

Notice of appeal from a tribunal

Federal Court of Australia
District Registry: Victoria
Division: General

No. VID of 2025

On appeal from the Administrative Review Tribunal

Lesbian Action Group Inc
Applicant

Administrative Review Tribunal
First Respondent

Australian Human Rights Commission
Second Respondent

To the Respondents

The Applicant appeals from the decision as set out in this notice of appeal.

The Court will hear this appeal, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

The Court ordered that the time for serving this application be abridged to.

Date:

.....
Signed by an officer acting with the authority
of the District Registrar

.....
Filed on behalf of The Applicant
Prepared by Leigh Howard of Counsel
Email lesbian.action.group@gmail.com
Address for service Suite 129, 585 Little Collins St, Melbourne, 3000

The Applicant appeals from the decision of the Administrative Review Tribunal (**ART**) given on 20 January 2025 at Melbourne: *Lesbian Action Group and Australian Human Rights Commission* [2025] ARTA 34 (**Decision** or **D**).

The Tribunal decided to affirm the Second Respondent's (**AHRC**) decision to refuse an exemption under section 44 of the *Sex Discrimination Act* 1984 (Cth) (**SD Act**).

The Applicant appeals from the ART's Decision.

Questions of law

1. On its proper construction, is section 44 of the SD Act intended to permit forms of discrimination that may be contemplated, or may arise, under the SD Act?
2. In exercising all of the powers and discretions of the AHRC, is the ART required to apply the mandatory duty imposed on the AHRC in s 10A(1) of the *Australian Human Rights Commission Act* 1986 (Cth)?
3. Does the SD Act prioritise the protection and advancement of the human rights of members of the female sex and of lesbians, and, if so, should the exemption power in s 44 be administered accordingly?
4. Is the Decision legally unreasonable?

Orders sought

1. The appeal be upheld.
2. The Decision be set aside.
3. The review be heard and determined by a differently constituted ART, according to law.
4. Pursuant to s 21 of the *Federal Court of Australia Act* 1976 (Cth), a declaration that the AHRC's guidance *Temporary Exemptions Under the Sex Discrimination Act* (**Exemption Guidelines**) is ultra vires insofar as the Exemption Guidelines fail to direct the AHRC to apply its mandatory obligation in s 10A(1) of the AHRC Act.

Grounds relied on

Ground 1

1. The ART found "endorsing overt acts of discrimination cannot be the intended effect of the s 44 exemption power in the SDA" (D[173], see also D[164]). The ART erred in so finding. On its proper construction, the intended effect of s 44 is to permit forms of discrimination that may be contemplated, or may arise, under the SD Act.

2. On its proper construction, s 44 of the SD Act is intended to permit applicants to apply for an exemption, such that the forms of discrimination that may arise, or that may be contemplated, do not result in a contravention of the SD Act.

Ground 2

3. In conducting its review, the ART exercises all of the powers and discretions that are conferred on the decision maker: D[34].
4. When ascertaining those powers and discretions, the ART found at D[127] that s 10A(1) of the AHRC Act does “not ... speak directly to the scope of the power in s 44 of the SDA”. The ART erred in so finding. Section 10A(1) establishes a mandatory duty “under this [AHRC] Act or *any other act*”, including the SD Act, and the function that is found in s 44 of the SD Act.
5. The ART at D[127] further found that s 10A(1) “appears aspirational or exhortational”. The ART erred in so finding. The s 10A(1) duty on the AHRC is to perform functions “with regard” to the matters in s 10A(a)(i) and (ii). The matters in s 10A(1) are mandatory considerations, which were not considered by the ART.
6. Section 10A(2) of the AHRC Act only serves to ensure that there is no cause of action established (the tort of breach of statutory duty) if the AHRC does not comply with s 10A(1) (cf. D[127]). Section 10A(2) does not render the mandatory duty in s 10A(1) optional.
7. As a matter of collateral challenge, the Applicant seeks declaratory relief that the Exemption Guidelines are ultra vires insofar as the Exemption Guidelines fail to direct the AHRC to apply its mandatory obligation in s 10A(1) of the AHRC Act. There is jurisdiction and utility in the relief for it has consequences on a subsequent ART review in the event the appeal is upheld (cf. the ART’s attempted application of the Exemption Guidelines at D[37]-[39], [124]-[125]).

