NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged:	Interlocutory Application - Form 35 - Rule 17.01(1)(a)
Court of Filing:	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	3/04/2025 12:28:19 PM AEDT
Date Accepted for Filing:	3/04/2025 2:19:22 PM AEDT
File Number:	NSD1386/2024
File Title:	GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) & ANOR v ROXANNE TICKLE
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

Form 35
Rule 17.01(1)

Interlocutory application

Federal Court of Australia
District Registry: New South Wales
Division: Appeals and Related (Human Rights)

No. NSD1386 of 2024

Giggle for Girls Pty Ltd (ACN 632 152 017) and another
Appellants

Roxanne Tickle
Respondent

To the Appellant and Respondent

The Applicant, the Lesbian Action Group Inc, applies for the interlocutory orders set out in this application.

The Court will hear this application, 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.

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	Sladen Legal
Tel	(03) 9611 0151
Email	kdennis@sladen.com.au
Address for service	Collins Square, Tower 2, 22/727 Collins Street, Melbourne VIC 3000

Interlocutory orders sought

1. Pursuant to rule 9.12(1) of the *Federal Court Rules* 2011 (Cth), that the Lesbian Action Group Inc be granted leave to intervene in this proceeding.

2. Pursuant to rule 9.12(3) of the *Federal Court Rules* 2011 (Cth), that the Lesbian Action Group Inc provides assistance in the form of written and oral submissions pursuant to a timetable that is most convenient to the parties.

Service on the Respondent

It is intended to serve this application on all parties.

Date: 3 April 2025

Signed by Katherine Dennis
Lawyer for the Applicant

NOTICE OF FILING

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
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File Title:	GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) & ANOR v ROXANNE TICKLE
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

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The date of the filing of the document is determined pursuant to the Court's Rules.

Form 59
Rule 29.02(1)

Affidavit

Federal Court of Australia
District Registry: New South Wales
Division: Appeals and Related (Human Rights)

No. NSD1386 of 2024

Giggle for Girls Pty Ltd (ACN 632 152 017) and another
Appellants

Roxanne Tickle
Respondent

Affidavit of:	Katherine Dennis
Address:	Sladen Legal, Collins Square, Tower 2, 22/727 Collins Street, Melbourne VIC 3000
Occupation:	Solicitor
Date:	3 April 2025

Contents

I, **Katherine Dennis**, of Sladen Legal, Collins Square, Tower 2, 22/727 Collins Street, Melbourne VIC 3000, affirm:

1. I am a Principal Lawyer of Sladen Legal, the solicitors for the Lesbian Action Group Inc (**LAG**).

[redacted]

Filed on behalf of	The Applicant
Prepared by	Sladen Legal
Tel	(03) 9611 0151
Email	kdennis@sladen.com.au
Address for service	Collins Square, Tower 2, 22/727 Collins Street, Melbourne VIC 3000

2. LAG makes an application for this proceeding to intervene in Giggle For Girls Pty Ltd & Anor v Roxanne Tickle (NSD1386/2024) (**Tickle Proceeding**), pursuant to rule 9.12.

3. I am authorised to make this affidavit on behalf of LAG. I make this statement in-part based on my instructions that I have received from the LAG Committee of Management. I believe these instructions are true and correct.

About LAG and its political movement

4. The Lesbian Action Group Inc is an association of lesbian women. LAG initially was formed in the late 1970s/early 1980s, and disbanded in the mid-1980s. It reestablished itself due to the recent undermining of the human rights of lesbians.

5. LAG's objects of association (as specified in its constitution) include:

   (a) being a political advocacy group for, by, and about, lesbians in Australia and internationally;

   (b) fighting the oppression of, and discrimination against, lesbians;

   (c) raising lesbian visibility, both in the general community and within LGB groups;

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

   (e) asserting the biological fact that sex is binary and immutable;

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

6. Politically, LAG subscribes to a lesbian feminist critique. The principles of lesbian feminism that most resonate with the objects of LAG's association include the following:

   (a) Lesbians are women loving. A lesbian's sense of self and her energies, including sexual energies, centre around women. A lesbian commits herself to other women for political, emotional, physical and economic purposes. A lesbian, as women loving, is dedicated to protecting woman and advancing the interests of women in every sense, and at all costs.

   (b) Lesbians need separatism. Lesbian feminism is distinguishable by the need for some degree of separation from the politics, institutions and culture of men. Separation is necessary because of the patriarchal state of our society.

(c) The personal is political. True equality between sexes, and the erasure of hierarchy, requires lesbians to not only have equality in public life, but also in personal life. Lesbians require freedom, and respect from others, to be able to engage in their private lives as they see fit. Lesbians should not have to fit into the stereotype roles that society requires.

(d) Rejecting the erotizing of equality. Lesbian feminists reject the objectification of women in society and in particular of lesbians. Sexuality is socially constructed for men out of their position of dominance, and for women out of their position of subordination. This extends into the LGBTIQ+ grouping and the culture that this grouping can often propound - these are practices that are grounded in a male supremacy and a patriarchal view of sexual behaviour.

About Lesbian Action Group Inc v Australian Human Rights Commission [2025] ARTA 34

7. On 3 August 2023, LAG made an application to the Australian Human Rights Commission (**AHRC**) for an exemption from the operation of the *Sex Discrimination Act* 1984 (Cth) (**SD Act**), pursuant to s 44 of that Act.

8. An exemption was necessary, as LAG wishes to hold events that exclude: males of all orientations, heterosexual females, bisexuals, and transgender persons who identify as female.

9. LAG wishes to promote and hold events to grow its political movement, to grow its membership, and to promote its causes. Political movements cannot be established in the private sphere.

10. These events are also necessary to enable lesbians to promote and celebrate in lesbian life and culture, and so enable lesbians to meet other lesbians. Over the past two decades, there has been a marked loss of lesbian spaces in which lesbians can explore their social, cultural and sexual needs.

11. On 12 October 2023, the President of the AHRC rejected LAG's exemption application. LAG subsequently sought review of this decision in the Administrative Appeals Tribunal (**AAT** or **ART**).

12. The merits review hearing was conducted on 2 and 3 September 2024, after Bromwich J published his reasons for decision in *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 (**Tickle Judgment**).

13. LAG was required to make a formal submission that the AAT was bound by the Tickle Judgment, but that it considered it to be wrong.

14. By the Tickle Judgment, LAG lost an opportunity to argue before the AAT what it considered to be the proper interpretation of the gender identity protections that are found in the SD Act, and how they are to be interpreted together with the sex and sexual orientation based protections.

15. In effect, and in LAG's view, the Tickle Judgment establishes a hierarchy of protections by which gender identity protections are supreme to others. This hierarchy has manifested itself in the ART's consideration of LAG's exemption request.

Now produced and shown to me, marked **KD-1**, is the ART Decision dated 20 January 2025.

LAG's judicial review proceeding depends upon the outcome in the Tickle Proceeding

16. LAG has appealed the ART Decision for errors of law.

Now produced and shown to me, marked **KD-2**, is LAG's Notice of Appeal dated 17 February 2025.

17. Consistent with the formal submission that it made to the AAT, Ground 3 seeks to impugn the ART's interpretation of the SD Act and the application of the Tickle Judgment in the course of that interpretation.

18. Ground 3 is:

> 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?

19. Ground 3 is particularised in the notice of appeal as follows:

> 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

[redacted]

[redacted]

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.

20. This ground directly overlaps with the grounds that are pursued by the Appellants in the Tickle Proceeding. The Appellants are contending that Bromwich J erred in equating the concept of "sex" and "gender identity" in the SD Act.

LAG's interlocutory application for a Full Court hearing

21. Given the overlap, and on 18 March 2025, LAG applied to the Chief Justice for its appeal to be referred to a Full Court, and for the proceeding to be heard by the same bench that will be convened to hear the Tickle Proceeding (see section 20(1A) of the *Federal Court of Australia Act* 1967 (Cth)).

22. LAG was of the view that this would be the most efficient use of judicial resources, and party resources, taking into account the requirements in s 37M of the *Federal Court of Australia Act* 1976 (Cth). At the hearing of that application before Moshinsky J, LAG raised with his honour all of the reasons which would support such a reference, and the AHRC made written submissions opposing it.

23. LAG advised his Honour of LAG's proposed alternative course, which would be to intervene in the Tickle Proceeding, so that it could achieve a practical opportunity to raise its arguments as to the proper interpretation of the sex, sexual orientation, and gender identity protections in the SD Act.

24. On 31 March 2025, the Chief Justice advised that that the interlocutory application was refused.

Reasons why LAG should be granted leave to intervene

25. Justice Wheelahan of this Court usefully summarised the discretion in rule 9.12 in *Sydney Trains v Australian Rail, Tram and Bus Industry Union (Leave to Intervene)* [2024] FCA 1466 at [6]-[7]:

> [6] Some of the factors to which the Court may have regard in considering whether to give leave to intervene are referred to in sub-rule (2), but this provision is permissive and is not exhaustive.
>
> [7] The circumstances in which a court might give leave to a non-party to intervene are the subject of judicial guidance, including in *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579 (Levy) and *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCA 54; 248 CLR 37 (Roadshow). In *Bauer Media Pty Ltd v Wilson* [2018] VSCA 68 (Bauer) at [7], the Victorian Court of Appeal distilled the following principles from *Levy* and *Roadshow* –
>
> > [7] The principles upon which a court may grant leave to intervene are not in dispute. The governing principles may be briefly summarised as follows:
> >
> > (1) A non-party whose interests would be affected directly by a decision in a proceeding is entitled to intervene to protect the interest liable to be affected.
> >
> > (2) Where the legal interests of a person may be affected by the operation of precedent or by the doctrine of stare decisis, a court may grant leave to intervene if the interest is sufficiently substantial.
> >
> > (3) Where a person having the necessary legal interest to apply for leave to intervene can show that the parties to the particular proceeding may not present fully the submissions

on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene.

