

Submission by the Melbourne Bisexual Network opposing an application by the Lesbian Action Group Application for temporary exemption relating to an exemption application under the Sex Discrimination Act 1984 (Cth)

1. *The purpose of this submission*

- 1.1. This submission by the Melbourne Bisexual Network (“MBN”) is made in opposition to an application by the Lesbian Action Group (LAG) for a temporary five year exemption (“the LAG exemption application”) under the Sex Discrimination Act (“the Act”). The application is directed, at least in the first instance, at securing an exemption 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” [sic].
- 1.2. The MBN Committee contend that granting an exemption to the LAG for this purpose would be contrary to the objects of the Sex Discrimination Act and would adversely impact our members, particularly our members who identify as trans women and/or bi+ women.

2. *The Melbourne Bisexual Network*

- 2.1. The MBN¹ is, as our website states:

A Bi+ led community organisation, proudly improving the health and wellbeing of Bi+ Victorians. We are committed to raising awareness of the unique [health and wellbeing](#) issues facing bisexual+ people, and to collectively determine strategies to improving the health, wellbeing and development of bisexual+ people in three areas of service delivery: education, community and mental health.

- 2.2. Our website indicates the extensive initiatives taken in relation to these issues.²
- 2.3. Members of the MBN Committee have been contributing authors on important publications concerning bi+ health and inclusion, including:
 - *Being Seen: A Spotlight on Bi+ Inclusion in the Workplace; and*
 - *Bi the Way: A Guide to Bisexual+ Research* (supported by the Victorian Department of Families, Fairness and Housing).
- 2.4. The MBN membership includes trans and bi+ women (including women who identify as both).
- 2.5. The MBN, and its individual members, have extensive positive interactions with, and strongly support, lesbian members of the LGBTQIA+ community. The MBN questions any implications by

¹ <https://www.melbournebisexualnetwork.com/>.

² <https://www.melbournebisexualnetwork.com/achievements>

the LAG that they reflect the views of the lesbian community, including the cis lesbian community. There is no evidence whatsoever to suggest this. To the contrary, in the experience of the MBN, many lesbians, including cis lesbians, are in the forefront of the struggle to support trans and bi legal rights and access to health. This experience is reflected in recent overseas survey data.³

3. The immediate purpose of the exemption application

3.1. The LAG exemption application states that:

LAG therefore, aims to provide regular lesbian born female only events starting with an all day fun-filled culturally appropriate lesbians born female only event at the Pride Centre in St Kilda on Sunday 15 October 2023, to celebrate International Lesbian Day 2023. which will include entertainment provided by lesbian writers reading their work, speakers on a range of subjects, music, singing, skits, dancing, food and refreshments throughout the day. It goes without saying that all of the lesbians involved in the new venture will be for young and old lesbians born female to provide an example to young lesbians just how dynamic and courageous the older lesbians in our communities have been for the past fifty plus years.

We intend to book the Theatre / Multipurpose Space at the Pride Centre in St Kilda which is viewed as an appropriate venue because it was purpose-built to specifically support the LESBIAN Gay Bisexual Transgender Intersex Queer+ communities in Victoria. We will be charging an entrance fee, plus 10% to pay the Rent to give free entry to First Nations lesbians, to cover the cost of hiring the venue as well as related costs. And expect, if the Exemption is granted, to organise many such events and gatherings in the future.⁴

3.2. The LAG seeks to exclude:

anyone who was not a Lesbian Born Female. That is, Heterosexual, Bisexual and Gay males, Heterosexual and Bisexual females, Transgender people and Queer plus people.⁵

3.3. The LAG therefore seeks to exclude our members and people on whose behalf we advocate.

4. Process for granting an exemption

4.1. In deciding whether to grant an exemption, the Commission will consider:

- Whether an exemption is necessary;
- The objects of the Sex Discrimination Act;
- The applicant's reasons for seeking an exemption;
- Submissions by interested parties; and
- All relevant provisions of the Sex Discrimination Act.⁶

³ A recent survey by Just Like Us, a charity based in the UK found that young lesbians are "the most likely of the whole LGBTIQ+ community to be supportive of trans people:

<https://www.justlikeus.org/blog/2023/06/01/positive-futures-report-lgbt/> at 27,63. .

⁴ LAG exemption application pages 9-10.

⁵ LAG exemption application page 9.

