Applicant's Outline of Submissions

Federal Court of Australia
District Registry: New South Wales
Division: General

No. VID170/2025

Lesbian Action Group Inc
Applicant

Australian Human Rights Commission
Respondent

1. The Applicant (**Lesbian Action Group** or **the Group**) appeals from the decision of the Administrative Review Tribunal (**ART**) given on 20 January 2025: *Lesbian Action Group and Australian Human Rights Commission* [2025] ART 34 (**Decision** or **D**). It seeks the setting aside of that Decision, remittal, and a declaratory order that the policy that was applied in the Decision, the *Temporary Exemptions Under the Sex Discrimination Act* (**Exemption Guidelines**), is ultra vires insofar as it fails to direct the Australian Human Rights Commission (**AHRC**) to apply its duty under s 10A(1) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).

2. The Group's originating application raises four grounds and four corresponding questions of law. As has been traversed in case management, a full articulation of grounds 3 and 4 is presently hampered due to a pending judgment in a related proceeding (**Giggle Proceeding**), which is due to be handed down shortly. These submissions are necessarily preliminary as a consequence.

A. A short background

3. Relevant background can be found in the witness statement of Carole Ann tendered below (**Ann Statement**), and in D[1]-[20], [40]-[50]. The Lesbian Action Group is an association of lesbians. A lesbian is "a female who is sexually oriented towards (or attracted to) females, and lesbians as a group are females who share the characteristic of being sexually oriented to females."[1]

[1] *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [206] (the Court).

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4. The particular lesbians who comprise the Group subscribe to a lesbian feminist political critique: see the Ann Statement at [7], and, more generally, the expert report of Professor Sheila Jeffreys. The Lesbian Action Group's objective for associating is to assert and fight for the human rights of lesbians: it fights for freedom of association, freedom of speech, freedom from discrimination, freedom from violence, and freedom in law, for all lesbians. As its constitution records, the Group's political association is intended to:

   (a) advocate for the rights of lesbians in Australia and internationally;

   (b) assert the biological fact that sex is binary and immutable;

   (c) fight the oppression of, and discrimination against, lesbians;

   (d) raise lesbian visibility, both in the general community and within LGB groups;

   (e) promote outlets for lesbians to meet, have discussions and organise events for the political, social, cultural, physical and mental wellbeing of lesbians; and

   (f) lobby relevant parties to raise awareness of lesbian needs and interests.

5. In 2023, LAG applied to the AHRC for a five-year exemption under section 44 of the *Sex Discrimination Act 1984* (Cth) (**SD Act**), so that it could organise public events for the above purposes. The exemption was sought so that the Group could exclude people of the opposite sex, and those who are not lesbians. The exclusion was proposed to extend to all males irrespective of the gender with which they identify. The exemption power in s 44 provides:

> **44 Commission may grant exemptions**
>
> (1) The Commission may, on application by:
>
> (a) a person, on that person's own behalf or on behalf of that person and another person or other persons;
>
> (b) 2 or more persons, on their own behalf or on behalf of themselves and another person or other persons; or
>
> (c) a person or persons included in a class of persons on behalf of the persons included in that class of persons;
>
> by instrument in writing, grant to the person, persons or class of persons, as the case may be, an exemption from the operation of a provision of Division 1 or 2, or paragraph 41(1)(e), or paragraph 41B(1)(b), as specified in the instrument.
>
> (2) The Commission may, on application by a person to, or in respect of, whom an exemption from a provision of Division 1 or 2, or paragraph 41(1)(e), has been granted under subsection (1), being an application made before the expiration of the period for which that exemption was granted, grant a further exemption from the operation of that provision.
>
> (3) An exemption, or further exemption, from the operation of a provision of Division 1 or 2, or paragraph 41(1)(e) or paragraph 41B(1)(b):
>
> (a) may be granted subject to such terms and conditions as are specified in the

instrument;

(b) may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument; and

(c) shall be granted for a specified period not exceeding 5 years.

6. An exemption was sought given the decades of litigation that the lesbian feminist community had experienced that was directed to suppressing their public events: Ann Statement at [21]-[38]. The application had nothing to do with causing harm or diminishing anyone's interests: Ann Statement at [85]-[89]; Reply Ann Statement at [3]. For the Lesbian Action Group, the holding of public events is essential for two reasons:

(a) Public events are critical to the Group's objective of accruing political influence in order to promote its movement and advance its key objectives. Public events will also assist the Group to accrue membership, which, in turn, assists the Group to broaden community awareness and build political influence.

(b) Public events are the most obvious and practical means by which the Lesbian Action Group can provide an outlet for lesbians to explore the sexual, political, cultural, and health based needs and interests of the kind articulated in the Ann Statement.

7. The Group's application for the exemption attracted significant support. For example, AHRC received 236 first round submissions from interested parties by the closing date of 1 September 2023. Of the 205 submissions received from individuals, 123 were unequivocally in support of the Commission granting the exemption, with 82 against.

8. The AHRC denied exemption request 12 October 2023. On 8 November 2023, the Lesbian Action Group applied to the ART for a review of that decision under s 45. Section 45 provides:

> **45 Review by Administrative Review Tribunal**
>
> Applications may be made to the Administrative Review Tribunal for review of decisions made by the Commission under section 44.

9. The ART received evidence and submissions from both the Lesbian Action Group and the AHRC, and held a hearing on 2-3 September 2024. The ART's Decision was to affirm the AHRC's decision.

10. The Lesbian Action Group appeals the ART's decision to this court, on questions of law, pursuant to s 172 of the *Administrative Review Tribunal Act 2024* (Cth).