(4) A grant of leave may be limited, and subject to such conditions as to costs or otherwise as will do justice as between the parties.

(5) A non-party must satisfy the Court that its contribution, as an intervener, will be useful and different from the contribution of the parties, and that the intervention will not unreasonably interfere with the conduct of the proceeding.

(Citations omitted, emphasis underlined)

LAG is directly affected by the operation of precedent and stare decisis

26. *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579 at 601-602, Brennan CJ stated:

> ...a non-party whose interests would be affected directly by a decision in the proceeding - that is, one who would be bound by the decision albeit not a party - must be entitled to intervene to protect the interest liable to be affected. This, indeed, is the explanation of many of the cases in which intervention has been allowed in probate and admiralty cases and in other cases where an intervener and a party are privies in estate or interest.
>
> But the legal interests of a person may be affected in more indirect ways than by being bound by a decision. They may be affected by operation of precedent - especially a precedent of this Court - or by the doctrine of stare decisis. Apart from the obsolete exception contained in s 74 of the Constitution, an exercise of the jurisdiction conferred on this Court is not subject to appeal nor to review by any other court. As this Court's appellate jurisdiction extends to appeals, whether directly or indirectly, from all Australian courts, a decision by this Court in any case determines the law to be applied by those courts in cases that are not distinguishable. A declaration of a legal principle or rule by this Court will govern proceedings that are pending or threatened in any other Australian court to which an applicant to intervene is or may become a party. Even more indirectly, such a declaration may affect the interests of an applicant either by its extra-curial operation or in future litigation. Ordinarily, such an indirect and

> contingent affection of legal interests would not support an application for leave to intervene. But where a substantial affection of a person's legal interests is demonstrable (as in the case of a party to pending litigation) or likely, a precondition for the grant of leave to intervene is satisfied. Nothing short of such an affection of legal interests will suffice.
>
> (Citations omitted)

27. Given the appeal grounds (and the grounds of contention) that are raised in the Tickle Proceeding, Ground 3 of LAG's review proceeding will effectively be determined by the Full Court convened to hear the Tickle Proceeding.

28. This will mean that, before the first instance proceeding before Moshinsky J, LAG is bound by the outcome just as it was in the AAT hearing. If LAG disagrees with the interpretation of the SD Act that is given in the Tickle Proceeding, LAG will have to make another formal submission, and then consider appealing again to a Full Court.

29. In the event that a party to the Tickle Proceeding appeals to the High Court, and special leave is granted, the conduct of LAG's proceeding before Moshinsky J will be further prejudiced. If the High Court gives a construction to the SD Act, LAG will be forever bound by that construction, it being given by the highest court in the hierarchy.

30. In these circumstances, LAG has no practical opportunity to advance its preferred construction of the SD Act, beyond intervening in the Tickle Proceeding.

LAG's participation will be useful and different

31. LAG's proposed submissions will be useful, and different to, the contentions that appear to be raised by the parties to the Tickle Proceeding. This is for five reasons.

32. *First*, LAG's submissions will solely be based upon the correct construction of the SD Act, one that is informed by text, context and purpose. LAG respectfully submits that this is 'useful' in and of itself, as the first duty of the Full Court will be to give a construction of the sex and gender identity protections of the SD Act. LAG's submissions on construction will be consistent with the particulars to Ground 3 (extracted at paragraphs 18-19 above).

33. *Second*, LAG will contend that protections in the SD Act are required to be interpreted distributively, so that lesbians, members of the female sex, and members of the community with a gender identity status, are all afforded protection. LAG will contend that context – deriving from the text of CEDAW, and the principles of indivisibility, equality, and

universality that are required in the proper interpretation of human rights – require this result.

34. *Third*, and as part of this argument, LAG will argue that Bromwich J erred in giving weight to the explanatory memorandum to the amending legislation, and erred in giving weight to how sex is regulated by birth certification legislation that operates in states and territories. LAG will bring to the court the principles that go to the limits that can be placed on statements from the executive as to legislative intention. LAG will contend that, in light of those principles and the conflict of rights and duties that are before the Court, that the text of the SD Act must be the primary guidance.

35. *Fourth*, LAG will not be raising any constitutional validity argument of the kind that are raised by the Notice of Appeal. LAG will not contend that the amendments to the SD Act that were made by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act* 2013 (Cth) are constitutionally invalid for want of legislative power. LAG will not contend that this amending legislation was unsupported by the 'other status' limb in the International Covenant on Civil and Political Rights. LAG will submit that the 'other status' limb has been validly relied upon to give effect to sexual orientation protections, and by extension, the protection of lesbians that are afforded to lesbians in the SD Act.

36. *Fifth*, LAG does not have a sufficient interest in the other questions of law that are raised in the Tickle Proceeding, and will not address any other matter beyond the proper scope of the sex, sexual identity, and gender identity protections that are contained in the SD Act.

LAG does not intend to unduly interfere with the parties' conduct of the Tickle Proceeding

37. I am instructed that the case management judge of the Tickle Proceeding, Abraham J, was advised of the possibility of LAG's potential intervention in a letter dated 6 February 2025.

Now produced and shown to me, marked **KD-3**, is LAG's letter to the Honourable Justice Abraham dated 6 February 2025.

38. I am instructed that, at a case management hearing that was conducted on 12 February 2025, this letter was raised and discussed. I understand that a four day listing has been tentatively scheduled for the Tickle Proceeding, in light of the possibility of intervention

from LAG, and from the Sex Discrimination Commissioner, and the Australian Christian Lobby.

39. LAG seeks the opportunity to provide written submissions (of 10 pages length), and an opportunity to provide oral submissions that address those matters in writing (of, perhaps, 1 hour in length, but this length would be subject to agreement of the parties).

40. LAG undertakes to not repeat the submissions of any party. This counts in favour of intervention: see *Lendlease Building Contractors Pty Ltd v Australian Building and Construction Commissioner* [2020] FCA 240 at [24] (Snaden J).

41. LAG does not wish to otherwise interfere with the conduct of the parties' respective cases beyond providing submissions to the effect that have been addressed in this affidavit.

42. LAG is willing to provide submissions at the same time as the Appellants provide its submissions – so that Ms Tickle has an opportunity to consider them, and reply to them.

43. LAG is otherwise willing to accommodate the needs of any party vis-à-vis its intervention.

44. As an intervener, LAG will not pursue any costs from any party.

Affirmed by the deponent
at Melbourne
in Victoria
on 3 April 2025
Before me:

[redacted]
Signature of deponent

Signature of witness

JORDAN MAREE NICHOLS
Siaden Legal - Tower 2, Level 22, 727 Collins Street, Melbourne
An Australian legal practitioner within the meaning of the Legal Profession Uniform Law (Victoria)

This document was electronically signed in accordance with all the requirements set out in section 12A of the *Electronic Transactions (Victoria) Act* 2000 (Vic) and witnessed using an audiovisual link in accordance with all the requirements set out in section 12 of the *Electronic Transactions (Victoria) Act* 2000 (Vic).

Form 59
Rule 29.02(1)

Exhibit Certificate

This is the exhibit marked **KD-1** now produced and shown to Katherine Dennis at the time of affirming her affidavit on 3 April 2025 before me:

Signature of witness

JORDAN MAREE NICHOLS
Sladen Legal - Tower 2, Level 22, 727 Collins Street, Melbourne.
An Australian legal practitioner within the meaning of the Legal Profession Uniform Law (Victoria)

Filed on behalf of	The Applicant
Prepared by	Sladen Legal
Tel	(03) 9611 0151
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Address for service	Collins Square, Tower 2, 22/727 Collins Street, Melbourne VIC 3000

Applicant:	**Lesbian Action Group**
Respondent:	**Australian Human Rights Commission**
Other Party:	**Lesbian Action Group Inc**
Tribunal Number:	**2023/8450**
Tribunal:	**General Member S. Fenwick**
Place:	**Melbourne**
Date:	**20 January 2025**
Decision:	The Tribunal affirms the decision under review.

.....**[SGD]**.....