⁶ Australian Human Rights Commission, 2009 Temporary exemptions under the Sex Discrimination Act, Commission Guidelines,

- 4.2. As indicated above, this is a submission by an interested party, a organisation all of whose members could be denied access to a highly important venue for our organisation if the exemption was granted.
- 4.3. The submission explains how the granting an exemption as requested by the LAG would be contrary to the objects of the Act and also explains why the exemption is unnecessary and not supported by any compelling reasons.
- 4.4. In order to clarify the context in which we address the criteria applied by the Commission in the course of considering an exemption application, this submission first notes the irony of LAG’s attempt to exclude other members of the LGBTIQ+ community from parts of the Victorian Pride Centre.

5. **The Victorian Pride Centre**

- 5.1. In considering whether to grant this exemption, the MSN submits that the Commission should take into account the nature and purpose of the Victorian Pride Centre.

- 5.2. The website of the Victorian Pride Centre describes it as follows:

The Victorian Pride Centre is the first purpose-built centre for Australia's LGBTIQ+ communities. It is a place to pave new directions for LGBTIQ+ communities, while honouring and celebrating their brave – and at times difficult – past. It is home to practical and supportive services and will grow into a destination for visitors from across Australia, and beyond.

The Victorian Pride Centre houses major and important LGBTIQ+ resident organisations, and provides flexible and multi-use spaces for hire, including, meeting rooms, rooftop terrace, co-working spaces, a theatrette and gallery.

The Centre serves as a hub for LGBTIQ+ groups and organisations to share ideas and resources and to further their work in supporting equality, diversity and inclusion across the state.⁷ (emphasis added)

- 5.3. It is notable that the Centre is designed to be a “hub” for LGBTIQ+ groups to “share ideas and resources”. It is not intended to divide LGBTIQ+ groups or to isolate them from one another. Granting the exemption would be contrary to a major purpose of the Victorian Pride Centre.

- 5.4. Oddly, the LAG writes in its application that

we intend to book the Theatrette / Multipurpose Space at the Pride Centre in St Kilda which is viewed as an appropriate venue because it was purpose-built to specifically support the LESBIAN Gay Bisexual Transgender Intersex Queer+ communities in Victoria.

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⁷ <https://pridecentre.org.au/about/about-the-centre/>

5.5. In other words, LAG seeks, on the one hand, to gain access to a venue because it is appropriate for queer communities, including bisexual and transgender communities, and then, on the other, to exclude those very communities from parts of the building.

6. The exemption application is contrary to the objects of the Sex Discrimination Act

6.1. The objects of the Sex Discrimination Act include:

(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs;⁸ and

6.2. The Act defines several of these terms which are relevant to this submission as follows:

“Sexual orientation” means “means 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.”⁹

6.3. This clearly includes bi+ women.

“Gender Identity” means “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.”¹⁰

6.4. This clearly includes trans women.

6.5. An attempt by LAG to deny bisexual and trans women (who may also identify as lesbians) access to a Pride Centre venue constitutes discrimination in the area of facilities and services and is thus contrary to an important object of the Act.

7. The exemption is neither necessary nor justified

7.1. In their “Additional Information” document, the LAG give several sets of reasons for asking for an exemption.

7.2. One set of reasons concern the need to discuss traumatic experiences:

I think it's reasonable to say that all members of oppressed, marginalised and discriminated against groups in Australia have urgent and necessary reasons why from time to time they need to meet with each other to discuss matters of importance for their own well-being and peace of mind without interference from those people in the dominant patriarchal culture who don't always have the best interests of the minority group at heart. [...] For Lesbians Born Female, that would include not wanting nor being able to discuss personal health-related issues in front of people who

⁸ Sex Discrimination Act 1984 (Cth) s.3 (b)

⁹ Sex Discrimination Act 1984 (Cth) s.4

¹⁰ Sex Discrimination Act 1984 (Cth) s.4.

are not lesbians born female, for example. Or only wanting to share personal stories about domestic violence between lesbians born female or being too frightened to go into a hospital or nursing home because our request for a female born medical person won't be met or because we need lesbian born female support after being raped.

7.3. Without in any way denying that members of the LAG may have suffered traumatic life events that needed to be discussed, we make the following observations. First, the exemption is sought in relation to an 'an all day fun-filled culturally appropriate lesbians born female only event'. This does not appear to be designed to facilitate the sharing of personal traumatic stories.

7.4. Second, trans and bi+ women are not "people in the dominant patriarchal culture". On the contrary, bi+/trans women are frequently victims of it.

7.5. Third, trans and bi+ women also have own traumatic stories and it is quite unclear what 'discounts' trans and bi+ women from sharing them with other women also attracted to women.