Ground 3

8. In ascertaining the subject matter, scope and purpose of the SD Act, the ART found that the SD Act confers “no particular priority” to members of the female sex who are lesbians (D[153]), and that the human rights of the members of the Applicant offer “no answer” to the question of whether an exemption should be granted (D[163]). The ART further found that an exemption would “demonstrate the potential redundancy of the protected gender [identity protection]” under the SD Act (D[156]).
9. The ART erred in these findings. On its proper construction, the SD Act gives priority to members of the female sex. The subject, matter and scope of the SD Act concern (inter alia) a legislative enactment of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, a treaty that is exclusively concerned with the

protection of members of the female sex, and the achievement of substantive equality for members of the female sex, including lesbians.

10. The SD Act and s 44 must be interpreted and applied to give effect to CEDAW. Thus, an exercise of the discretion in s 44 can and should result in an exemption being granted that results in members of the female sex being able to fully realise their human rights.
11. A CEDAW-informed interpretation of the SD Act does not bring about any redundancy to the gender identity protections in the SD Act. The SD Act can be interpreted distributively to accommodate protections for members of the female sex and members of the community with a gender identity status. A contrary construction would run the risk of the SD Act being an inappropriate and ill-adapted implementation of CEDAW.

Ground 4

12. The Decision lacks an evident and intelligible justification.
 - (a) The uncontradicted evidence was that the Applicant was a political advocacy group that (inter alia) seeks to uphold the interests of lesbians, and particularly the tenets of lesbian feminism, in the formation of public policy.
 - (b) The core tenets of lesbian feminism were before the Tribunal, uncontradicted, in the expert evidence of Professor Sheila Jeffreys, and corroborated by the witness statement of Carole Ann.
 - (c) The AHRC, through its purported expert Dr Elena Jeffreys, sought to characterise the Applicant and its beliefs as akin to “*nazi facists*” (cf. the finding in D[158]).
 - (d) The uncontradicted evidence was that the Applicant and its membership did not intend to occasion any harm on the transgender community, and that it recognised that the transgender community has its own unique needs and interests which should be respected and catered for.
 - (e) There was no evidence that the exemption “could well have a detrimental effect upon the wellbeing of trans women” (D[161]).
 - (f) There was ample evidence of violence directed at trans-exclusionary radical feminists, which includes lesbian feminists, that an exemption could have served to protect against.
 - (g) The terms of s 44 contemplate an exemption being drafted to extend to the Applicant’s agents, including those who would assist it in holding public events (cf. D[147]-[148], [168]).
 - (h) An exemption, if granted, would have had the practical effect of providing immunity from suit. As a legal instrument, it can be further presumed that it would have

served to moderate the behaviour of those who do not wish the Applicant to hold public events, for the community at large can be presumed to comply with legal instruments (cf. the findings at D[62], [168]).

- (i) The law (including the SD Act, CEDAW, other treaty instruments to which the SD Act gives effect, the common law, and the *Constitution*), and therefore the discretion in s 44, is concerned to ensure that the Applicant is able to exercise its political, civil, social, and cultural rights (cf. the finding at D[163]).
- (j) Politics cannot be done in private (cf. D[165]).

Applicant's address

The Applicant's address for service is:

Place: Suite 129, 585 Little Collins St, Melbourne, 3000.

Email: lesbian.action.group@gmail.com.

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Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 17 February 2025



Nicole Phillips
For and on behalf of the Applicant

This notice of appeal was prepared by Leigh Howard of Counsel