General Member S. Fenwick

Catchwords

HUMAN RIGHTS – sex and gender identity discrimination – exemption – proposed public event for lesbians born female – exercise of discretion – relevant considerations – public interest test considered – decision affirmed

PRACTICE AND PROCEDURE – joinder of parties – consideration of whether interests of incorporated association affected by decision – consideration of whether interests of United Nations Special Rapporteur affected by decision

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)

Administrative Review Tribunal Act 2024 (Cth)

Anti-Discrimination Act 1998 (Tas)

Equal Opportunity Act 1995 (Vic)

Sex Discrimination Act 1984 (Cth)

Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic)

Cases

Commissioner for Equal Opportunity v ADI Limited [2007] WASCA 261

Evans v New South Wales [2008] FCAFC 130

FAI Insurance Ltd v Winneke (1982) 151 CLR 342

G v Minister for Immigration and Border Protection [2018] FCA 1229

Jacomb v Australian Municipal Administrative Clerical and Services Union [2004] FCA 1250

Jessica Hoyle and LGB Alliance Australia (Review of Refusal of an Application for Exemption) [2002] TASCAT 142

Kruger v Commonwealth (1997) 190 CLR

Lifestyle Communities Ltd (No 3) (Anti-Discrimination) [2009] VCAT 1869

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Minister for Immigration and Citizenship v Li [2013] HCA 18

Peel Hotel Pty Ltd (Anti-Discrimination Exemption) [2010] VCAT 2005

R v Secretary of State for Home Department; Ex parte Simms [2000] 2 AC 115
Stevens v Fernwood Fitness Centres Pty Ltd [1996] EOC 92-782

Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960 (*Tickle No 2*)

Walker v Cormack [2011] FCA 861

Water Conservation and Irrigation Commission (NSW) v Browning (1974) 74 CLR 492

Secondary Materials

Australian Anti-Discrimination and Equal Opportunity Law, 3 ed, The Federation Press, 2018

Australian Human Rights Commission, *Temporary exemptions under the Sex Discrimination Act, Commission Guidelines* (2009)

Statement of Reasons

On 14 October 2024, the Administrative Appeals Tribunal (AAT) became the Administrative Review Tribunal (the Tribunal). Under the transitional provisions in the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (the Transitional Act), applications for review to the AAT that were not finalised before 14 October 2024 are taken to be an application for review to the Tribunal. The Transitional Act gives the Tribunal the authority to continue and finalise any aspect of the review not already completed by the AAT. This decision and statement of reasons is made by the Tribunal.

BACKGROUND

1. This matter is about whether a lesbian association can be granted an exemption under the *Sex Discrimination Act 1984* (Cth) (the SDA). The immediate objective of the original application by the Lesbian Action Group (LAG) for an exemption was to conduct a public event for people they describe as lesbians born female. The application was denied by the Australian Human Rights Commission (the Commission) on 12 October 2023.

2. At the time of the request the Applicants were a group of eight individuals, and the majority of those individuals have now formed an incorporated association. The articles of incorporation include among the purposes of LAG Inc to be a political advocacy group for, by and about lesbians in Australia and internationally, to assert the biological fact that sex is binary and immutable, and to fight the oppression of and discrimination against lesbians wherever they see it.

3. There is some federal judicial authority dealing with discrimination under the SDA, most recently *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 (*Tickle No 2*), but there have been no decided cases federally on the subject of exemptions. There is some, but limited, state tribunal and judicial authority on the subject. *Tickle No 2* was decided immediately prior to the hearing and there are important points of difference with this matter, and it is now on appeal.

4. The original request for exemption was made to the Commission in August 2023, with a view to conducting an event to mark International Lesbian Day in October that year. The Respondent conducted a public consultation process in two parts, issuing a preliminary view on the exemption in September 2023 before seeking views in a second round of consultations. The decision under review was issued on 12 October 2023. A large number of submissions were received across both parts of the consultation process and views were expressed both for and against the proposed exemption.

5. The Applicants applied to the Tribunal for review of the decision on 8 November 2023. They subsequently lodged the following material:

   (a) Reasons for the Application: Particulars, dated 25 January 2023 (Particulars);

   (b) a Statement of Facts, Issues and Contentions, dated 1 July 2024 (ASFIC);

   (c) a statement in Reply, dated 29 August 2024 (Reply);

   (d) Reply Submissions: International Law, dated 17 September 2024;

   (e) witness statement of Carol Ann, LAG spokesperson, dated 1 July 2024, together with exhibits including:

      (i) articles of association for Lesbian Action Group Inc (LAG Inc);

(ii) commentary on government funding to the LGBTQIA+ community;

(iii) literature concerning community dynamics between lesbians and trans women; and

(iv) 'Position paper on the definition of "woman" in international human rights treaties, in particular the Convention on the Elimination of All Forms of Discrimination Against Women', Special Rapporteur on violence against women and girls, Reem Alsalem (CEDAW Position Paper);

(f) a witness statement of Carol Ann in reply, dated 28 August 2024, with exhibits:

(i) literature concerning gay liberation and lesbian feminism; and

(ii) General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, 16 December 2010;[1]

(g) affidavit of Megan Blake, of the Applicants' legal representatives, dated 16 August 2024 exhibiting material collected at the website terfisaslur.com and also x.com (previously known as Twitter) described as examples of violence and hatred directed towards so-called trans exclusionary radical feminists ('TERFs') on social media platforms;

(h) expert report of Professor Sheila Jeffreys, University of Melbourne, dated 26 June 2024; and

(i) Proposed Terms and Conditions Under Section 44(3) of the SDA (Exhibit A1).

6. The Respondent lodged the following material:

(a) documents pursuant to s 37 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) (T documents);

[1] Also referred to elsewhere in these reasons as CEDAW.

(b) a Statement of Facts, Issues and Contentions, dated 15 August 2024 (RSFIC), with Appendix A tabulating material from public submissions on harm to, and discrimination against, trans people and women;

(c) Supplementary Submissions (concerning *Tickle No. 2*), dated 27 August 2024;

(d) Submission on Issues of International Law, dated 10 September 2024;

(e) expert report of Professor Paula Gerber, Monash University, dated 12 August 2024, with exhibits including:

(i) The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007 (Yogyakarta Principles); and

(ii) Best Practice Guide: CEDAW as a Tool to Protect the Rights of Trans Women, Kaleidoscope Human Rights Foundation, May 2024;

(f) expert report of Dr Elena Jeffreys, dated 13 August 2024;

(g) expert report of Siobhan Patton, dated 15 August 2024;

(h) statement of Lisa Salmon, dated 12 August 2024;

(i) statement of Margaret Mayhew, dated 12 August 2024; and

(j) statement of Bumpy Favell, dated 13 August 2024.

Procedural history

Confidentiality orders

7. The Respondent lodged with the Tribunal copies of the submissions made during the Commission's public consultation process, however only included in the T documents submissions made by organisations. It took upon itself to consult with individual submitters about the fact that this material had been lodged as part of the proceeding. Due to the varying views provided in response, the Respondent sought, and was granted, a series of Directions under s 35 of the AAT Act, now s 70 of the *Administrative Review Tribunal Act 2024* (Cth) (ART Act). The effect of these orders was to protect the names of certain

submitters. Ultimately, an approach was arrived at which allowed the Applicants' legal representatives to consider all of the submissions. In the event, limited if any reliance was placed by the parties upon specific submissions.

Joinder of incorporated association

8. In February 2024, the Applicants applied to the Tribunal to amend the name of the Applicant due to the registration of the incorporated association in December 2023. The Respondent had declined to consent to the amendment, essentially on the basis that the incorporation took place after the original application by the individuals comprising LAG. The Commission was also of the view that the incorporated body was not an organisation whose interests are affected by the decision under s 27 of the AAT Act. The alternative proposed by the Respondent was that some or all of the members of LAG could be named as applicants.

9. Further alternatives proposed by the Applicants were that LAG Inc be joined as a party to the proceeding under s 30(1A) of the AAT Act, or that it replace the original applicants. I determined at a telephone directions hearing that the interests of the incorporated association are affected by the decision and that the most expedient solution was to join LAG Inc as an Other Party.

Joinder application by Special Rapporteur Reem Alsalem

10. Immediately prior to the hearing in this matter the Tribunal received correspondence directly from Ms Alsalem, the United Nations Special Rapporteur on violence against women and girls, together with an Application to be Made a Party to a Proceeding, dated 29 August 2024, associated Submissions, and the Special Rapporteur's position paper of 4 April 2024.

11. The Submissions sought joinder under s 30(1)(d) of the AAT Act [3] and note that Ms Alsalem did not seek to otherwise actively engage in the proceeding [4]. Ms Alsalem identified the formal basis of her mandate under a decision of the Human Rights Council [6], and describes this as including '*recommending measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences*' [7].

12. It was further contended that the following matters support the view that Ms Alsalem's interests are affected by the decision under review:

(a) it involves consideration of the term 'sex' and 'sexual orientation' as legal concepts under the SDA [13];

(b) one of the objects of the SDA is to give effect to certain provisions of CEDAW and other treaties [14];

(c) the interpretation of the term 'sex' and related terms and their use by States are relevant to the mandate [16]; and

(d) international law allows for women and girls to retain spaces for biological females, including those attracted to biological females, '*without such a differentiation constituting discrimination, since the criteria for such differentiation are reasonable and objective and aims to achieve a purpose which is legitimate under the ICCPR*' [International Covenant on Civil and Political Rights] [19].

13. I acknowledged the application by Ms Alsalem and advised the parties. The Respondent filed submissions opposing the application on the basis that the Special Rapporteur's interests are not affected by the decision. It was contended that Ms Alsalem is not based in Australia and had not indicated how her interest in a decision could be more than merely intellectual. However, noting that the position paper was already before the Tribunal, the Respondent did not oppose the submissions being considered either under s 33 of the AAT Act, now ss 49, 50 and 52 of the ART Act, or as evidence of the Applicants. It was also contended that the Special Rapporteur is not an authoritative interpreter of CEDAW, and the Human Rights Council has no formal control over CEDAW or its associated committee.

14. The hearing commenced two business days after the application was lodged, and Ms Cheligoy of counsel appeared to ascertain the Tribunal's position. On the basis of the Respondent's submission outlined above, and the Applicants' contention that the Tribunal, pursuant to s 33 of the AAT Act, have regard to Ms Alsalem's submissions, Ms Cheligoy formally withdrew the application. I accepted this to be an appropriate course of action, particularly in light of the fact that the position paper was already before me.

