

Lesbian Action Group
Applicant

Australian Human Rights Commission
Respondent

Lesbian Action Group Inc
Other Party

REPLY¹

The AHRC's new case

1. By its Statement of Facts, Issues and Contentions (the **ASOFIC**), the AHRC:
 - (a) has abandoned the factual conclusions reached by its own President, being the primary finding at D[9.58] and the secondary finding at D[9.59]; and
 - (b) chosen to advance a new case to the effect that LAG is a voluntary body for the purposes of s 39 of the SD Act: see paragraphs [62]-[70] of the ASOFIC.
2. This change in position comes after the AHRC submitted to the Tribunal at a directions hearing on 13 March 2024 that it did not intend to participate in the hearing.
3. It is astonishing that the AHRC is not prepared to defend the reasoning of its own President, and instead has chosen to advance a new case. The explanation offered at ASOFIC [4]-[6] provides an underwhelming justification. LAG made it clear in its application that it sought to associate so that it could engage in cultural and political activities. The summary at ASOFIC [4]-[6] correctly records the statements made in LAG's application that identify these activities. The only difference, now, is that LAG has been able to cobble together some legal resources to help assist it in articulating itself before this Tribunal.
4. The new argument can be dealt with briefly. The full gamut of LAG's proposed activities cannot be classified as activity of a voluntary body for the purposes of section 39 of the SD Act, nor are the objects of its constitution articulate activities that can be said to be only concerned with services to members. LAG intends to hold public events, not provide services to its members. LAG needs to hold public events so that it can accrue a membership and attract supporters, advance its political objectives in public, accrue political

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

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influence, and broaden the public's awareness and understanding of its causes. Politics cannot be done in private.

5. This makes it necessary to consider LAG's application. The President below reached this very conclusion: D[8.7]. The finding at D[8.7] is correct. The AHRC's about-face from its own President's reasoning should be rejected.

The AHRC's failure to advance its own statutory duty

6. ASOFIC[59] attempts to downplay its own duty in section 10A of the AHRC Act. The balance of the ASOFIC fails to address the principles of universality, indivisibility, equality and dignity as set out in that provision. The ASOFIC offers no reconciliation of LAG members' rights to freedom of expression and association, nor their cultural, sexual and health-based human rights.
7. The Tribunal cannot adopt the same approach. The failure to apply the obligations that are prescribed by section 10A of the AHRC Act would be in error.

The AHRC's failure to advance human rights

8. ASOFIC[47] then makes this startling assertion: "*The common law and the Constitution are not the starting point for the interpretation of the SDA.*" It is not the case that the SD Act establishes a legal system that is separate from the Australian legal system. Rather:
 - (a) All legislation is to be interpreted subject to the Constitution,² including the freedom of political communication implied therein.
 - (b) All legislation is to be interpreted subject to a bundle of rights and freedoms which exist at common law, which includes freedom of expression and association.
9. The latter observation derives from the principle of legality, which Kiefel J in *Lee* usefully summarised as follows:

[171] As Gleeson CJ observed in *Al-Kateb v Godwin*, the principle of legality is not new. In 1908, O'Connor J, in *Potter v Minahan*, referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that "[i]t is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness". Absent that clarity of expression, the courts will not construe a statute as having such an operation. In *Electrolux Home Products Pty Ltd v Australian Workers' Union*, Gleeson CJ said "[t]he presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law." The principle has been cited

² *Acts Interpretation Act 1901* (Cth), s 15A. LAG does not submit that the *Constitution* protects an individual's freedom of political expression (cf. ASOFIC[47]). Rather, legislation must be interpreted consistently with it.

and applied on many occasions as a rule of statutory construction. The principle was applied in X7.

[172] In *Coco v The Queen*, it was explained that the insistence on express authorisation of an abrogation of a fundamental right, freedom or immunity must be understood as a requirement for a manifestation or indication that the legislature not only directed its attention to the question of abrogation, but has also determined to abrogate the right, freedom or immunity. General words will rarely be sufficient to show a clear manifestation of such an intention because they will often be ambiguous on the aspect of interference with fundamental rights. The same requirement must apply to any interference with fundamental principles or departure from the general system of law to which *Potter v Minahan* drew attention.

[173] The applicable rule of construction recognises that legislation may be taken necessarily to intend that a fundamental right, freedom or immunity be abrogated. As was pointed out in X7, it is not sufficient for such a conclusion that an implication be available or somehow thought to be desirable. The emphasis must be on the condition that the intendment is "necessary", which suggests that it is compelled by a reading of the statute. Assumptions cannot be made. It will not suffice that a statute's language and purpose might permit of such a construction, given what was said in *Coco v The Queen*.³

10. The power to be exercised by the Tribunal in s 44 of the SD Act does not abrogate LAG's fundamental rights with "*irresistible clearness*". The bare discretion in s 44 is to the opposite effect. Indeed, the objects of the SD Act (s 3(a)) state that the SD Act intends to give effect to international instruments in which these fundamental rights and freedoms are protected. The AHRC's function in section 10A likewise serves to ensure that these fundamental rights are observed and applied.

