



**AFFILIATION OF AUSTRALIAN  
WOMEN'S ACTION ALLIANCES  
(AAWAA)**

Women's Action Alliance Canberra (WAAC)  
Women's Action Alliance Tasmania (WAAT)  
Queensland Women's Action Alliance (QWAA)  
South Australian Women's Action Alliance (SAWAA)  
Western Australian Women's Action Alliance (WAWAA)  
Women's Action Alliance Victoria (WAAV)



**Response to the AHRC's preliminary view on the Lesbian  
Action Group's exemption application under the  
*Sex Discrimination Act 1984 (Cth)***

**Submission from the  
Affiliation of Australian  
Women's Action Alliances  
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## Introduction

We refer to the Australian Human Rights Commission Notice, *Sex Discrimination Act 1984* (SDA), Notice of Preliminary View on Application for Temporary Exemption: Lesbian Action Group, and thank you for the opportunity to comment.

The Affiliation of Australian Women's Action Alliances (AAWAA)<sup>1</sup> is surprised and disappointed at the commission's preliminary view not to grant the exemption sought, especially in light of your acknowledgement (para. 7.34) that lesbians in Australia have faced structural and entrenched discrimination, both historically and in the present day.

We believe the commission's preliminary view is mistaken in law and principle for reasons we set out below.

### 1. The commission's powers and the scope and purpose of the SDA

We note the preliminary view recognises that the commission has discretion to grant exceptions under the *Sex Discrimination Act* (subject to terms and conditions such as time) so long as the commission exercises this power in conformity with the subject matter, scope and purpose of the *Sex Discrimination Act* (paragraphs 6.6–6.9).<sup>2</sup>

We also note any exemptions that the commission grants will have the effect of qualifying (that is, limiting) the "norms of conduct that the SDA seeks to establish" (paragraphs 6.12 and 7.9), and the commission must "balance relevant factors" (paragraph 6.13). In essence, the commission must assess whether, or to what extent, it has the responsibility *and* the legal authority to qualify rights set out in the SDA, carefully weighing the interests of all interested parties.

Regrettably, the preliminary view fails to address these matters systematically or comprehensively, hindering their proper consideration and, we contend, denying the applicants procedural fairness.

### 2. What rights are we talking about?

The most salient and consequential deficiency in the preliminary view arises from its failure to identify and consider the rights of the applicant and the responsibilities of the commission in relation to the objects set out in section 3a of the Act, that is, the article giving effect to certain provisions of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and other relevant international instruments (notably the International Covenant of Civil and Political Rights (ICCPR)).<sup>3</sup>

It is our view – and we believe it should also be evident to the commission – that the LAG's (Lesbian Action Group's) application is, at its core, a request for the protection of the human rights set out in these instruments, notably the freedoms set to assembly, association, and

<sup>1</sup> The Affiliation of Australian Women's Action Alliances (AAWAA) brings together women's liberation groups from the ACT, Tasmania, Queensland, South Australia, Western Australia, and Victoria, all of whom have endorsed this submission.

<sup>2</sup> [Preliminary View in relation to the Lesbian Action Group's exemption application](#), Australian Human Rights Commission, 25 September 2023.

<sup>3</sup> Section 4 of the *Sex Discrimination Act 1984* makes specific reference to the [ICCPR](#) which includes, among key rights, the right to hold opinions without interference, the right to freedom of expression, to receive and impart information and ideas of all kinds (article 19), the right to peaceful assembly (article 21) and the right to association (article 22), while [CEDAW](#) includes rights relevant to participation in public and political life (article 7).

expression, including the right to hold and communicate opinions without interference, as set out in the ICCPR.

While the LAG does not itself refer specifically to these civil and political rights, the fact that these rights are at issue is clear in the substance and language of its application, including that the LAG seeks the exemption in order to “meet freely, and without being abused for wanting to do so ... to organise and attend workshops on a plethora of pertinent topics ... to exchange views and opinions ... without fear of being hauled before VCAT ... and being told our exclusive Lesbian born female events are illegal ... and to meet publicly without fear of litigation.”<sup>4</sup>

We would respectfully submit that applicants for exemption under the Act or for any other engagement with the commission should not need to cite the specific legal instruments and articles within statutes, as a human rights lawyer might, in order to seek to have their human right upheld. Indeed, as the commission itself has recently – and admirably – advocated, human rights are “for everyone, anywhere and at all times.”<sup>5</sup>

We do not contend that the commission must endorse the specific ideas the LAG intends to discuss at its proposed events. We simply ask that the commission explicitly acknowledge that the applicants’ wish to discuss and exchange ideas, without harassment, engages civil and political rights that are a key object of the Act. We believe this is a minimum requirement of procedural fairness in this matter, even before the commission proceeds to judge the evidence for and against the claims, or before it considers whether, or to what extent, it has the power to “qualify” “the norms of conduct the Act seeks to establish” through granting or denying the exemption requested.