15. Further written submissions, dated 16 September 2024, were lodged by Ms Alsalem following the close of the hearing. I informed the parties that I would not consider this

material on the basis that the Special Rapporteur had no formal standing, and to avoid further ongoing commentary in circumstances where the parties had the primary responsibility for making submissions on international law.

Applicant objection to evidence

16. The Applicant initially raised an objection to the report of Professor Gerber at a telephone directions hearing at which matters relating to preparation for the hearing were discussed. It was submitted here that the report was 'inadmissible' because it deals with questions of law. In their Reply, the Applicants contended that the report does not go to any fact in issue and attempts to usurp the role of the Tribunal's duty to find and apply the law [11]. The Reply went on to commend Ms Alsalem's '*commonsense reading of CEDAW*' [14].

17. This objection was pursued during the hearing. It was contended that *Tickle No 2* was binding on the Tribunal, and that this decision adequately addresses matters such as the application of CEDAW to the SDA. I note for completeness that the Applicants' reply observes further that, while *Tickle No. 2* is binding on the Tribunal, the Applicants consider the decision to be wrong, and also that its ratio is not relevant to the matter before the Tribunal.

18. As already noted, the statement of Carol Ann in effect has already put some material about aspects of international law before me. Accordingly, I determined that it was appropriate for the Tribunal to receive the report of Professor Gerber, but that any weight that would be placed on its contents would be determined by the prior question of the significance of matters of international law in the interpretation and application of the SDA.

19. A second objection was raised by the Applicant during closing submissions of the Respondent. The Respondent sought to refer to the findings of a coronial inquest into the death of a person, delivered on 29 August 2024. The material had – I was told – only just come into the hands of the Respondent. It was contended that the findings were relevant to the issue of harm granting an exemption might do to members of the trans community.

20. I agreed with the Applicants' objection to the late production of this material, noting that I was satisfied with the material already available to me on this topic.

LEGISLATION

21. The full title of the SDA reads as follows:

> ***An Act relating to discrimination on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy, breastfeeding or family responsibilities, and relating to discrimination involving sexual harassment, harassment on the ground of sex or hostile workplace environments***
>
> *Recognising the need to prohibit, so far as is possible, discrimination against people on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities 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:*
>
> *Affirming that every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law, without discrimination on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:*

22. The objects in s 3 of the SDA include:

> *(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments; and*
>
> *(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.*

23. Relevant international instruments are identified in s 4 as including CEDAW (the text of which forms a Schedule to the SDA) and the ICCPR.

24. Gender identity is defined in s 4 of the SDA to mean '*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*'.

25. Discrimination on the various grounds covered by the SDA is defined consistently to mean a discriminator treating an aggrieved person '*less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person*' who does not bear the distinguishing characteristic (on the ground of sex, s 5; on the ground of sexual orientation, s 5A; on the ground of gender identity, s 5B; on the ground of intersex status, s 5C etc.).

26. Under s 7D, the SDA provides that a person may take special measures for the purpose of achieving substantive equality between men and women, people who have different sexual orientations, who have different gender identities, or who are of intersex status (and in respect of other defined groups).

27. As noted above, the SDA states in s 13A that part of the Criminal Code setting out the general principles of criminal responsibility apply to offences identified against the Act.

28. Given the circumstances of this matter, the most relevant potential area of discrimination appears to be that identified in s 22 of Division 2 of the SDA, being the provision of goods, services and facilities. Services are defined widely in s 4 as inclusive of certain activities such as entertainment and recreation. Under this provision:

> *It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:*
>
> *(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;*
>
> *(b) in the terms or conditions on which the first mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or*
>
> *(c) in the manner in which the first mentioned person provides the other person with those goods or services or makes those facilities available to the other person.*

29. The SDA also makes it unlawful to discriminate in the administration of a club through s 25. Club is defined in s 4 as an association of persons of not less than 30 persons associating for purposes including social, cultural and political purposes that provide and maintain facilities from funds of the association and provide liquor on such premises.

30. Division 4 of the Act provides a series of standing exemptions, such as permitting sex discrimination in employment where it is a genuine occupational qualification that a person be of a different sex (s 30). Under s 39, discrimination on the various grounds covered by the SDA is permitted in connection with admission of persons as members of a voluntary body, or the provision of benefits, facilities or services to its members. Voluntary body is defined in s 4 as a non-profit association (incorporated or unincorporated).

31. The full text of s 44 is as follows:

> *(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.*

32. Review of these decisions before the Tribunal is provided for in s 45 of the SDA, and the Act also requires publication by gazettal of decisions. As noted above, the SDA provides in s 47 that the grant of an exemption renders lawful anything done in accordance with the instrument by which the exemption was granted.

33. While not raised in submissions or the decision under review, I note that the SDA includes further potentially relevant provisions:

(a) by s 105, a person is liable for an unlawful act if they cause, instruct, induce, aid or permit another person to do an act that is unlawful; and

(b) by s 106, vicarious liability is established for a person whose employee or agent does an unlawful act, unless they took all reasonable steps to prevent such an act.

34. Pursuant to s 43 of the AAT Act, now s 54 of the ART Act, in conducting a review, the Tribunal '*may exercise all of the powers and discretions that are conferred by any relevant*

enactment on the person who made the decision'. For this reason, reference also needs to be made to the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

35. The functions of the Commission must be performed, under s 10A of the AHRC Act:

> *(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.*

36. The functions of the Commission are established in s 11 of the AHRC Act and include, as noted, the power under the SDA to decide applications for exemption, and the power to deal with complaints of unlawful discrimination. While not strictly relevant, I note that complaints that are terminated by the Commission may proceed to an application in respect of unlawful discrimination at the Federal Circuit and Family Court of Australia (Division 2) (Division 2 of Part IIB of the AHRC Act).

Commission guidelines

37. A set of guidelines has been published by the Commission setting out its approach to handling exemption requests: '2009 Temporary exemptions under the Sex Discrimination Act' (T11) (the Guidelines). Summarising from the reasoning of (then) Justice Mortimer in *G v Minister for Immigration and Border Protection* [2018] FCA 1229, I note that policy statements of the kind provided in the Guidelines can be an aid to decision-making. This is because they contribute to consistency of approach in like cases, in circumstances where decision-making is not bound by statute to adopt a policy. However, the particular outcome in a specific case must be the product of active intellectual consideration to what is the correct or preferable decision based on all the information before the decision-maker: '*A decision-maker must not "abdicate" her or his exercise of power to the terms of a policy*' [210].

38. The Guidelines note at [2] that consideration will be given to whether an exemption is necessary, the objects and all relevant provisions of the SDA, the reasons for seeking an exemption, and submissions by interested parties. The document goes on at [3] to identify criteria at greater length:

> (a) Is an exemption necessary? This part observes that a starting point is the existence of an arguable case that the activities subject to the exemption application constitute

discrimination. It also provides that consideration will be given to whether the special measures provisions or permanent exemptions apply;

(b) Is granting an exemption consistent with the objects of the SDA? This part states that consideration must be had to the objects of the SDA. The Guidelines state here that '*If an exemption is sought that would allow conduct that is inconsistent with, or would undermine, the objects of the [SDA] this will be a significant reason not to grant an exemption*'. This part also states that the Commission will have regard to:

(i) the reasonableness of the exemption sought, weighing up '*the nature and extent of the discriminatory effect against reasons advanced in favour of an exemption*';

(ii) whether the circumstances might closely resemble those arising in the permanent exemptions so as to be within the spirit or broad scheme of these exemptions; and

(iii) whether an exemption could be granted subject to terms and conditions;

(c) Is it appropriate to grant an exemption subject to terms and conditions? This part states the Commission will consider whether it is appropriate to make the exemption subject to terms and conditions or to limit its application to particular circumstances or activities. It states that in particular, consideration will be given to whether the grant could be subject to terms and conditions which require action during the term for which it is granted that reduce or remove the discriminatory practice or circumstance, and/or further the objects of the SDA;

(d) What are the views of persons or organisations who are interested in or who may be affected by the outcome of an application? Submissions from interested parties will be considered.

39. As part of addressing various procedural matters, the Guidelines propose at [5](g) that exemption applications should set out reasons why the exemption is required and any supporting evidence, explaining where possible:

- *How the proposed exemption fits within the objects and scheme of the Sex Discrimination Act;*
- *Why immediate compliance with the Sex Discrimination Act is not possible or should not be required in this case;*

- *Any things done or planned by the applicant which seek to achieve the objects of the Sex Discrimination Act;*
- *Any terms or conditions which further the objects of the Sex Discrimination Act and which the applicant is prepared to meet as a condition of being granted the exemption;*
- *The results of any consultations undertaken by the applicant with people who may be affected by the proposed activity and their representative organisations;*
- *The financial or other hardship which will be incurred if the exemption is not granted; and*
- *Measures proposed to minimise or reduce any hardship which may be faced by people affected by the proposed exemption.*

THE EXEMPTION REQUEST

40. The application for exemption, submitted on 3 August 2023 (T7), is titled: 'Application by the Lesbian Action Group for a Temporary Five Year Exemption under the Sex Discrimination Act for a Lesbians Born Female only Event to Celebrate International Women's Day To be organised by the Lesbian Action Group at the Pride Centre in St Kilda on Sunday 8 October 2023'.