The AHRC's application of CEDAW

11. The AHRC has led 'expert evidence' from a legal academic about questions of law. Professor Gerber's report does not go to any *fact in issue*. This attempts to usurp the Tribunal's duty to find and apply the law. Witnesses give evidence of facts. Questions of law are not for the witness box. The report is inadmissible and cannot be taken into account.
12. In any event, whether and how CEDAW extends to the transgender community is not the Tribunal's current concern.⁴ Rather, the Tribunal has before it a group of lesbian women who are seeking to exercise their human rights in a way that is free from the hatred and violence that is perpetrated against them. CEDAW is engaged and is relevant to the exercise of discretion in that circumstance: see LSOFIC[26].
13. CEDAW does not establish a hierarchy where the rights of transgender community are given preference over everyone else's rights. It is the Special Rapporteur on Violence Against Women and Girls, Reem Alsalem's, view that CEDAW does not permit the subordination of the rights of lesbian women *where there is conflict* between those rights

³ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [171]-[173] (Kiefel J, emphasis added and citations omitted).

⁴ LAG formally records that it considers the judgment recently in *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 to be wrong. It accepts that the judgment is binding on the Tribunal, but cannot see how the ratio of the decision is relevant to the issues raised in this proceeding.

and the rights of the transgender community. In that situation, the human rights of lesbian women should be accommodated to ameliorate that conflict.

14. Ms Alsalem's view in this regard is a commonsense reading of CEDAW. Why is it that the Tribunal cannot move to grant an exemption to achieve CEDAW compliance, and thereby relieve the conflict that exists? No real answer is offered to that proposition in the ASOFIC.
15. Ms Alsalem is not an "outlier".⁵ She is a Special Rapporteur, an office that has an important and longstanding advisory and investigative role in the United Nations.⁶ It serves the Australian government no credit to lead evidence that is disrespectful to Ms Alsalem.

The ARHC's contention that no violence is perpetuated against lesbian feminists

16. ASOFIC[114] states: "*It appears that the applicants' key concerns are of harm to them by trans women, which is not borne out in the evidence*". LAG (and others) submitted below a variety of material from the internet, including extracts of terfisasur.com and social media more generally. LAG (and others) encouraged the AHRC to review that website in full.⁷
17. LAG will not be gaslit by the AHRC.
 - (a) Through Dr Blake's affidavit, the Tribunal now has extracts of the putrid violence and hate speech directed to anyone who seeks to advance the sex-based interests of women.
 - (b) The Tribunal can examine every page of Dr Blake's exhibits before arriving at the correct and preferable decision.
 - (c) When doing so, the Tribunal can also account for the examples of how this violence has transgressed into the physical environment around the world, as is recorded in Professor Sheila Jeffreys' report.
18. It is high time that this behaviour directed towards the lesbian feminist community is called out and regulated, rather than enabled.

The AHRC's straw man

19. ASOFIC[116] seems to suggest that LAG will engage in the "screening" of those who wish to attend its public events. This is a straw man argument. LAG has never said such a thing.

⁵ Gerber Report, [53].

⁶ *XYZ v Commissioner of Police* (2010) 33 VAR 1, [446] (Bell J).

⁷ See for example T134, T277, T351, T917, and the extracts at T313-T314.

20. It is tolerably clear from the AHRC's own evidence that those who do not wish to attend LAG's events will not attend: "*most lesbians and queers have always ignored them - or laughed at them - and they have had zero influence on our lives, our events, our opinions or our politics.*"⁸ Ms Favell's statement reflects an ordinary human experience: those who do not wish to associate with LAG will not attend its events, and those who wish to associate with LAG will attend its events. No screening is required to bring about this ordinary human experience, and in the event that there is an attendee that wishes to disrupt a LAG event, this Tribunal's exemption can be provided to them.
21. An exemption has practical application for those who have sought to make a point by frustrating (through demonstrations and litigation) the kinds of events that LAG wishes to hold. "*Those that wrote to the AHRC to oppose our application are the ones we fear and the ones we need protection against. They are the ones stopping us having our own spaces. They are the ones redirecting the funding away from us. They are the ones threatening litigation, and vilifying us.*"⁹

Disposition

22. The AHRC evidence comprehensively demonstrates how resourced and supported the LGBTIQ+ and transgender communities are. This is a great thing.
23. However, LAG have been excluded from those resources and support. Its members, and the beliefs that they subscribe to, have been subject to a long erasure campaign for many decades.
24. All LAG wishes to do is publicly associate without threats of violence and litigation. It is not asking that any resources given to the LGBTIQ+ and transgender communities be directed to them, nor is it asking for anyone within those communities to associate with them if they do not wish to. All LAG wants is an opportunity to publicly associate so that it can explore its political, cultural, sexual and health interests.
25. LAG's request is a minor ask. It causes no harm to anyone. The human rights considerations traversed in the LSOFIC are compellingly in favour of an exemption.

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⁸ Favell Declaration, page 3.

⁹ Carole Ann Statement, [88].