Likewise, we firmly believe that if, during its evaluation of the SDA in relation to this matter, the commission finds certain objects of the Act to be irrelevant to the LAG’s application, principles of procedural fairness, combined with the commission’s responsibility to educate the Australian public on human rights, require that commission clearly articulate and clarify the reasoning behind these assessments.

We urge the commission to remedy these deficiencies in its final notice on this matter, setting out what specific rights the LAG’s application engages, or might be assessed to engage by a ‘reasonable and well-informed person,’ and to provide the basis for its reasoning. This should involve a considered evaluation of the rights outlined in both section 3a (fundamental rights) and section 3c (protections against discrimination and harassment in areas of public activity). As it currently stands, the preliminary view makes only one linkage between the LAG’s application and a specific “norm of conduct that the SDA seeks to establish”, and that is in relation to discrimination in the provision of goods, services, and facilities (section 3b).

In passing, we would urge the commission to be precise and fair in its description of the activities the LAG proposes. For example, at paragraph 7.41 we are left wondering what the commission means by “events of this kind” because, as we set out below, the intended purpose of these events is key to the rights of the applicants and the legal prerogatives and responsibilities of the commission.

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<sup>4</sup> [Application by the Lesbian Action Group for a temporary five year exemption under the Sex Discrimination Act for a Lesbians Born Female only event to celebrate International Lesbian Day to be organised by the Lesbian Action Group at the Pride Centre in St Kilda on Sunday 15 October 2023;](#) and [Additions to the application for an exemption, Lesbian Action Group, 2023](#)

<sup>5</sup> [Free & Equal Position paper: A Human Rights Act for Australia](#), Australian Human Rights Commission, 2022

### 3. ‘Qualifying’ rights: the commission’s powers and responsibilities

In addition to setting out what rights the LAG’s application engages – or may be assessed by a ‘reasonable and well-informed person’ to engage – we also respectfully request that the commission set out its assessment of its legal prerogatives and responsibilities in relation to these rights. We submit that doing so is essential to procedural fairness in this application as the commission’s prerogatives and responsibilities in relation to the ‘objects of the SDA’ depend on the precise nature of the right at issue.

In relation to the civil and political rights established under section 3a of the Act, we submit that the commission has both prerogatives *and* responsibilities. As the commission notes, civil and political rights are fundamental to the operation of our democracy and its power to qualify these are very limited.<sup>6</sup> Of substantial relevance in this matter also is the fact that the commission has ‘positive duties’ in relation to these rights. As the United Nations Human Rights Commission has noted, “States parties to the ICCPR have certain positive duties to facilitate peaceful assemblies and to make it possible for participants to achieve their objectives.”<sup>7</sup> As the commission notes on its website, the commission must also respect the Australian Constitution with regard to the High Court of Australia’s affirmation that an implied freedom of political communication exists as an indispensable part of the system of representative and responsible government created by the constitution.”<sup>8</sup>

In relation to sections 3b and 3c, the commission also has powers and duties – including the right to ‘qualify’ rights to protections from discrimination and harassment in the provision of goods, services, and facilities and in relation to areas of public activity, so long as the commission acts in conformity with the Act – essentially the provisions set out in Part II.

### 4. Balancing relevant factors

In light of the foregoing, we draw attention to paragraph 7.41 and ask that the commission make clear the legal authority for its view that it is “not 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.” Though the commission does not say so, we assume this is a reference to sections 5A, 5B and 5C of the SDA, which incorporated parliament’s 2013 amendments to the Act to introduce new prohibitions on discrimination on the grounds of sexual orientation, gender identity, and intersex status.

But the commission would also know that the 2013 amendments did not limit the fundamental rights set out in section 3a of the SDA, including the ICCPR rights to freedom of opinion, assembly, and association. This is in accordance with the well-established principle of statutory interpretation in Australian courts that the Australian Parliament is presumed not to have intended to limit fundamental rights unless it indicates this intention in clear terms.<sup>9</sup> We refer to the hansard and explanatory memorandum to the 2013 amendments, noting that

<sup>6</sup> [Freedom of Assembly](#), Australian Human Rights Commission, accessed 3 October 2023; [Freedom of Association](#), Australian Human Rights Commission, accessed 3 October 2023

<sup>7</sup> [General comment No. 37 \(2020\) on the right of peaceful assembly \(article 21\)](#), UN Human Rights Committee, September 2020

<sup>8</sup> [Freedom of information, opinion and expression](#), Australian Human Rights Commission, accessed 3 October 2023

<sup>9</sup> [Common law rights, human rights scrutiny and the rule of law](#), Australian Human Rights Commission, accessed 3 October 2023

neither make reference to the pre-existing rights Australian women enjoyed under the *Sex Discrimination Act*.<sup>10</sup>

To be clear, all Australians enjoy civil and political rights – irrespective of race, age, sex, sexual orientation, or gender identity. Our point here is to note that maintaining a certain opinion – in this instance that sex is immutable, and that lesbians are female – is a fundamental civil and political right. We note the commission’s own assessment (at paragraph 7.33) that “this is a complex issue where opinions are divided.” We respectfully submit that it is not for the commission to determine which opinions in relation to this complex issue are valid and deserving of protection, and which are not. On the contrary, it is the commission’s duty to ensure that all Australians – including lesbians – enjoy their right to maintain beliefs and opinions on this issue and to express them without fear of harassment, a right that the 2013 amendments to the SDA did not extinguish.