41. Subsequent correspondence confirmed that the event was re-booked to take place on 15 October 2023 (T8), and further information was provided to the Respondent about the application in other correspondence (T9, T10).

42. The application sets out a fifty-year history of lesbian events and recounts that the '*transgender community*' raised a challenge to lesbian gatherings in 2003 (T7, 74). The Applicants explain that this led to the grant, but subsequent revocation '*on a technicality*', of an exemption for an event known as Lesfest 2004 to be conducted for lesbians born female (T7, 74–76). The notifications relating to this exemption under the *Equal Opportunity Act 1995* (Vic) (the EO Act), which was considered by the Victorian Civil and Administrative Tribunal (VCAT), are in the materials (T80, T81).

43. The Applicants observe that as a consequence, '*lesbians born female*' have conducted only private gatherings over the ensuing 20-year period. Due to increasing frustration with this state of affairs, the Lesbian Action Group was formed and decided to apply '*for another Exemption to try and change this untenable situation for the benefit of the Lesbian community as a whole*' (T7, 76). The following reasons are set out (T7, 77–78):

> *To meet on a regular basis as Lesbians Born Female for our own well-being in order to exchange information, hold workshops around a range of issues pertinent to Lesbians and celebrate our many achievements.*

To consolidate and expand our social and political Lesbian networks.

To confirm that Lesbians are a distinct and well established community group with our own culture and lifestyle.

To build on the fact that we have been meeting as lesbian in various ways, at conferences dances, meetings and social events over the previous fifty years and counting and can attest how beneficial and necessary it is that these get-togethers continue.

To recognise the Lesbians have been building a strong and a specifically Lesbian culture and we have particular needs as Lesbians that need to be discussed and celebrated in a Lesbian born female only environment.

To be able to advertise widely and publicly in order to make it known to Lesbians who are socially isolated, particularly in rural areas, Lesbians with disabilities and Lesbians from linguistically diverse cultures that exclusive Lesbian events are being organised for their benefit.

To continue to recognise the Sovereignty Aboriginal and Torres Strait Islander people by continuing to Pay the Rent by adding a surcharge of 10% to any registration fees charged at Lesbian Born Female events and provide free entry for Aboriginal and Torres Strait Islander Lesbians Born Female.

44. After providing further information about the significance of International Lesbian Day (T7, 78–80), the application states that the exemption is necessary to advertise events and to '*once again meet publicly without fear of litigation or discrimination*' (T7, 80). It states further: '*The Exemption would 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*' (T7, 81).

45. The application describes the Applicants (the Lesbian Action Group) as a '*community-based, not-for-profit Lesbian Born Female activist group which was established to actively address the discrimination lesbians born female have been experiencing for the past 20 years*' (T7, 81). In addition to wishing to organise events and be politically active, the Applicants describe the October 2023 event as an '*all-day fun-filled culturally appropriate lesbians born female event*' including various forms of entertainment and with the intention to provide '*an example to young lesbians just how dynamic and courageous the older lesbian communities have been for the past fifty plus years*' (T7, 81).

46. Further information was provided on 11 August 2023 (T7, 84–87). This was provided in response to questions put by the Respondent (T7, 88) including why it is reasonable and necessary to exclude the groups identified in the application, as well as what other activities might be covered in a five-year exemption. In summary, the Applicants responded that:

    (a) there is a need to meet '*without interference from those people in the dominant patriarchal culture who don't always have the best interests of the minority at heart*',

including a need to discuss personal health issues and stories of domestic violence as well as to rejoice in their culture;

(b) a five-year exemption was sought to engage in more fun and political action and '*equally importantly, in this repressive and conservative political climate over the past two decades, 2003-2023, where we are having to ask permission to not only meet but to advertise*', the more events, the better; and

(c) while the Applicants have the support of an incorporated lesbian group [not identified] they would consider incorporating if and when necessary.

THE ORIGINAL DECISION

47. As noted above, the Respondent undertook a public consultation process in two parts. It corresponded with a number of independent and government-run human rights institutions and agencies [T12]–[T26]. Submissions were also received from individuals and organisations [T27]–[T55].[2] At this point, the Respondent issued a preliminary view, dated 25 September 2023 (T60), in which it indicated that it was '*not persuaded that it is appropriate or reasonable to grant the exemption*' [7.46].

48. This document summarises views for and against the exemption, which I will not deal with here. The stated considerations are, in summary:

(a) restricting access to a public event to celebrate International Lesbian Day and similar events in the future, appears to amount to unlawful discrimination on the ground of at least sexual orientation and gender identity in the provision of goods and services and the permanent exemptions under the SDA do not appear to apply [7.31];

(b) the exemption for voluntary bodies (s 39 SDA) would likely permit discrimination in connection with the LAG's own members and to hold events in private [7.32];

(c) temporary exemptions should not be granted lightly and a grant '*has the effect of taking relevant conduct out of the SDA's prohibitions and denying redress to a*

[2] The Commission received 236 submissions at this point, 31 from organisations and 205 from individuals (T2 [6.2]).

person who is affected', thus qualifying the norms of conduct the act seeks to establish [7.36];

(d) the reasons provided for conducting the event indicate it '*is intended to be a community social event, involving singing, dancing, celebrations and the discussion of ideas*' [7.38]–[7.39];

(e) grant of an exemption may lead to further exclusion of, and discrimination against, same-sex attracted transgender women, a group who experience discrimination, harassment and social exclusion [7.42];

(f) the applicants did not describe how they would limit participation to the intended participant group, and to do so may involve intrusions on privacy that may amount to sexual or sex-based harassment [7.43]; and

(g) the Respondent does not consider a five-year exemption reasonable without details of future events and the opportunity for submissions about the reasonableness of the grant at these events [7.45].

49. Further submissions were provided by individuals and organisations (T61–T79)[3] before the publication on 12 October 2023 of the final notice that a temporary exemption would not be issued (T2). In its preliminary parts, the decision states, briefly:

(a) the s 39 exemption in the SDA does not apply because of the intention to engage with persons beyond its membership [8.7];

(b) the power to grant an exemption is largely unconfined and '*must be exercised in conformity with the subject matter, scope and purpose of the legislation*' [8.11] (a number of authorities are cited in support of this position);

(c) the power must also be interpreted in light of the objects of the SDA and the legislative scheme as a whole [8.14];

(d) the power should '*not be granted lightly*', as the SDA already provides for permanent exemptions and an exemption renders alleged discrimination not unlawful, and the

[3] The Commission received a further 262 submissions at this point, 20 from organisations and 242 from individuals (T2 [6.7]).

Commission '*must be satisfied that a temporary exemption is appropriate and reasonable, and persuasive evidence is needed to justify the exemption*' [8.15]; and

(e) the Guidelines are cited [8.16].

50. In its substantive parts, the decision states, in summary:

(a) most submissions in favour of the exemption '*emphasise the importance of preserving spaces for lesbian women only based on their biological sex*', stating that trans women '*cannot be women by virtue of their gender identity and accordingly cannot identify as lesbians*' [9.12]–[9.13];

(b) many of the submissions opposing the exemption state that LAG '*does not represent the majority of lesbians who are supportive of trans lesbians, bisexual and queer cisgender women and rights-based inclusion regardless of other intersecting identities*' [9.21];

(c) the s 39 exemption under the SDA permits discrimination in respect of LAG's own members, and the special measures under s 7 may permit exclusion of men and heterosexual women [9.39]–[9.44];

(d) '*The balancing of the rights of minority groups that experience structural and entrenched discrimination is a complex issue where opinions are divided*' [9.46];

(e) it is '*important and beneficial for lesbians to gather together as a community to celebrate their culture and discuss issues of special relevance to their community*' [9.47];

(f) Parliament has signalled its intention to protect individuals from discrimination based on sexual orientation and gender, and that transgender women can be women within the meaning of the SDA [9.48];

(g) the Respondent was not persuaded that '*it is appropriate and reasonable to make distinctions between women based on their biological sex at birth or transgender experience at a community event of this kind*' [9.55];

(h) the underlying premise of the application that a person's sex cannot be changed and that trans women could neither be women nor lesbians is contrary to the clear intention of the 2013 amendments to the SDA [9.56];

(i) grant of the exemption may lead to the further exclusion of and discrimination against transgender women who are lesbians, a group who have and continue to experience discrimination, harassment and social exclusion, leading to poor health outcomes, mental health conditions and thoughts about suicide [9.58]; and

(j) a number of submissions included anecdotal accounts of abuse and harassment experienced by lesbians perpetrated by men and members of the transgender community, but were not supported by '*persuasive empirical evidence that an exemption was necessary to ensure the safety of attendees at a public event*' [9.59].

EVIDENCE IN SUPPORT OF GRANT

Evidence at hearing

51. Written statements from Carol Ann were relied upon as her evidence in chief at the hearing. In her July witness statement, Carol Ann refers to LAG's objectives for associating [6] (summarised very briefly above), and explains the concept of lesbian feminism, with reference to the thinking of Professor Sheila Jeffreys [7]. In addition to matters such as separatism and the need for true equality, Carol Ann cited the principle of '*rejecting the erotizing of equality*', being rejection of the objectification of women. Carol Ann refers here to the idea that: '*sexuality is socially constructed for men out of their position of dominance, and for women out of their position of subordination. This extends into the LGBTIQ+ grouping … [including sexual] practices that are grounded in a male supremacy and a patriarchal view of sexual behaviour*'.