B. The path of reasoning in the Decision

11. The ART analysed the applicable legislative provisions on review in D[21]-[36], and the effect

of the Exemption Guidelines on the review at D[37]-[39]. Other preliminaries – such as the terms of the application, the AHRC's decision, the evidence before the AHRC and before the ART – are then summarised at D[40]-[91]. The ultimate path of reasoning that led to the affirmation decision is exposed at D[92]-[173].

12. Critical to the path of reasoning at D[92]-[173] is how the ART interpreted and applied s 10A of the AHRC Act. As can be seen from the Group's Statement of Facts, Issues and Contentions dated 1 July 2024 (**LSOFIC**), the gravamen of its case before the ART was framed around the duty imposed by that section:

> **10A Duties of Commission**
>
> (1) It is the duty of the Commission to ensure that the functions of the Commission under this or any other Act are performed:
>
> (a) with regard for:
>
> (i) the indivisibility and universality of human rights; and
>
> (ii) the principle that every person is free and equal in dignity and rights; and
>
> (b) efficiently and with the greatest possible benefit to the people of Australia.
>
> (2) Nothing in this section imposes a duty on the Commission that is enforceable by proceedings in a court.

13. Whilst the ART correctly concluded that the Tribunal was to be imbued with the duty in s 10A on review (D[34]-[36]), it made the following pivotal conclusion at D[127]:

> [127] … I do not consider this provision to speak directly to the scope of the power in s 44 of the SDA. On its face, s 10 [sic] of the AHRC Act appears aspirational or exhortational. This is because of the reference to the Commission performing its functions 'with regard' to certain principles of human rights, and the fact that the provision itself explicitly states that it does not create an enforceable duty.

14. This construction of s 10A led to a number of related and ultimately erroneous findings that:

(a) arguments relating to duty on the ART by s 10A(2) to perform its review "efficiently and with the greatest benefit to the people of Australia" were not open (and not argued by the Lesbian Action Group) – cf. LSOFIC at [27]-[39]): D[128];

(b) an analogous exemption that was granted by VCAT to allow homosexual men to associate to the exclusion of others should be treated with caution, for that application involved legislation that required the consideration the human rights of those men while the Group's application before the Tribunal did not: D[110]-[111];

(c) the principles of interpretation do not permit the consideration of the range of human rights the Lesbian Action Group sought to advance in its submissions: D[121];

(d) the suite of fundamental rights that Lesbian Action Group sought to be considered was expanding the power in s 44 beyond its intended bounds: D[121];

(e) the SD Act was the principal reference point for questions of rights –and, by extension, that s 10A had no say on those questions): D[121];

(f) no particular priority ought to attach to the human rights advanced by the Lesbian Action Group: D[153];

(g) it is no answer to seek to rely on the human rights that attach to the members of the Lesbian Action Group: D[163];

(h) it was challenging to define the proper bounds of the discretion of s 44, despite the terms of s 10A: D[163]; and

(i) it was not necessary to rely upon a detailed comparison of the arguments for and against an exemption: D[171].

15. A second, and just as critical, strand of findings made by the ART concerned the characterisation of the power in s 44 of the SD Act:

> [164] The jurisprudence and commentary I have referred to highlight that there is some debate about the proper scope of exemption provisions. However, given the clear intent of the legislation, it seems to me that it follows that an exemption that fundamentally detracts from the operation of the SDA should not be permitted. Specifically, I mean by this – in the context of the present facts – that an exemption that actively creates or promotes discrimination that did not previously exist should not be permitted.

16. The finding at D[164] is repeated in the ultimate conclusion at D[172]:

> [172] In summary, the Applicants identify as a discrete minority within a group in the community that is already identified by their sex and sexual orientation, characteristics that afford them the protection of the SDA. They seek to actively discriminate against another group in the community identifiable by their gender identity, a characteristic also protected under the SDA. I have determined that endorsing overt acts of discrimination cannot be the intended effect of the s 44 exemption power in the SDA.

C. Question 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?

17. Ground 1 concerns the findings at D[164] and D[172] identified at paragraphs [15]-[16] above, and is straightforward. It *is* the case that s 44 is intended to permit acts of discrimination that may be contemplated, or may arise, under the SD Act. How the ART reached the opposite conclusion is not explicable at D[164] and D[172], or elsewhere.

18. The ART's conclusion is certainly not justified by the "clear intent of the legislation": cf. D[164]. Legislative intention is discerned from the text and structure of the SD Act,[2] and, for present purposes, is obvious.

    (a) Part II of the SD Act – which establishes the duties to refrain from discrimination and harassment – is divided into four divisions.

    (b) Division 1 deals with discrimination in work, whilst Division 2 deals with discrimination in other areas of public life (education, goods and services, accommodation, land, clubs, and so on). Division 3 deals with harassment, whilst Division 4 is entitled "Exemptions".

    (c) As the title suggests, Division 4 enacts a number of provisions which render conduct that would otherwise be discriminatory exempt from the prohibitions contained in the balance of Part II.

    (d) Section 44 is contained within Division 4. It unambiguously allows a person to apply for an instrument that, if granted, exempts from the operations of the prohibition against discrimination that are found in Division 1 or 2 of Part II.

    (e) In the words of D[172], the instrument to be granted under s 44 results in the "endors[ement] of overt acts of discrimination".

19. The scope of the exemption power in s 44 is correctly articulated at paragraphs [16]-[27] of the LSOFIC. Ground 1 should be upheld.

D. Question 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 AHRC Act?

20. Ground 2 concerns the first strand of reasoning identified at paragraphs [12]-[14] above. Section 10A is not aspirational nor is it exhortational. It imposes an explicit duty on the AHRC, and the ART on review. As the then-HREOC President, Sir Ronald Wilson, said upon s 10A being enacted:

> These words, in section 10A of the Act, contain an expression of principle of the utmost importance. They are far more than merely a high level statement of good intent to be nodded at and then put out of mind. The principle embodies the essence of [the AHRC's]

[2] *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, [25] (French CJ and Hayne J).

mission, which is to advance human rights in their totality for all Australians.[3]

21. Sir Ronald cannot be doubted:

    (a) Section 10A declares the existence of a "duty", which is language conferring obligation.