For our part, we submit that it is neither reasonable nor proportionate for the commission (as it does implicitly in paragraph 7.41) to impede the LAG exercising its civil and political rights in order to ensure non-discrimination in the matter of goods, services, and facilities, particularly when numerous alternative avenues are available for accessing these goods and services. We also submit that the effect of denying an exemption would be to deprive the applicant an opportunity to express and exchange opinions publicly. By contrast the effect of granting an exemption to the LAG would not be to deprive same-sex attracted women and others with different experiences and opinions the opportunity to exercise their civil and political rights through attending the numerous public events that other communities host.

### **5. A way forward: Special measures and other considerations**

If, as we believe is reasonable, the commission recognises that the LAG’s application engages civil and political rights – rights that the commission has a legal obligation to uphold and a positive duty to facilitate – then we would urge the commission to reconsider the mechanisms the SDA provides to address potential challenges under sections 5A, 5B and 5C.

We commend the commission for its consideration of a possible permanent exemption under section 39 also noting your view (paragraph 6.5) that this 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. We would respectfully contend however that the LAG has a right both to advertise for membership and for its events in line with its constitutional rights to freedom of political communication. We would welcome the commission’s views of section 32 (Charities) were the LAG to register under the *Australian Charities and Not For Profits Commission Act 2012* noting the LAG’s purpose in promoting and protecting human rights.

### **6. Special measures**

More urgently, we implore the commission – including as a matter of procedural fairness in this matter – to set out its views on making use of section 7D of the Act (special measures) to ensure that the LAG’s rights are upheld. Special measures are intended to achieve

<sup>10</sup> [Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Bill 2013 Explanatory Memorandum](#), On the authority of Mark Dreyfus, Attorney General, 2013

[Federation Chamber - BILLS - Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Bill 2013 - Second Reading](#), Hansard, 30 May 2013

[BILLS - Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Bill 2013 - Report from Committee](#), Hansard, 27 May 2013

equality (for example, between men and women (7Da) and between people who have different sexual orientations (7Db)) and do not constitute unlawful discrimination. We submit that the use of 7D in relation to the LAG's application would allow the LAG to enjoy its civil and political rights to opinion, expression, and assembly.

### 7. Terms and conditions

We would also urge the commission to explore the range of mechanisms that are open to it to address concerns raised in paragraphs 7.43 (privacy) and 7.44–7.45 (scope), including by imposing terms and conditions on any exemption it grants in line with its section 44 powers. We recommend, for instance, that the commission consider a similar approach to the one the Victorian Civil and Administrative Tribunal employed to address privacy concerns when granting a temporary exemption to a Melbourne hotel, allowing it to operate a venue specifically for gay men.<sup>11</sup> In this regard, we submit that the risk of individuals thwarting or attempting to thwart an exemption should not serve as a reason not to grant an exemption. Similarly to alleviate the burden on itself and all concerned parties, we recommend the commission clearly articulate its terms and conditions, along with its purposes and principles, and at the same time reserve an express right to revert in instances where conditions are not adhered to.

We also respectfully submit that the AHRC has a positive duty to engage and educate those who may object to the LAG's events, with the aim of fostering an understanding of and respect for the rights of these female-born lesbians to meet and exchange opinions free from harassment. We note that the legislation establishing the commission sets out the commission's responsibilities to perform its functions with regard to relevant international instruments – notably the ICCPR, which your Act incorporates – a responsibility that extends to positive duties.<sup>12</sup>

### Conclusion

AAWAA keenly anticipates a revised commission view that rectifies the omissions and deficiencies in its preliminary view, particularly concerning the analysis of the SDA's objects and their correlation with the rights implicated by the LAG's application. A clarification of the legal foundation underpinning the commission's reasoning would also benefit procedural fairness for all parties.

While we respect the commission's authority to adjudicate on this matter, we firmly believe that a better-researched and reasoned consideration of all relevant factors will support the grant of this exemption.

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<sup>11</sup> Victorian Civil and Administrative Tribunal, [Peel Hotel Pty Ltd \(Anti-Discrimination Exemption\) \[2010\] VCAT 2005 \(13 December 2010\)](#)

<sup>12</sup> [Australian Human Rights Commission Act 1986](#); See also, [Free & Equal Position paper: A Human Rights Act for Australia](#), Australian Human Rights Commission, 2022