52. A personal history including experience as an organiser of lesbian events [8]–[20] leads to observations about the decline in lesbian community activities over the past 20 years [21]–[25]. Carol Ann states in particular that she '*observed that the decline in lesbian community activity was the direct consequence of an increasing number of trans lobbyists attempting to gain access to our events, facilities, and services*' [24].

53. Carol Ann then addresses how '*collectivising everyone as LGBTIQ+ as one group has undermined lesbians*' [47]–[58]. Addressing each of the categories in turn, she argues that

'*Transgender identity is socially constructed – it is not about sex or sexual orientation. In contrast, lesbians are defined by both'* [47(c)]. The grouping of LGBTIQ+ is described as a new phenomenon that has undermined lesbian culture, and that there is a lack of funding for lesbian-specific events [48], [50]–[51].

54. Further, Carol Ann states that young lesbians inform the Applicants that '*they are being encouraged into rejecting sex based rights and interests, being encouraged into identifying non-binary or trans*' [53]. She adds that, overall, organisations like the Victorian Pride Centre have demonstrated a lack of willingness to '*support lesbians like us*' [58].

55. In respect of LAG's emphasis on sex rather than gender [59]–[65], Carol Ann states, ultimately, that '*We do not believe in the legal fiction that humans can change sex*' [61]. She provides further statements in support of the needs of young lesbians, arguing that '*a high proportion of young people are being pressured into transitioning, and if left alone, would grow into being same-sex attracted*' [66]. She also argues for the particular needs of older lesbians, being a particularly vulnerable group for whom dignity and safety are very important [69].

56. Recent political and other activities since incorporation are described as follows [70]:

    (a) reaching out to young lesbians, including '*detransitioners who have come to realise they are lesbians not trans*';

    (b) starting a separate membership-based not-for-profit group, The Lesbian Club Vic Inc;

    (c) developing a website and a presence on X, and making contact with '*other lesbian and like-minded groups around the world*';

    (d) speaking at an event in Victorian Parliament and having a question raised in Question Time;

    (e) conducting media engagement around the exemption application along with other speaking engagements; and

    (f) working on a submission to the United Nations in collaboration with other groups entitled 'Protection against violence and discrimination based on sexual orientation

and gender identity, in relation to the human rights to freedom of expression, association and assembly – submission to the United Nations'.

57. Carol Ann states that the experience of the past 20 years is such that without public meetings, the needs of lesbians '*will continue to be suppressed, ignored and subordinated*' [71]–[72]. She refers to the 'Let Women Speak' events on 18 March 2023 which became '*infiltrated with unwanted extremist groups*' as an example of why lesbians feel the need to meet separately [73]. They were affected by violence and trauma and their safety was '*seriously compromised*'. Carol Ann states that an exemption would '*be legal recognition of our right to organise and associate for our own unique political, social and cultural needs*' [74].

58. Carol Ann rejects the idea that an exemption may carry a risk of harm to members of the trans community [84]. She states the Applicants have no intention of creating harm: '*To be clear, the trans community has its own needs and interests which should be respected and catered for*' [85]. Rather, Carol Ann argues that the harm is directed toward lesbians, citing material later lodged in the affidavit of Megan Blake [87].

59. Finally, Carol Ann refers to the position paper of Ms Alsalem as explaining how CEDAW protects the rights of lesbian women who are biological women, and states that the Applicants endorse this paper in its entirety [91].

60. I set out here key matters that arose in cross-examination. Carol Ann stated that the Applicants came together as a group in about March or April 2023, were now all members of the board of LAG Inc, and she described the group as one of membership by invitation.

61. In addition to the events described in the application, Carol Ann stated that the Applicants have commenced regular Zoom sessions including after reaching out to young lesbians. They presently number 16 people in the 18–30 age range who responded to a notification on X.

62. When asked if it was LAG's position that they would not 'enforce' the exemption, but let people come as they please, Carol Ann replied that this was a matter of security and vetting. She stated that with an exemption the Applicants would know they were conducting the event legally, but if some decided not to respect their guidelines, '*there would not realistically*

be anything we could do', and they would be asked to leave. Carol Ann stated further that '*in today's climate*' it was likely that such people would attend an event.

63. With respect to the types of attendees that would be welcome, Carol Ann explained that a trans woman would always, in her eyes, remain male. She added that to the Applicants, a trans person born female who goes on to want to be a man is still a woman. With respect to bisexual attendees, she stated that there are '*all sorts of discussions to be had*'.

64. Carol Ann also confirmed that the Applicants did not consider a person who is born male can change their gender. In response to a follow-up question from myself, she confirmed her view that this is a statement of fact. Carol Ann stated that she has not seen any convincing evidence to say people can change sex, rather it was a belief that people held: '*what does gender mean? It is made up in people's heads; it is a sex stereotype*'.

65. The statement of Professor Sheila Jeffreys was also relied upon as evidence in chief. She states that the fact that lesbians are women was previously an '*uncontentious*' matter, but now needs to be expressed because the gender identity movement '*proselytises the idea that human beings can change sex and that men, persons of the male sex, can be not only women but lesbians*' [8]. Professor Jeffreys also provides a description of the development of the science of sex through the twentieth century, addressing transvestitism and transsexualism and the emergence of the gender movement [9]–[12]. She states that it was not until the end of the twentieth century that the men who created this movement wanted not only to be recognised as possessing gender or sex role stereotypes associated with women, '*but to be treated in law as if they were actually women*' [13].

66. Professor Jeffreys sets out fundamental elements of lesbian feminism and the decline of the movement [15]–[26], placing particular emphasis on lesbians '*being subsumed with other constituencies such as gay, queer, non-binary and other constituencies of men and heterosexual people*'. Among political and policy issues of current concern [27]–[34], she describes the '*lesbian erasure*' that arises from gender clinics. She adds that '*there is a need for lesbian feminists to end the promotion of transgenderism in schools and other places where children gather*' [32].

67. Professor Jeffreys also considers the need for lesbians to organise separately [45]–[68]. Among the statements made here include:

(a) '*… both policymakers and the public had been bamboozled into thinking that both adults and children could change their gender*' [46];

(b) the Cass Review in the United Kingdom, published April 2024, was critical of the pathway to drugs and surgery overwhelmingly applied to girls [47];

(c) a UK government policy review also in 2024 has explored the provision of single-sex spaces and services [49]; and

(d) there is an increasing body of evidence '*men who claim to be women*' are likely to become abusive and violent toward women who will not accept their identity and women who fail to affirm gender identities are likely to receive considerable abuse, as documented at the 'TERF is a Slur' website [51], [56].

68. The statement then addresses conflicts in the different political interests of lesbians of the female sex and men who identify with the female gender as lesbians [69]–[74]: '*The men's political demands stem from their sexual paraphilia of transvestism*'. Professor Jeffreys observes here, ultimately, that: '*If men can be 'lesbians' then the category lesbian is exploded. It no longer makes sense*' [74]. In conclusion, she refers back to the several main issues identified in the statement by way of identifying the risks associated with lesbians conducting public events that permit the attendance of members of the male sex who identify as women and lesbians [75]–[80].

69. In cross-examination, Professor Jeffreys cited some of her own writing in support of key propositions. With respect to matters of sexology, she referred to the work of, mainly, American psychiatrists, stating that the source material was not merely theoretical. In response to my request for clarification, Professor Jeffreys described the development of psychiatric thinking around autogynephilia, or love of the woman in yourself. She added that 'gender' in feminist literature always meant the requirements of women based on biology.

70. Professor Jeffreys stated that gender identity clinics now mainly treat female children, as opposed to the majority being boys before the last ten years. The distress that drives female children to seek assistance will be a problem as long as gender ideology remains socially acceptable. Professor Jeffreys stated that she considers the situation is now changing, and

eventually there will be no such thing as a trans child. She stated there are a range of very severe impacts from the use of drugs in gender transitioning, including suppressed IQ, reduced bone density and loss of fertility.

71. When asked about her views on the SDA, Professor Jeffreys identified the *Gender Recognition Act 2004* in the UK as the forefront of the gender movement, with many countries joining in. She considers the SDA 'extraordinary' as the definition of gender in her view includes men being recognised as women due to mannerisms, asking whether a flick of the hair would be included. In short, Professor Jeffreys stated that '*the law is an ass*'.

72. Some time was then taken in cross-examination to address the experience of violence directed at lesbians or otherwise arising from various public events, as recounted in Professor Jeffreys' statement, to which some objections were raised. Ultimately, she gave evidence that violence from trans activists is frightening for women, trans activists being men, and some women, who fight politically for men with gender identities. With respect to the material compiled from the 'TERF is a Slur' website, Professor Jeffreys stated that it was common sense that this material is not generated by women, because it is 'generally accepted that women do not engage in this abuse toward women'.

73. Professor Jeffreys stated that she did not consider safety to have been an issue at her public appearances. I asked in follow-up to this what her opinion was about the possible impact of the debate upon the mental health of transgender people. Professor Jeffreys responded that this is a clash of rights: women have existing human rights as women and the fact that men claim to be women creates the clash. The clash needs to be taken seriously, she continued, but the fact that men are upset even to the extent of self-harm is not something women have to be concerned about.