    (b) The duty is to "ensure", which ordinarily means "to make certain."[4]

    (c) What is to be ensured is the "performance of functions" – such as the function in s 44.

    (d) The functions to be the subject of s 10A extend to any function "any other Act" – including the SD Act.

22. It follows that the ART was bound to apply both of the matters specified in s 10A(1)(a) and (b). The ART instead positively set itself against each of them, and this infected the entire analysis: see paragraph [14] above.

23. Section 10A(2) does not convert the duty in s 10A(1) to an exhortational one: cf. D[127]-[128]. The text of s 10A(2) is directed to preventing "enforce[ment] by proceedings in a court." This has nothing to do with the application of the duty by the AHRC, or by the ART on review.

24. In truth, s 10A(2) is a familiar[5] legislative device that is intended to clarify that a tort for breach of statutory duty is not established the duty created in s 10A(1). The creation of a tort of that kind depends upon discerning the legislative intent to create one.[6] Thus, it is common for commonwealth legislation to enact stipulations of the kind in s 10A(2) as a means of ensuring no actionable tort is established. Section 10A(2) serves no other purpose.

25. Ground 2 should be upheld.

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3 "Statement from the President", in HREOC, *Human Rights and Equal Opportunity Commission Annual Report 1994-1995* (Australian Government Publishing Service, Canberra) 4-5. Section 10A was enacted by the by the *Human Rights Legislation Amendment Act* 1995 (Cth).

4 *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321, [25] (Maxwell P, Buchanan and Redlich JJA)

5 See by way of example ss 24(3) and 26(2) of the *Aged Care Act* 2024 (Cth), s 45(4) of the *Online Safety Act* 2021 (Cth), s 62 of the *Defence Housing Australia Act* 1987 (Cth), *Australian Broadcasting Corporations Act* 1983 (Cth), s 6(4).

6 See the useful distillation of principles in *DOQ17 v Australian Financial Security Authority (No 3)* [2019] FCA 1488, [112]-[122] (Perry J); *Poyton v Retailworld Resourcing Australia Limited Partnership* [2016] FCA 494 at [39]-[42] (Logan J).

E. Question 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?

26. As mentioned, the capacity of the Lesbian Action Group to advance Ground 3 has been hampered by the fact that the judgment in the Giggle Proceeding remains pending. As the judgment in that proceeding will substantially determine the question of law that is raised by this Ground, at present, the Group can only refer to its particulars in the Originating Application, and **annex** the submissions that were filed on its behalf as intervener in the Giggle Proceeding.

27. As those submissions contend, the SD Act protects members of the female sex. So, too, does CEDAW. The discretion in s 44, therefore, has to be exercised in a way that delivers this protection. The discretion cannot be exercised to *prevent* the exercise of rights by females in favour of another class, which is the situation presently before the Court. Section 44 must be exercised in a way that *promotes* the exercise of rights by members of the female sex. The Decision effectively establishes a hierarchy under which the rights of the Group to associate and express have been subordinated in favour of unidentified rights of the transgender community.

28. A fulsome articulation of Ground 3 will be provided in supplementary submissions upon publication of the reasons in the Giggle Proceeding (a possibility traversed at the case management hearing).

F. Question 4: Is the Decision legally unreasonable?

29. The capacity of the Lesbian Action Group to similarly advance Ground 4 is similarly impacted: legal unreasonableness is assessed in light of the relevant statute, its terms, scope, and purpose.[7] Judgment in the Giggle Proceeding will answer critical aspects of each of these integers.

30. Notwithstanding, some preliminary observations can be made (beyond those particulars specified in the Originating Application). The first is that establishing Grounds 1 or 2 will give rise to a supplemental conclusion of legal unreasonableness: it would follow from establishing either ground that the process of legal reasoning was legally unreasonable. In other words, the ART's findings:

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[7] See generally: *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158, [54]-[65] (Allsop CJ, Griffiths and Wigney JJ).

(a) that accounting for the human rights of Lesbian Action Group members is "no answer" (D[163]);

(b) that the Group's attempt to have these rights considered (through the prisms of legality and interpretation) was "misconceived" and not permitted (D9121]);

(c) such that "it was not necessary to rely upon a detailed comparison of the arguments for and against the exemption" (D[171]);

is precisely the kind of reasoning to be characterised as legally unreasonable. These conclusions are capricious and lacking in common sense, having regard the nature of the power, and the resulting need to account the conflicting and multifaceted interests of the putative discriminator and discriminated that will be on any application under s 44.

31. The Group further contends that the Decision is legally unreasonable on an "outcome focussed"[8] lens. Whether that is made good depends upon an intensive analysis the findings in the Decision, and the facts underpinning it, which will be developed at the hearing. In short:

(a) The uncontradicted evidence was that the Lesbian Action Group 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 Group and its beliefs as akin to "nazi fascists" (cf. the finding in D[158]).

(d) The uncontradicted evidence was that the Group 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: Ann Statement at [85]-[89]; Reply Ann Statement at [3].

(e) There was, therefore, no basis to find that the Group rejected the need for legal protections for the transgender community, and that the Group's position was "disingenuous": D[162].

(f) There was no evidence that the exemption "could well have a detrimental effect upon

[8] *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158, [60] (Allsop CJ, Griffiths and Wigney JJ).

the wellbeing of trans women" (D[161]), and indeed, there was much evidence which substantiated that the trans community had many opportunities to associate, and to exclusively associate: Ann Statement at [51]-[53].

