultation

- 7.10 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.

Issues raised in submissions in favour of the exemption

- 7.11 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.
- 7.12 These submissions state that transgender women cannot be women by virtue of their gender identity and accordingly cannot identify as lesbians.²¹ They consider lesbians are women exclusively by virtue of their biological sex at birth

²⁰ Above n 17, pages 1 and 2.

²¹ 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.

who are 'same-sex attracted', and that same-sex orientation is also a protected attribute under the SDA.²² They state that there are many other event and advocacy opportunities for transgender women.²³

7.13 LGB Alliance Australia submitted:

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. ...

7.14 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'.²⁴

7.15 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.

7.16 Some submissions say there is a risk of violence or abuse if events are not restricted as requested in the Application.²⁵ 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

²² Women's Rights Network.

²³ Affiliation of Australian Women's Action Alliances.

²⁴ 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.

²⁵ Lesbian Rights Australia, Affiliation of Australian Women's Action Alliances and LGB Alliance Australia.

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.

7.17 The submissions highlight that lesbians in Australia have faced structural and entrenched discrimination, both historically and in the present day.²⁶ In particular, a number of individual submissions were received from older 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'.

7.18 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.

7.19 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

7.20 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.²⁷

7.21 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

²⁶ Lesbian Rights Australia and Visible Lesbian Group.

²⁷ Q+Law, Equality Australia joint submission, Melbourne Bisexual Network, Rainbow Rights Watch.

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.

7.22 Most of the submissions say that it is not reasonable to make distinctions between women based on their cis or trans 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.²⁸

7.23 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.

7.24 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.²⁹

7.25 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.³⁰

7.26 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'

²⁸ Q+Law, Equality Australia joint submission.

²⁹ Equality Australia joint submission, Rainbow Rights Watch.

³⁰ Q+ Law, Equality Australia joint submission, Rainbow Rights Watch, Victorian Trades Hall Council.

and who is not without intrusion on an individual's privacy, bodily integrity, and dignity.

- 7.27 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.
- 7.28 Individual submissions also raise the difficulty for transgender partners of cisgender lesbians who would also be excluded from attending the proposed event.
- 7.29 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.

Consideration and Reasons for Preliminary View

- 7.30 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 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.'
- 7.31 It appears that restricting access to a public event to celebrate International Lesbian Day (and similar public events in the future) in the manner proposed by the Lesbian Action Group would amount to unlawful discrimination under the SDA on the ground of at least sexual orientation and 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.
- 7.32 The Commission does note, however, 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.
- 7.33 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. This is a complex issue where opinions are divided.

- 7.34 The Commission acknowledges that lesbians in Australia have faced structural and entrenched discrimination, both historically and in the present day.³¹ The Commission agrees that it may be important and beneficial for lesbians to gather together as a community to celebrate their culture and discuss issues of special relevance to their community.
- 7.35 The Commission recognises that many of the submissions in support of the Application 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 have threatened their ability to do so.
- 7.36 However, 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.
- 7.37 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.
- 7.38 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 same-sex attracted women who are transgender, bisexual and queer 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, 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'.
- 7.39 These reasons suggest that the event is intended to be a community social event, involving singing, dancing, celebrations and the discussion of ideas. It

³¹ Lesbian Rights Australia and Visible Lesbian Group.

aims to build a sense of pride, recognition and wellbeing amongst the community.

- 7.40 The Commission notes that some submissions in favour of the exemption refer to the risk of violence or harassment if the event is not restricted as requested in the Application. These submissions were not supported by compelling evidence. The risk of violence or harassment was not part of the Application made by the Lesbian Action Group although reference was made to discrimination experienced by lesbians who publicly speak out, and the need to meet with each other to discuss matters of importance for their own well-being, including only wanting to share personal stories about health issues or domestic violence between lesbians born female.
- 7.41 The Commission is not persuaded it is appropriate and reasonable to:
- make distinctions between women based on their cisgender or transgender experience, or among same-sex attracted women based on the exclusivity of their same-sex attraction at an event of this kind, or
 - exclude same-sex attracted women who are transgender, bisexual and queer from an event of this kind.
- 7.42 The Commission notes that the grant of this exemption may lead to the further exclusion of and discrimination against same-sex attracted transgender women. Transgender women are a group who have and continue to experience discrimination, harassment and social exclusion.³²
- 7.43 The Application does not describe how the Lesbian Action Group proposes to make distinctions to limit the event, and any future events, to 'lesbians born female'. Limiting participation in the manner proposed may involve questions about an attendee's physical sex characteristics or the exclusivity of their same-sex attraction, which could reasonably be expected to intrude on an individual's privacy and, in some cases, has the potential to amount to sexual or sex-based harassment.
- 7.44 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.

³² Equality Australia joint submission, Rainbow Rights Watch, Melbourne Bisexual Network.

- 7.45 The Commission does not consider it reasonable to grant a five-year exemption in such broad terms without details of the events and the opportunity for submissions from interested parties to engage with the question of whether it is reasonable in the circumstances to discriminate on the basis of sexual orientation and gender identity at these events.
- 7.46 On balance, for the reasons outlined above, the Commission's preliminary view 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 style with a large initial 'R'.

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

25 September 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:

- Affiliation of Australian Women's Action Alliances (AAWAA)
- Aleph Melbourne
- Antypical Hair & Gallery
- Equal Opportunity Tasmania
- Euphoria Social
- Fair Game Australia
- Feminist Legal Clinic
- IWD Meanjin
- Lesbian Bill of Rights International
- Lesbian Rights Australia
- LGB Alliance Australia
- LGB Tasmania
- Victorian Commissioner for LGBTIQ+ Communities
- Mamma Chen's
- Melbourne Bisexual Network
- Q+Law
- Queensland Women's Action Alliance
- Rainbow Rights Watch
- Renters and Housing Union (RAHU)
- Scottish Lesbians
- Triple Bi-Pass
- Victorian Pride Centre
- Victorian Women's Guild
- VISIBLE Lesbian Group
- Vixen
- Victorian Trades Hall Council
- Western Australian Women's Action Alliance
- Women's Rights Network Australia

The Commission received a joint submission from:

- Australian GLBTIQ Multicultural Council (AGMC)
- Drummond Street Services
- Dykes on Bikes Melbourne
- Equality Australia
- Human Rights Law Centre
- LGBTI Legal Service Inc
- Melbourne Bisexual Network

- Midsumma
- Parents of Gender Diverse Children
- Rainbow Community Angels
- Switchboard
- Trans Justice Project
- Transcend Australia
- Transgender Victoria
- Zoe Belle Gender Collective

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>