Other evidence

74. The CEDAW Position Paper relied upon by Carol Ann was developed by Ms Alsalem to provide input on the meaning of the word 'woman' in the convention in respect of *Tickle No 2*, in which the Respondent acted as intervenor. Very briefly, some of the key propositions in the CEDAW Position Paper are:

    (a) CEDAW does not define 'woman', 'man', or 'sex' and therefore the meaning and practice attached to the definition of non-discrimination based on sex is important;

(b) sex-based discrimination is understood as a biological category, and its elimination is integral to the special mandate;

(c) the CEDAW Committee's General Recommendation No. 28 defines gender as '*socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences*';

(d) where a tension exists between discrimination based on sex and on gender, or gender identity, '*international human rights law does not endorse an interpretation that allows either for derogations from the obligation to ensure non-discrimination based on sex or the subordination of this obligation not to discriminate based on sex to other rights*';

(e) the CEDAW Committee also took a very strong stance on intersectionality and specifically in its General Recommendation No. 28, recognised lesbian women as part of the groups of women who are particularly vulnerable; and

(f) based on this approach the Committee '*has highlighted that discrimination against women was inextricably linked to other factors that affect their lives and which include 'being lesbian, bisexual, transgender, or intersex"*.

75. The affidavit of Megan Blake describes the deponent's retrieval in July 2024 of material, being aggregated social media content from terfisaslur.com up to January 2021, and also a search of x.com in August 2024, when seeking to determine whether similar content continued to exist. The material, together, comprises over 150 pages of what appear to be screenshots comprising text and images making various forms of threats of violence toward 'TERFs', often of a quite violent and graphic nature.

76. In closing submissions, the Applicants provided the text of proposed terms for grant of an exemption. The relevant text states:

> *The exemption allows the Lesbian Action Group Inc to lawfully discriminate on the grounds of:*
>
> 1. *Sex - by excluding all males, and for the avoidance of doubt, males recorded male at birth;*
> 2. *Sexual orientation - by excluding all orientations other than lesbian;*
> 3. *Gender identity - by excluding those who identify as a transwoman, and males that otherwise assume an alternative gender identity to their male sex as recorded at birth.*

Persons are politely asked not to attend if they fall within one of the excluded categories.

The Lesbian Action Group is a political advocacy group by, for, and about, lesbians in Australia and internationally. Amongst other things, it seeks to assert and fight for freedom of association, freedom of speech, freedom from discrimination, freedom of violence, and freedom in law, for all lesbians.

Lesbian Action Group Inc events are for the purposes of organising and pursuing their political objectives. It kindly asks that its member's and supporter's rights to expression and association be respected.

If you would like more information about the Lesbian Action Group, visit [link to LAG website].

If you would like more information about other organisations that might better suit your needs and interests, visit [link to appropriate LGBTIQA+ resource or directory applicable to the geographical location].

If you would like more information about the exemption granted by the AAT, visit [link to reasons for decision].

EVIDENCE AGAINST GRANT

Evidence at hearing

77. In her written statement, Dr Elena Jeffreys sets out her qualifications and experience, which include certain academic experience, and the history of lesbian feminism [2]–[22]. Her interpretation of different strands within the movement are, briefly: Option A, which '*promotes the belief that anti-lesbian tendencies are a function of patriarchy*', a smaller subset of which maintains a binary understanding of sex (including Ms Alsalem); Option B, which is a capitalist theory that promotes marriage and board representation; and Option C that sees lesphobia as a function of capitalism. Dr Jeffreys states further that the '*controversy surrounding trans inclusion (or not) in lesbian feminist spaces is highly personal for women in the queer community*' [19].

78. Dr Jeffreys goes on to provide examples of how lesbian feminism sits within the broader feminist movement [23]–[27], including men's attendance at events. She also addresses debates about the term lesbian [28]–[35], providing the example of a debate about the membership of trans women in an activist group and in women student circles. In reflecting upon these debates [36]–[42], Dr Jeffreys states she has observed '*very heated conflict*' and observes that Option A lesbian feminists see creating women-only space as a '*tactic to nurture anti-patriarchal organising*', with a subset promoting '*the exclusion of trans women as 'true' separatism*'. She states, specifically, that in her observation lesbian feminism '*does not, as a rule, include belief in binary sexes*'.

79. Dr Jeffreys also gives her opinion of lesbian culture, solidarity and political participation over the past 30 years [43]–[68]. She states that she observed that the 'Let Women Speak' rally in Melbourne, March 2023, was '*led by a subset of Option A lesbian feminists arguing against the recognition of trans women*' and, with reference to the attendance of nazi fascists, states that she concludes this subset of women '*have more in common with nazi fascists than with the other strands of lesbian feminists*' [43].

80. With respect to trans inclusion, Dr Jeffreys states that she has observed trans women involved in lesbian community events since the 1990s, and concludes they are active in all areas '*except for perhaps the transphobic subset of Option A*' [69]. Dr Jeffreys deals with event safety [80]–[98] and states that '*safer spaces policies are normalised today*' at queer events, and hosts should have policies that include ejecting patrons upon breach.

81. Dr Jeffreys also states that excluding trans women has a negative impact upon cisgender lesbians because it reinforces a gender binary and that '*in most human rights and trauma-informed thinking, public exclusion of oppressed minorities is fascist because it endorses discrimination*' [101]–[102]. She cites literature that indicates some trans and gender non-conforming adults who were younger or had experienced unfair treatment were '*significantly more likely to think about suicide*' than older study participants [104]. She also states that she has observed assigned-male-at-birth lesbians express fear of their status being revealed [106].

82. After brief examination in chief dealing with the loss of lesbian spaces, some time was taken in cross-examination to reinforce Dr Jeffreys' substantial experience in and for the sex-worker industry. She replied, in part, that she considered herself qualified from her studies to address matters of community organisation, and accepted that the options cited in her statement was a typology she had developed herself. She also acknowledged that she does not directly associate with trans-exclusionary feminists, but does interact with them.

83. When asked if there would be a benefit in the Applicants holding public events to air their views, Dr Jeffreys responded that '*so much activity in lesbian feminism is not public*'; collaboration and learning happens in many different ways. It was then put to her that '*politics can't be done in private*' and Dr Jeffreys replied that she '*cannot accept that* [proposition]'.

84. Further questions addressed Dr Jeffreys' views about the Let Women Speak event. She explicitly stood by her opinion that a subset of Option A lesbian feminists holds views similar to those of nazi fascists. She stated that she observed this and similar rallies internationally and noted the willingness of lesbian feminists, including Professor Sheila Jeffreys, to attend in the presence of nazi fascists. Dr Jeffreys described the similarity in views as being that fascism is '*totally fine with exclusion on the basis of difference*'.

85. It was put to Dr Jeffreys that this view entailed an '*insidious insinuation*' that the Applicants are nazis, and she restated her position that they '*have more in common with*' that ideology. Dr Jeffreys maintained that an apology is not necessary as this was an analytical position, and she agreed that certain items identified from the 'TERF is a Slur' material represented associations with Nazism.

86. Evidence in re-examination highlighted Dr Jeffreys' own lived experience in the lesbian community as a basis for her views. She added that a bibliography backing up her opinions would include the published work of Professor Jeffreys. Dr Jeffreys also explained that much coalescing in the community occurs in private due to the marginalisation arising from oppression in the public sphere.

Other evidence

87. References were made in the Respondent's closing submissions to the wider body of material lodged by the Commission, which deals with the negative impact of granting an exemption. The following 'pinpoint' references were made:

(a) Statutory Declaration of Lisa Salmon, school teacher and convenor of the Wicked Words storytelling event, where she states that these events are inclusive as trans women are women, and '*inclusivity is a key factor in creating safety at our events*' [6], [8];

(b) Statutory Declaration of Margaret Mayhew, arts worker, where she states that it is extremely important not to organise events that discriminate against trans women as this would '*set a dangerous precedent for other forms of discriminatory use of social space*' (p 7);

(c) expert report of Siobhan Patton, a trans lesbian woman, organiser and performer, where she refers to the negative impact of excluding trans women, including that

'*portraying lesbian spaces as falsely hostile will … likely discourage trans lesbians from accessing community and community resources vital for mental health and flourishing*' (p 10); and

(d) Statutory Declaration of Bumpy Favell, writer, editor and event producer, where she states that most lesbians and queers have ignored 'TERFs' but '*we have seen across the world, anti-trans zealotry teaming up with far-right bigotry is dangerous … Excluding, shaming, or vilifying members of our community makes everyone less safe*' (p 3).

88. In her report Professor Gerber states that CEDAW was drafted in the 1970's, at a time when gender was not well understood, explaining the lack of definitions in the text [11], [12]. She states that the meaning of 'woman' in CEDAW should be defined in an expansive way to include any woman who performs and/or identifies as a woman [14]–[17]. She observes that there are critics of this approach, but the jurisprudence of the CEDAW Committee illustrates that it does not accept a binary construct of sex [18]–[20].

89. Professor Gerber further draws attention to the Yogyakarta Principles, which she describes as taking '*the non-discrimination principles in all human rights treaties and highlight*[ing] *their application to discrimination based on sexual orientation and gender identity*' [24]–[26]. Professor Gerber goes on to provide references to both CEDAW and other human rights committee work, which she states represents '*comprehensive recognition that trans women are women and are protected as women under international law*' [53].

90. Further, Professor Gerber identifies specific recommendations made by the CEDAW Committee for Australia to improve its efforts to protect trans women [61]–[64]. She also observes that CEDAW jurisprudence on gender was not relied upon at the time of the 2013 amendments to the SDA, but rather international human rights law prohibiting discrimination on the basis of sexual orientation and/or gender identity [67]–[68]. Professor Gerber states that lesbian rights are protected at international law under the 'catch all' of 'or other status', and are therefore protected from discrimination [72]–[74]. She also cites literature concerning the negative effect of exclusion on trans women [76]–[82].