(g) 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: Affidavit of Megan Blake affirmed 16 August 2024.

(h) There was precedent for an analogous exemption being granted to the male homosexual community so that male homosexuals could associate with one another securely and in "comfort": *Peel Hotel Pty Ltd (Anti-Discrimination Exemption)* [2010] VCAT 2005 at [9].

(i) The terms of s 44 contemplate an exemption being drafted to extend to the Group's agents, including those who would assist it in holding public events (cf. D[147]-[148], [168]).

(j) 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 Lesbian Action Group to hold public events, for the community at large can be presumed to comply with legal instruments (cf. the findings at D[62], [168]).

(k) 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 members of the Group are able to exercise their political, civil, social, and cultural rights (cf. the finding at D[163]).

(l) Politics cannot be done in private (cf. D[165]).

32. Rejection of the exemption was not within the range of acceptable outcomes when the proper scope of the power in s 44 and the above matters are brought into account.

G. Relief

33. The relief specified in the originating application should be granted, with costs. Should the Court be minded to instead grant the exemption (and thereby avoid remittal), the Group seeks the same exemption in the same terms applied for at the Tribunal (or such other terms as the Court sees fit). The errors are material, the relief is of utility, and there is no other discretionary basis to refuse it.

34. The Lesbian Action Group seeks additional declaratory relief (pursuant to s 21 of the *Federal Court of Australia Act* 1976 (Cth)) to the effect that the Exemption Guidelines are ultra vires insofar as they fail to direct the AHRC to its mandatory obligation in s 10A(1) of the AHRC Act. In the words of Sir Ronald, s 10A(1) has been "nodded at and then put out of mind": nowhere within the Exemption Guidelines is the AHRC (and ART) directed to the duty in s 10A(1), and how the consideration of an exemption application must have regard to the indivisibility and universality of human rights, to equality and dignity, and the need for efficiency and the greatest possible benefit to Australians. Other considerations extraneous to the duty in s 10A(1) have instead been specified.

35. The jurisdictional prerequisites for declaratory relief are met.[9] The declaration has utility given the influence the Exemption Guidelines had (D[37]-[39], [151], [169]) and will have on remitter.[10] The declaration will put beyond doubt that the Exemption Guidelines are an unsafe guide to the decision to be made in the remittal hearing.

28 NOVEMBER 2025

LEIGH HOWARD

DR MEGAN BLAKE

[9] *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519, [32] (Kiefel CJ, Keane and Gordon JJ).

[10] *G v Minister for Immigration and Border Protection* [2018] FCA 1229, [200]-[205] (Mortimer J) (cited at D[37]).

Submissions of the Lesbian Action Group[1]

Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD1386 of 2024

Giggle for Girls Pty Ltd (ACN 632 152 071) and another
Appellants

Roxanne Tickle
Respondent

Sex Discrimination Commissioner
Intervener

Lesbian Action Group
Intervener

A. The issue

1. Does the *Sex Discrimination Act 1984* (Cth) (**SD Act**) confer dedicated protection on members of the female sex? In words more pertinent to the provision at hand, s 7D(1)(a): do the words "men" and "women" in that provision refer to biological sex, or to persons who identify with a gender that corresponds to a biological sex? This appeal must resolve that issue, because the Appellants contend that the Giggle App is a special measure "between … men and women" under s 7D(1)(a).

2. The trial judge found below that the concept of "sex" in the SD Act is not confined to its biological meaning: **TJ[55]-[61]**. This finding was then used to refute the Appellants' contention that the Giggle App was a special measure intended to achieve "substantive equality … between men and women": **TJ[85]-[86]**.

3. The issue is to be resolved in this way: under the SD Act, the words "sex", "men" and "women" is language that is used to confer protection on the biological sexes. The SD Act has established other, equivalent, protections for those who have a "gender identity," such that "equal protection and equal benefit of the law"[2] is afforded to both the sex and the gender identity classes. The trial judge failed to apply this distinction. The Appellants' appeal must proceed on the premise that the Giggle App is capable of being classified as a special measure pursuant to s 7D(1)(a), as it was a service dedicated to the female sex class.

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1 Information about the Lesbian Action Group, its objects of association, and the basis for its intervention in this proceeding, can be found in the affidavit of Katherine Dennis affirmed 3 April 2025.

2 SD Act, preamble.

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4. If the above proposition is not right, then women cannot establish special measures for their exclusive benefit, to the exclusion of men who identify as women. That cannot be so. And, as will be explained, the practical ramifications to the operation of the SD Act are far broader, and far more unreasonable.

B. The approach to resolving the issue

5. There is no common law, top-down starting point, as the trial judge has uncritically accepted: **TJ[55]-[56]**. The actual starting point is that, in statutory law, legislation is gender neutral.[3] The next step is to observe (as the High Court has) that gendered language falls to be interpreted within its own statutory setting.[4] The meaning of "woman" in one statute does not inform the meaning of "woman" in another statute: cf. **TJ[56]**.

6. What must be observed next is the importance of what is being interpreted here: the SD Act. It is not legislation concerning a mere singular issue, such as marriage or social security legislation. It is legislation that regulates the most important facets of the Australian way of life in pursuit of formal and substantial equality between its participants. It does not do so at all costs, as the many reservations and exemptions within it demonstrate. Since the 2013 amendments, the SD Act has extended its pursuit from equality of the sexes, into the pursuit of equality for those who have a sexual orientation, a gender identity, or an intersex status.

