

Applicant's Reply Submissions



Federal Court of Australia
District Registry: Victoria
Division: General

No. VID170/2025

Lesbian Action Group Inc

Applicant

Australian Human Rights Commission

Respondent

1. The AHRC adopts the Tribunal's error in winnowing down the Lesbian Action Group's objects and its purposes of seeking the exemption. Disagreement about the Group's gender politics is one thing; denying the Group's agency to publicly associate for its political, cultural, social and sexual purposes is another. It was made very clear below that the Lesbian Action Group had no intention of causing harm to anyone, and that the transgender community has its own needs and interests that must be catered for.¹
2. The beneficial approach to interpretation can only materially assist where there is ambiguity.² No ambiguity is present in the terms of s 44. Section 44 is a device to resolve competition of rights and interests of the applicant and the potentially discriminated. Chief Justice Gleeson's approach in *Carr* therefore applies.³ The clash below was essentially between:
 - (a) permitting the Lesbian Action Group a public sphere of operation to explore their political, cultural, social and sexual interests; and
 - (b) an alleged harm that was said to result, which was only substantiated by evidence of certain persons who took offence to the gender critical views of the Group.

A. 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?

3. The Group's submissions in chief have not "mischaracterised" (R[27]) the Tribunal's findings

¹ Ann Statement at [85]-[89]; Reply Ann Statement at [3].

² *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [25], [30] (the Court).

³ *Carr v Western Australia* (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).

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at D[164] or D[172]. The Group's submissions actually extract each of those findings in full. The legal error engaged in by the Tribunal at D[164] and D[172] is clear. It is the AHRC, not the Lesbian Action Group, that is contorting those findings.

4. It cannot be said that a erroneous construction of s 44 "would make no difference": R[30]. On the AHRC's own approach, the Lesbian Action Group has been put to an evidentiary and persuasive onus (R[25]) on the wrong statutory test. It led the Tribunal to find, for example, that "due to the nature of the statutory power in the context of the SDA as [the Tribunal] understood it, it has not been necessary to rely upon a more detailed comparison of arguments for and against the exemption": D[171].⁴ The attempt to justify the Tribunal's reasoning by another pathway of reasoning, despite the legal error engaged in, is disguised merits review.

B. 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?

5. Section 10A(1) is not a duty of imperfect obligation. The language in s 10A(1) confers a "duty" "to ensure" that functions are performed "with regard for" the matters specified. This is precise, not indeterminate, language that is inapt for characterisation as an imperfect obligation: see by analogy *Environment East Gippsland Inc v Vicforests* (2010) 30 VR 1 at [312] (Osborn J). Like the precautionary principle in *Environment East Gippsland*, s 10A(1) is not couched in general language, but, instead, in language that directs the Tribunal to consider human rights principles. The Tribunal, standing in the shoes of the AHRC, is capable of applying those human rights principles. This Court is capable of supervising the application of those principles.⁵
6. The imperfect obligation line of case law does not assist the AHRC in any event. An imperfect obligation remains enforceable in the event of a total default to apply it.⁶ "[W]hatever latitude is given to the authority, the mere assertion of a discretion as to performance of the duty will not be allowed to outweigh the fact that a duty, not a power, is in question, and can never therefore excuse complete failure to perform it."⁷
7. That is the case here. The Tribunal has not only failed to perform its s 10A(1) obligation, but

⁴ See also the other infected findings summarised at A[14].

⁵ An example of a Court judicially reviewing the exercise of an imperfect human rights obligation can be found in *Wheeler v Leicester City Council* [1985] 1 WLR 335 (HL), 340-342 (Lord Ruskil).

⁶ *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739, 749-750 (Burchett J).

⁷ AJ Harding, *Public Duties and Public Law* (Oxford University Press, 1989) 52.

has positively refused to perform it. It then went on to set itself against all of the Group's submissions in its LSOFIC that were directed at s 10A(1).