7.6. Further, there is no evidence advanced, nor as far as we are aware is that any rigorous evidence that could be advanced, to suggest that Bi+/trans women pose any significant threat to lesbians in a shared space.

7.7. The LAG additional document also asserts that:

One of the most important aspects of getting together with like-minded and like-bodied lesbians born female is to celebrate our achievements, to rejoice in our culture which is like nothing else, to relish in the fact that we can meet freely and without being abused for wanting to do so and 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.

7.8. An unfortunate implication of this passage is that LAG appears to be claiming an exemption from anti-discrimination law on the basis that they should be permitted to use a community venue to celebrate and rejoice in the fact that they are different from other women for whom the venue was specifically built. This can hardly be a valid basis for an exemption.

7.9. It is arguably not an unfair characterisation of the LAG case, referring as it does to shared history, to say that they wish to return to the days when it was possible to lawfully discriminate against and exclude trans and bi+ women from community spaces because sexual orientation and gender identity were not covered by the Act. Those days ended a decade ago.¹¹

7.10. The MBN greatly appreciates the many achievements of lesbian activists over recent decades, some of which are referred to in the LAG exemption application. This has contributed to a much better social and legal environment for queer people overall. However, bi+ and trans activists have also contributed to this environment, including the "Mother of Pride" Brenda Howard¹² and Marsha P. Johnson.¹³ And it is by no means established that lesbians who have

¹¹ See Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth).

¹² <https://legacyprojectchicago.org/person/brenda-howard>

¹³ <https://www.womenshistory.org/education-resources/biographies/marsha-p-johnson>

historically contributed to that environment would now, as a group, wish them to be celebrated in an exclusionary manner.

7.11. In any case, the supposition that, in attributing credit for the past achievements of queer activists, a “bright-line” distinction can be made between “lesbians born female” and other lesbians, raises very problematic questions of body and behaviour policing. This is dealt with in further in the next section.

8. An exemption could not be implemented without severe human rights incursions, particular in relation to personal privacy

8.1. Article 17 of the International Covenant on Civil and Political Rights, which is set out in Schedule 2 of the Australian Human Rights Commission Act 1986 provides that:

1. No one shall be subjected to arbitrary or unlawful interference with his [sic] privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

8.2. We submit that, in exercising a power to grant an exemption under the Sex Discrimination Act, it is appropriate for the Commissioner to have regard to the broader framework of human rights, of which equality is a part. This includes the right not to be subjected to arbitrary or unlawful interference with a person’s privacy.

8.3. If the exemption were to be granted to give effect to the aims of the LAG with respect to the Victoria Pride Centre, there would need to be some process of identifying trans and bi women in order to exclude them/us. That could only be done by means of extremely intrusive questions into a persons’ medical and psychological history, and indeed may give rise to attempts to elicit a person’s sexual history. This arguably entails a breach of article 17.

8.4. This point has been made by Tasmania’s Anti-discrimination Commissioner in refusing an application for an exemption (under a legislative scheme which does not appear to be materially different) by Ms Jessica Hoyle and an organisation styling itself the “LGB Alliance”. The exemption would have permitted Ms Hoyle “to discriminate against biological men on the basis of sex” in relation to a drag king performance. In refusing the exemption, the Commissioner indicated that exemption created the potential for the applicants to “*seek to confirm a person’s biological sex*”.¹⁴ The Commissioner could not see how this could be done without intrusive questioning and undermining a person’s right to privacy.

8.5. The Tasmanian Civil and Administrative Tribunal upheld the refusal, noting that:

It is accepted that same-sex attracted persons of both genders have historically suffered disadvantage, discrimination, the criminalisation of their sexual activity, harassment and abuse. As acknowledged by LGB Alliance website, the Australian community has evolved considerably and is largely accepting of the experience of gay, lesbian and bisexual members of society. Transgender

¹⁴ *Jessica Hoyle and LGB Alliance Australia (Review of Refusal of an Application for Exemption)*, [2022] TASCAT 142 (24 November 2022) (distinguishing *Peel Hotel Pty Ltd (Anti-Discrimination Exemption)* [2010] VCAT 2005 (*Peel Hotel*)).

and transsexual members of the community have also experienced marginalisation, discrimination, criminalisation, disadvantage, harassment and abuse on the basis of their gender identity.¹⁵

9. Conclusion

9.1. We submit that, on the basis of the arguments we have advanced, that the exemption sort by the LAG, far from furthering the objects of the Act would perpetuate discrimination and potentially lead to other human rights breaches. The exemption should be refused.

¹⁵ At [89].