7. The pursuit of equality for and between these groups generates conflict between differing interests, as this proceeding ably demonstrates. When this occurs, Gleeson CJ's dicta in *Carr v Western Australia* applies.[5] The conventional, purposive approach to construction is of limited assistance. It is the text of the SD Act, according to such principles of interpretation that are able to provide rational assistance in the circumstances, that controls the outcome of construction. That outcome must bring about a reasonable and coherent operation of the SD Act,[6] and, given its breadth, should also bring about one capable of being applied by the various stakeholders of differing sophistication who come into contact with it. Construction must proceed according to the presumption that the same meaning is given to the same words appearing in different parts of a statute, such that all provisions of the SD Act are consistent with one another.[7]

8. An appeal to the SD Act's beneficial purpose, if made, must be treated with caution. The focus here is on the specific meaning of words, and a beneficial label obscures the task of finding the

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3 *Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ). For the federal statutory presumption of gender neutrality, see *Acts Interpretation Act* 1901 (Cth), s 23(a).

4 *AB v Western Australia* (2011) 244 CLR 390, [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

5 (2007) 232 CLR 138, [5]-[7] (Gleeson CJ); applied in *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, [40] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

6 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan and McHugh J), 58 (Kirby J).

7 *The King v Jacobs Group (Australia) Pty Ltd* (2023) 97 ALJR 595, [23], [25] (Kiefel CJ, Gageler, Gordon, Steward, Gleeson and Jagot JJ).

meaning of those words.[8] Such an approach is also antagonistic to achieving equality that is envisaged by the SD Act itself: it is one thing to say that the SD Act is beneficial legislation; it is another to use that observation as a device to construe the SD Act so that it prefers one protected class over another, and in a way that undermines the protections afforded to members of the female sex.

C. The text of the SD Act

9. An examination of the whole of the text of the SD Act confirms that dedicated protection to members of the female sex exists when the language "sex", "men" and "women" are used. The special measure in s 7D(1)(a) relied upon by the Appellants falls to be interpreted accordingly.

10. ***Definitions and legislative machinery.*** The classes of protected persons under the SD Act are denoted by reference to a sex, identity, orientation, status, or by gender-neutral nomenclature.[9] The differing language used to define each of these classes, in and of itself, suggests that there are different classes of persons singled out for protection. The different choices in language for each device also suggests that there are different interests between these classes.

11. There are two 'statuses': "intersex status" and "marital or relationship status."[10] Designating intersex persons as having a "status" conforms to the ordinary understanding that the intersex community does not comprise a third sex. The definition of "intersex status", itself, relies upon the binary biological meaning of a sex: by defining it by reference to "male" and "female" "physical, hormonal or genetic features."[11] This definition, in turn, suggests that there remains a sex class for the purposes of the SD Act, and this class comprises males and females.

12. The definition of "sexual orientation," too, relies on the word "sex."[12] The definition conforms to the ordinary understanding that sexual attraction is oriented towards a biological sex.[13] "Sexual orientation" is not oriented towards an "identity" or a "status". As the UK Supreme Court in *For Women Scotland* observed: "a person with same sex orientation as a lesbian must be a female who is sexually oriented towards (or attracted to) females, and lesbians as a group are females who share the characteristic of being sexually oriented to females."[14] As people are not sexually oriented towards "identity" or a "status", "[p]eople are not sexually attracted towards those in

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8 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, [32]-[33] (French CJ, Kiefel, Bell and Keane JJ).

9 "Person" and "employee" are the primary methods of the lattermost device. See for e.g. SD Act, ss 4A, 7A (discrimination on the grounds of family responsibilities), s 6 (discrimination on the ground of marital or relationship status).

10 SD Act, s 4 (meaning of "intersex status" and "marital or relationship status").

11 SD Act, s 4 (meaning of "intersex status").

12 SD Act, s 4 (meaning of "sexual orientation").

13 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 483 (Lockart J): "[h]omosexuals are persons who are sexually attracted to persons whom they know are of the same biological sex of themselves." See too *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [205]-[207] (the Court).

14 *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [206] (the Court).

possession of a certificate."[15]

13. "Gender identity" is a composite phrase. It eschews the language of "sex" and also "status". Its definition all but confirms that it is concerned with the outward identity of a person, and that no binary biological concept is intended to be conveyed by it. It also confirms the corollary: that "sex" under the SD Act *is* binary and biological. A person's gender identity relates to appearance, mannerism or other characteristic, and that is so regardless of the person's designated sex at birth.[16] "Sex" must therefore be different from "identity." The legislature could have defined this class as having a "sex identity", but it did not.

14. ***The discrimination protection definitions*.** With the protected classes so defined, the SD Act goes on to define discrimination on the ground of sex (s 5), sexual orientation (s 5A), gender identity (s 5B), intersex status (s 5C) and marital or relationship status (s 6). Each of these provisions is crafted in near exact terms, and no class is afforded lesser protection.

15. Importantly, s 7 (pregnancy discrimination) and s 7AA (breastfeeding discrimination) confer protections on a "woman" who is pregnant or who is breastfeeding. The use of "woman" in these sections makes it abundantly clear that a sex class subsists, and that a "woman" under the SD Act has its biological meaning. Women, not men, give birth. Women, not men, breastfeed. A transman – that is, a member of the female sex who has a male gender identity – is capable of giving birth and capable of breastfeeding, and is protected by these provisions. They are protected by these provisions by virtue of their female sex. Holding otherwise would result in a troubling lacuna, and an objectively unintended one given the reliance on a woman's biological sex in both provisions.