8. The AHRC's interpretation of s 10A does not conform to the beneficial, rights based approach that it promotes in its submissions (R[23]). That is, the AHRC's proposition that the duty in s 10A is unreviewable denies the Lesbian Action Group a fundamental right – access to this Court.⁸ Section 10A(2) must therefore be read in the way the Lesbian Action Group contends. Section 10A(2) only serves to oust the creation of an actionable statutory tort and access to remedies associated with that tort, and leaves untouched access to this Court's appeal jurisdiction.

C. 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?

9. There is no conflict with the position taken below. The Lesbian Action Group made a formal submission that it considered the judgment in *Tickle v Giggle for Girls (No 2)* [2024] FCA 960 to be plainly wrong. Consistently with that it says now, it also submitted below that CEDAW does not permit the subordination of the rights of lesbians.⁹ The AHRC's continued reliance on *Tickle* in response to Ground 3 serves to underscore the importance of the Full Federal Court's pending judgment on appeal to the disposition of this ground.
10. CEDAW is scheduled to the SD Act, serves as the constitutional underpinning of that Act, and is singled out in the objects: see s 3(a). The Full Federal Court has previously held that CEDAW is specifically concerned with women, rather than equality per se.¹⁰ The discretion in s 44 must be administered accordingly – CEDAW required the discretion to be applied in a way that promotes (rather than subjugates) the rights of the women that comprise the Lesbian Action Group. That can be achieved whilst giving effect to equality before the law (as is required by Article 26 of the ICCPR). One does not cancel the other out. The Tribunal's conclusion that CEDAW "plays a somewhat ambiguous role" was wrong (D[126]).

⁸ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [32] (Gleeson CJ), [72] (Gaurdon, McHugh, Gummow, Kirby and Hayne JJ). The AHRC's submission goes so far as to say mandamus would be unavailable, which is a construction that is inconsistent with this Court's entrenched minimum of judicial review: see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [76] (Gaurdon, McHugh, Gummow, Kirby and Hayne JJ).

⁹ Lesbian Action Group Reply Submissions dated 29 August 2024, [f4], [13]; T108.40-45; 109.1-42.

¹⁰ *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, [14] (Black CJ), [81], [88] (Kenny J), [121] (Gyles J).

D. Question 4: Is the Decision legally unreasonable?

11. The AHRC has no response to the supplemental basis upon which this ground has been put.
12. On the outcome-focused basis in which this ground has been put, the particulars to this ground are facts that were established in the evidence, most without contradiction. As a consequence, they can be considered by this Court for the purposes of determining this ground. The outcome is “partial and unequal in [its] operation as between different classes ... [and] involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.”¹¹
13. The AHRC has made an unfortunate submission that Professor Jeffreys associates with Nazi fascists (R[21]). No citation is given for this submission, because it is false. Professor Jeffreys is unable to defend herself against this slur. The submission should be withdrawn.

E. Relief

14. Each of the errors is indeed material in that there is a realistic possibility that the decision that was made in fact could have been different if the errors had not occurred.¹²
15. The Exemption Guidelines cannot be read harmoniously with s 10A(1) (R[34]). Section 10A(1) establishes a mandatory duty on the Tribunal that must be performed when exercising the power in s 44, which has been omitted in the Exemption Guidelines in favour of other extraneous considerations. The declaration has utility in that it establishes issue estoppel and res judicata – the declaration would render it unlawful for the Tribunal to apply the guidelines on remittal. The declaration further serves to vindicate the Lesbian Action Group, to assist the AHRC in carrying out its statutory obligation in s 10A going forward, to clarify the law, and to inform the public.¹³ It is no answer to submit that the Tribunal on remittal can have regard to the Court’s reasoning about the ultra vires nature of the Exemption Guidelines – the rule of law requires the court to grant whatever remedy is available and appropriate.¹⁴

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¹¹ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [70] (Hayne, Kiefel and Bell JJ), quoting *Kruse v Johnson* [1898] 2 QB 91, 99-100 (Lord Russell)

¹² *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 199 CLR 135, [7] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

¹³ See by analogy *ACCC v CFMEU* [2006] FCA 1730, [6] (Nicholson J).

¹⁴ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, [59] (Gaudron J).