16. ***Special measures to achieve substantive equality*.** The structure of s 7D (special measures) must be noted next. Akin to ss 7A and 7AA, subsections (c), (d) and (e), use the word "women" when addressing special measures relating to pregnancy, potential pregnancy and breastfeeding. Section 7D then separately addresses special measures with respect to gender identity, intersex status and sexual orientation, in (aa), (ab), and (ac). Given that setting, the special measure provision in (a) concerning "men and women" cannot be interpreted differently from the special measures in (c), (d), and (e) so as to result in there being different types of women for different types of special measures. The presumption against that interpretation is strong.[17]

17. ***The application of the discrimination protections to areas of public life.*** Divisions 1 and 2 of Part II of the SD Act pick up and apply the above concepts of discrimination to various fields of public life: work, education, goods and services, accommodation, land dealings, clubs, the administration of commonwealth law and programs, and requests for information.[18] These provisions afford an equal protection to the defined classes by using a common textual formula.

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[15] *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [204] (the Court).

[16] SD Act, s 4 (meaning of "gender identity").

[17] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21, [25] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ).

[18] SD Act, ss 14-27.

Discrimination is prohibited "on the ground of … sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities." This textual device ensures that each protected class is afforded no lesser protection. This device, in turn, confirms the futility of diluting the distinction between the sex and gender identity classes.

18. Reservations to this textual device exist in particular situations where the legislature has considered it warranted. The majority of these reservations are reserved for the "sex" class, and appear in:

    (a) Section 21(3) (education): educational institutions can discriminate by conducting education for the single "sex". This allows, for example, the ability of a parent to send their daughter to an all-girl school.

    (b) Section 23(3)(c) (accommodation): charitable accommodation providers can discriminate by providing accommodation for persons of one "sex". This allows, for example, for the operation of domestic violence shelters and rape crisis centres that are dedicated to women.

    (c) Section 25(3) and (4) (clubs): clubs can discriminate by offering membership to the one "sex", or limit benefits to a single "sex" if such benefits cannot be enjoyed simultaneously by "both men and women". This allows, for example, the opportunity for lesbians to gather together to share in their culture and to find partners.[19]

    (d) Section 27(2) (requests for information): requestors of information have a defence if their request is for medical information that concerns a medical condition experienced "by persons of that sex only." This allows, for example, medical practitioners to obtain information from female patients in the screening or diagnosing cervical cancer.

19. The nature of these sex-based reservations to the prohibition against discrimination not only confirms the SD Act's continuation of dedicated protections for the sex class, but also the importance of maintaining the distinction.

20. ***The prohibition on sexual harassment.*** Division 3 of Part II prohibits sexual harassment across the same fields of public life, using two definitional devices: "sexual harassment" and "harassment on the ground of sex."[20] Both definitions, in turn, depend upon a non-exhaustive consideration of circumstances that can include the victim's sex, sexual orientation, gender identity, or intersex status. The definitions are then used to prohibit harassment in most of the same fields of public life in a similar fashion to Div 2.[21] The structure of both definitions again confirms the SD Act's equal protection to each class, and, in turn, the futility of confusing the boundaries drawn between the

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[19] Albeit a haphazard and highly limited opportunity, because the definition of "club" only extends to an association of less than 30 persons, who also sell or supply liquor, that also have gathered for specified purposes: see s 4 (definition of "club").

[20] SD Act, ss 28A and 28AA.

[21] SD Act, ss 28B-28L.

sex and gender identity classes.[22]

21. ***Exemptions*.** It is the exemptions in Div 4 of Part II where the distinction between sex and gender identity becomes most prominent, and where it becomes most important.

    (a) Section 30 permits "sex" discrimination in the form of genuine occupational requirements where they relate to the fitting of clothing, the entry into spaces whilst people are in a state of undress, body searches, entry into lavatories, the provision of accommodation, artistic performance, or the physical attributes possessed by a sex.

    (b) Section 31 permits discrimination against a "man" on the ground of "his sex" that necessarily arises from privileges that are given to a "woman" in connection with her pregnancy, childbirth or breastfeeding.

    (c) Section 32 permits discrimination in the provision of services the nature of which can only be provided to members of "one sex".

    (d) Section 34(2) permits discrimination engaged in by an educational institution in the form of providing accommodation to students of "one sex".

    (e) Section 35(1) permits discrimination on the basis of "sex" in residential care facilities that involve the care of children.

    (f) Sections 41 to 41B permit discrimination on the basis of "sex" in insurance and superannuation products that is drawn from actuarial and statistical data.

    (g) Section 42 permits discrimination on the grounds of "sex, gender identity or intersex status" from competitive sporting activity where strength, stamina or physique is relevant.

22. These exemptions can be compared to others which do not depend on "sex" for their definition, concerning charitable bodies, religion, religious educational institutions, voluntary bodies, and acts done with statutory authority.[23] As none of these exemptions necessarily turns on the female condition, none of them is defined by reference to the concept of "sex".

D. The trial judge has erred

23. The reasoning below, however, practically means that there is no longer a distinction between the sex and gender identity classes.

24. The conclusion that a biological man who identifies as a woman is a "woman" under the SD Act has innumerable unintended consequences. Schools are to admit biological boys into all-girl

[22] It is only the protection against hostile work environments that is sex specific: see s 28M. The provision does not expressly refer to sexual orientation, gender identity or intersex status in its terms. This does not deny the potential for sexual orientation, gender identity or intersex status to become relevant in any given case of a hostile working environment, noting the breadth of the protection in s 28M and the potentiality for any relevant circumstances that might bring about such hostility.

[23] SD Act, ss 36-40.

schools (s 21(3)). Charitable accommodation providers are to admit biological men into domestic violence shelters and rape crisis centres (s 23(3)(c)). Lesbians are to admit biological men into their clubs (s 25(3)). Employers are to allocate the duties of clothing fitting, body searches, and entering into a women's lavatory to biological men (s 30). The artistic performance of a woman is to be depicted by a biological man (s 30). Biological men are to be afforded privileges in connection with their pregnancy, childbirth and breastfeeding (s 31). Biological boys are to reside in the girl's dormitory at school (s 34(2)). Vulnerable or disabled girls residing in residential care are to be cared for by biological men (s 35(1)). Actuarial data applied favourably to women in insurance or superannuation policies are to be applied to biological men (ss 41-41B). "Sex only" medical conditions are unable to be identified, and both men and women are affected by cervical cancer (s 27(2)). Each of these propositions varies in impossibility, irrationality or unreasonableness. None of them can be said to be the product of a reasonable interpretation of the words of the SD Act.

25. The chain of reasoning relied upon by the trial judge at **TJ[55]-[62]** is wrong, at every turn. Contrary to **TJ[55]**, there is no single, uniform meaning of the word "woman" that encompasses a transwoman.[24] Dictionary definitions are against that proposition.[25]

26. State and territory birth registration legislation does not alter matters: cf. **TJ[55]**. This legislation, as the High Court observed in *Norrie*, effects a legal deeming.[26] An altered birth certificate issued to a transgender person deems that person to be a member of the certified sex "for the purposes of" but "subject to" the legislation of the state or territory in question. This is an almost uniform stipulation.[27] None of this legislation effects a legal deeming that is capable of being applied to the SD Act (and such an attempt would be ineffective in any event). Deeming provisions, by their nature, are interpreted strictly, and only for the purpose for which they are created.[28] The only purpose in s 58(1) of the *Births, Deaths and Marriages Registration Act 2023* (Qld) is to deem Ms Tickle's sex "for the purposes of, but subject to, a law of the State" of Queensland. This deeming provision does not permit the conclusion drawn at **TJ[62]**.

27. Contrary to **TJ[56]**, this Court in *SRA* did not find that "sex can refer to a person being male, female, or another non-binary status"; nor did it find that that phrase "encompasses the idea that a person's sex can be changed". The Court in *SRA* concluded that the words "woman" and "female"

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[24] *Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 469 (Black CJ), 485 (Lockart J).

[25] Macquarie Dictionary Online (Pan MacMillan Australia, 2025), definition of "woman"; Oxford English Dictionary (online, 2025) definition of "woman".

[26] *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [19] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[27] *Births, Deaths and Marriages Registration Act 1995* (NSW), ss 32I; *Births, Deaths and Marriages Registration Act 1996* (Vic), s 30G(3); *Births, Deaths and Marriages Registration Act 2023* (Qld), s 58(1); *Births, Deaths and Marriages Registration Act 1988* (WA), s 36S; *Births, Deaths and Marriages Registration Act 1999* (Tas), s 28D(1); *Births, Deaths and Marriages Registration Act 1996* (NT), s 28H; *Births, Deaths and Marriages Registration Act 1997* (ACT), s 29D(1). The deeming is cast in different language in South Australian legislation: *Births, Deaths and Marriages Act 1996* (SA), s 29U.

[28] *FCT v Comber* (1986) 10 FCR 88, 96 (Fisher J); *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, [55] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

in the *Social Security Act 1947* (Cth) included a reference to a post-operative transwoman, but did not go as far as extending to a pre-operative transwoman.[29] Black CJ stressed (as the High Court would later also find[30]) that his conclusion was one of construction of the statutory text before him.[31] He did not have benefit of the "gender identity" definition that is now usefully supplied in the SD Act. Nor did his Honour have the benefit of the "gender identity" definition when he would later observe in *AB* that: "*there being no contrary intention*, the applicant [a post operative transwoman] is a woman within the meaning of the [SD Act] (our emphasis)."[32]

28. Contrary to **TJ[57]**, the determination of sex under the SD Act does not "take into account a range of factors, including biological and physical characteristics, legal recognition and how they present themselves and are recognised socially". Nowhere in the SD Act can one find support for this sweeping statement. In truth, it is the definition of "gender identity", not the phrases "sex" and "woman", that brings into account the matters that are referred to by his Honour in this paragraph. "Gender identity", it is to be recalled, is primarily defined by reference to three matters: identity, mannerisms and characteristics.[33]

29. The principle expressed in the *Commissioner of Stamps* has the opposite effect from that described in **TJ[58]-[59]**. The addition of sexual orientation, gender identity and intersex protections by the 2013 Amendments produced clearly identified classes for protection, each of which can now be devised according to the terms of the SD Act as amended. The amendments avoided the need to strain for meaning in the initial limited text, and, as the judgments in *SRA* and *AB* exemplified, a straining of meaning was liable to produce incomplete results. With the 2013 Amendments so enacted, the classes of those protected are clear, there are equal and distributive protections, and no piecemeal result of the kind wrought by *SRA* and *AB* is possible. There is thus no need to read sex-based protections in the way his Honour did.

30. The removal of the definitions of "man" and "woman" in s 4 by the 2013 Amendments is suggests a change in meaning (**TJ[59]**), but this places far too much reliance on what a definition in a statute does. Definitions are drafting devices, not substantive enactments of law. Definitions are read into substantive enactments for the purpose of construing the substantive enactment.[34] As has been demonstrated in Part C above, the 2013 Amendments did nothing to change the substantive enactments that protected members of the female sex.

31. The passage of the explanatory memorandum relied upon at **TJ[60]** is wrong. As has been explained above, gender identity discrimination is provided on the same terms as sex

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29 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 474 (Black CJ), 493-494 (Lockart J), 496 (Heerey J).

30 *AB v Western Australia* (2011) 244 CLR 390, [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

31 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 473-474 (Black CJ).

32 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, [4] (Black CJ).

33 SD Act, s 4 (meaning of "gender identity"). The words "identity", "mannerisms" and "characteristics" are not further circumscribed by definition in the SD Act.

34 *Qantas Airways Limited v Transport Workers Union of Australia* (2023) 278 CLR 571, [80] (Gordon and Edelman JJ); *Kelly v The Queen* (2004) 218 CLR 216, [103] (McHugh J).

discrimination under the SD Act. No "protections" are capable of being denied to a transwoman on a distributive reading of the protections in the SD Act. This is not the first time the explanatory memorandum misrepresented the law.[35] Nor is it the first time such a misrepresentation has been made by the department responsible for administering a discrimination statute.[36] The words of an explanatory memorandum do not displace the meaning of the statutory text, nor are they a substitute for the text.[37] **TJ[60]** offers no clarity as to precisely how the explanatory memorandum was capable of assisting construction for the purposes of s 15AB(1)(a) or (b) of the *Acts Interpretation Act 1901* (Cth).[38] In any event, its weight diminishes given the competition of interests and the resulting importance of the text, as s 15AB(3)(a) recognises.

E. The Lesbian Action Group's interpretation of the SD Act conforms to CEDAW

32. An interpretation of the SD Act that retains dedicated protection for members of the female sex is consistent with the treaty which it seeks to enact, the *Convention for the Elimination of All Forms of Discrimination Against Women* (**CEDAW**).[39] CEDAW is scheduled to the SD Act, and a stated object of the SD Act is to give effect to certain provisions of it.[40] Thus, the Court's task is to endeavour to adopt a construction of the SD Act that conforms to CEDAW.[41]

33. As was noted by this Court in *AB*, CEDAW is a convention that is concerned to eliminate discrimination *against women*; it is not concerned with discrimination per se.[42] Most relevantly, Art 4(1) of CEDAW provides that the "[a]doption by States Parties of temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention…". Article 4(1) has been statutorily enacted in s 7D(1)(a), and both are referring to the male and female sex classes.

34. CEDAW is not concerned with transwomen: its terms unmistakably deal with the discrimination experienced by the female sex. Stipulations concern the female biological condition: reproduction (Art 11(f)), pregnancy and confinement (Arts 4(2), 11(2a), 11(2d), 12(2)), family planning (Arts 10(h), 12(1), 14(2b)), and the spacing of children (Art 16(1)(e)). Other stipulations concern the female social condition as experienced internationally: sex trafficking and prostitution (Art 6), equal

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35 *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, [72] (Gageler J).

36 *Purvis v New South Wales* (2003) 217 CLR 92, [90]-[92] (McHugh and Kirby JJ).

37 *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, [70] (Gageler J); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).

38 Cf. *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, [68]-[72] (Gageler J).

39 Opened for signature on 1 March 1980, 1249 UNTS 13 (entered into force on 3 September 1981).

40 SD Act, s 3(a).

41 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ).

42 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, [14] (Black CJ), [81], [88] (Kenny J), [121] (Gyles J). At TJ[162]-[180], the trial judge records a series of troubling arguments advanced below about the effect of CEDAW Committee guidance and reports have on the force of *AB*. These arguments are misguided. None of this material is relevant to the construction of the SD Act, nor CEDAW, in this Court: *Maloney v The Queen* (2013) 252 CLR 168, [24] (French CJ), [134] (Crennan J), [173]-[176] (Kiefel J), [235] (Bell J). In any event, the CEDAW Committee has confirmed that CEDAW's reference to sex is biological: CEDAW Committee, General Recommendation 28 on the core obligations of States Parties under article 2 of the CEDAW, UN Doc CEDAW/C/GC/28 (16 December 2010), paragraph 5.

remuneration (Art 11(1d)), maternity leave and child-care (Art 11(2), forced marriage (Art 16(1)(b)), child marriage (Art 16(2)), franchise and participation in public life (Art 7), and equal legal capacity (Art 15(2)-(4)). Nowhere can one find the parties to CEDAW contemplating and accommodating the unique needs and interests of transwomen.

35. The SD Act must remain reasonably capable of being considered appropriate and adapted to implementing CEDAW, and must avoid being characterised as substantially deficient in its implementation.[43] A construction that undermines sex-based protections that are afforded to women conflicts with the objects and the terms of CEDAW, whilst one that maintains a sex distinction does not.

F. Conclusion

36. Sex-based protections are critical to a sensible and equal operation of the SD Act. For lesbians in particular, undermining them denies autonomy, dignity and safety. There remains "dangers in a male capable, or giving the appearance of being capable, of procreation being classified by the law as a female,"[44] despite the best intentions of gender ideology. It is the lived experience of lesbians to be confronted by autogynephilic[45] men seeking lesbian attention, as a means of generating sexual gratification for themselves. It is now commonplace for lesbians to be pressured into having sex with transwomen, and to face risk of social isolation if they do not agree with that very concept.[46] This is unacceptable.

37. Returning to s 71D(1)(a), the appeal must proceed on the basis that the Giggle App is intended to be used by women (members of the female sex) to the exclusion of Ms Tickle (a member of the male sex). A text-driven, consistent and coherent construction of the SD Act produces this result. Construing the SD Act in this way properly accommodates the needs of members of the female sex, and does not diminish any protection afforded to Ms Tickle and the broader transgender community by the SD Act. This community, like members of the female sex, can establish their own special measures: s 7D(1)(ab).

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[43] *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 487, 489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Acts Interpretation Act* 1901 (Cth), s 15A.

[44] *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 495 (Lockart J).

[45] Autogynephilia is the condition of a man becoming sexually aroused by the idea or image of himself as a woman: Diagnostic and Statistical Manual of Mental Disorders (5th ed, 2013) 702-704.

[46] C Lowbridge, "The lesbians who feel pressured to have sex and relationships with trans women", BBC Online, 26 October 2021 <https://www.bbc.com/news/uk-england-57853385> (accessed 4 July 2025). The Court in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 at [207] notes evidence of the "chilling effect" on lesbians who are no longer using lesbian-only spaces because of the presence of transwomen.