91. Finally, Professor Gerber provides observations about aspects of Professor Jeffreys' report, including that '*overall there is strong support for the LGBTIQA+ acronym and community because of the strength and unity it represents*' [100]. She concludes with reference to a

study of sexuality among trans women finding that 42% are attracted almost exclusively, or only, to women, and that permitting one group of lesbians to exclude others because they are trans would contravene both international law and the SDA [101]–[103].

CONSIDERATION

Application of *Tickle No 2*

92. The Applicants contend that, to the extent that the decision is binding upon the Tribunal, the ratio in *Tickle No 2* does not apply to the issues here. These submissions flow from the Applicants' arguments with respect to the application of CEDAW to the present matter which is to the effect that that convention protects the rights of (only) biological women (ASFIC [26]).

93. In its supplementary submissions on *Tickle No 2*, the Respondent contends that the issue raised by the Applicants is resolved by the findings of Bromwich J at [176] and [178] with respect to CEDAW (Supplementary Submissions [11]–[12]). The Respondent also contends that gender identity discrimination under the SDA was held by His Honour to be valid and consistent with Australia's obligations under art 26 of the ICCPR [13].

94. *Tickle No 2* concerned gender identity discrimination under s 22 of the SDA (being discrimination in the provision of goods and services (*Tickle No 2* [2])). The respondents in that matter did not accept that gender is a matter of self-identification, and in that matter the applicant was assigned male at birth, but had registered as female under the relevant state legislation [2]–[3]. The discrimination in question claimed by the applicant there was that they were prevented from using a social media application marketed for communication between women [5]. The respondents there challenged the validity of the gender identity provision in the SDA [8].

95. His Honour held that the gender identity provisions are valid, both constitutionally and as an enactment of art 26 of the ICCPR [10]. The respondent there argued that CEDAW cannot support the gender identity discrimination provisions of the SDA [11], but His Honour determined this issue did not need to be decided because CEDAW was not engaged, as the discrimination in question was not in favour of a man or men.

96. I note that His Honour specifically declined to make a concluded finding on whether references to women in CEDAW include transgender women [180]. Shortly prior to making this statement, His Honour accepts that the decision of the Full Court of the Federal Court in *AB v Registrar of BDM* [2007] FCAFC 140 is binding on the application of CEDAW. In this respect, His Honour states as follows [178]:

> *On that interpretation, assuming rather than deciding for present purposes that CEDAW is capable of supporting discrimination against a transgender woman at all, CEDAW can only go so far as supporting a prohibition on discrimination on the ground of gender identity where a transgender woman is treated less favourably than a man, or men … CEDAW does not support a prohibition on such discrimination which results in a woman or a class or group of women, however widely the word "woman" is understood, being treated less favourably than another woman, or other classes or groups of women …*

97. Finally, as already noted, His Honour found that gender identity discrimination validly forms part of the framework of the SDA consistently with art 26 of the ICCPR. Briefly, this is due to this article providing for equal protection under the law without discrimination, and gender identity as 'another status' subject to this non-discrimination obligation [181]–[188].

98. It appears to me that the statements in *Tickle No 2* at [178] and [180] potentially raise questions relevant to the present matter about the application of CEDAW. This is because this matter relates directly to the question of discrimination as between groups of women, in which case I am not certain that the Respondent's contention that *Tickle No 2* resolves the CEDAW issue is correct.

99. However, given the finding in *Tickle No 2* about the scope of art 26 of ICCPR and its relevance to the SDA, CEDAW cannot be considered the only relevant source of international human rights law. Accordingly, whether or not CEDAW can or should be understood as embracing discrimination against transgender women is of somewhat lesser importance in determining this application.

100. It is also important to state that this matter engages a different provision of the SDA to that in question in *Tickle No 2*, quite apart from the different factual background. This matter also does not involve a challenge to the validity of the embrace of gender discrimination in the SDA. Finally, I consider the scope for consideration of international law here depends upon a proper understanding of the exemption power, to which I now turn.

The nature of the discretion

101. The Applicants contend, following *Water Conservation and Irrigation Commission (NSW) v Browning* (1974) 74 CLR 492 (*Browning*), that in the case of an unfettered statutory discretion, what might be relevant to its exercise is 'limitless' save for matters that may be excluded based on the subject matter, scope and purpose of the legislation (ASFIC [17]–[18]). It is also contended that the SDA must be construed consistent with the high value placed in the common law upon freedom of expression and association [19]. In short, they submit there is a '*residual public interest in some forms of sexual discrimination*', and the considerations applying to the discretion remain unconfined by the subject matter, scope and purpose of the SDA [23]–[24].

102. It is further submitted that the objects provision of the SDA permits reference to international human rights as further relevant considerations, including freedom of expression and association (RSFIC [25]). The Applicants contend the CEDAW convention is concerned with the protection of biological women which, in the case of conflict, cannot be subordinated [26]. It is also submitted that s 10A of the AHRC Act is relevant to the discretion [27], in the sense that it must be exercised consistent with the principles of indivisibility, universality, and equality of rights.

103. At the hearing it was contended that the approach taken in the decision under review highlights the rights of the trans community. This was said to have the effect of creating a hierarchy of rights. The Applicants, accordingly, oppose a construction of the SDA that in any way imposes a hierarchy. It was contended that discrimination and equality are two sides of the same coin, but s 44 of the SDA permits discrimination. In other words, this provision is the 'valve' that releases the pressure where a clash of rights arises. In oral and written submissions (ASFIC [22]–[23]) it was contended that permissible discrimination under an exemption was necessary because the legislature could not anticipate all instances of activities where there may be justified forms of discrimination.

104. Further on the issue of construction, reference was made to the importance of personal liberty as addressed in *Evans v New South Wales* [2008] FCAFC 130, [72]. This passage deals essentially with the principle of legality as expressed in *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115 at 131, and it was contended that fundamental rights may only be curtailed by express language. It was submitted that the

cultural rights of the Applicants are also protected at international law, and further reference was made to the focus in CEDAW on biological sex difference. The exemption in the SDA was also described as a relevant legal and policy response to gender-based violence in terms of General Recommendation No. 28.

105. The Respondent cited well-known principles of statutory interpretation, in particular that the discretion should be applied consistently with the SDA read as a whole (RSFIC [46]). The Respondent also contends that the Applicants' reliance upon common law and constitutional principles in respect of wider freedoms is misplaced [47]. This matter, it is submitted, is not about the validity of the legislation itself. The Respondent also contends that the discretion must be exercised in conformity with the subject matter, scope and purpose the SDA (citing among other decisions *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342, which itself cites *Browning*, and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at [40] (*Peko-Wallsend*)). It also explicitly rejects the argument that there is a public interest test in the SDA [48].

106. It is contended, generally, that the existence of exemptions in the SDA means that temporary derogation from the SDA is permitted when it is reasonable and necessary, for example, where a company is working toward longer-term compatibility with anti-discrimination legislation [51]. It also follows from the existence of standing exemptions in the SDA that the exemptions power is 'residual', and prevents complaints against behaviour that is otherwise discriminatory during the period of the exemption [53]. The Respondent further submits that the 2013 amendments to the SDA inserting gender identity '*show a clear Parliamentary intention, in both text and context, to protect as many people as possible*' [54]. The exemption sought, it is submitted, is fundamentally at odds with the amendments and therefore requires a compelling justification [55].

107. At the hearing, the Respondent emphasised in its submissions the objects of the SDA set out in s 3, in particular, that of eliminating discrimination '*as far as possible*'. This was described as establishing an inexorable march toward substantive equality. Accordingly, it was contended, the broader in terms and longer in time the exemption, the greater the level of scrutiny and evidence required in its consideration.

108. The Respondent also submitted that the SDA does not establish a hierarchy of rights holders, nor does it involve a balancing exercise between the rights of trans women and

lesbians. All persons are entitled to protection under the legislation and a decision to depart from the norm sought to be established by the SDA is not unfettered, because of the nature of the equal rights against discrimination that it establishes.

109. Given the absence of any precedent federally in respect of the power to grant an exemption under s 44 of the SDA, I consider it appropriate to give some consideration to decisions made in related areas.

110. The decision in *Peel Hotel Pty Ltd (Anti-Discrimination Exemption)* [2010] VCAT 2005 (*Peel Hotel*) was raised in the written evidence of Carol Ann and it was also touched on briefly in the Respondent's submissions at the hearing. In that matter an exemption was granted to a men-only bar under the EO Act for the venue to refuse or restrict entry for persons who may adversely affect the safety or comfort of the venue for its homosexual male patrons, and to explain the nature of the venue to all patrons on arrival. The Victorian Civil and Administrative Tribunal (VCAT) determined the measures were designed to redress disadvantage caused in part by discrimination [23].

111. I consider some caution should be exercised in relying upon this decision for two reasons. First, the factual context differs from the present matter in that the applicant there did not wish to exclude patrons based upon their sexual orientation [8]. Second, the matter was decided under the *Victorian Charter of Human Rights and Responsibilities Act 2006* (the Victorian Charter), requiring the decision-maker to give consideration to any relevant human right [17].

112. The decision of the Tasmanian Civil and Administrative Tribunal in *Jessica Hoyle and LGB Alliance Australia (Review of Refusal of an Application for Exemption)* [2002] TASCAT 142 (*Hoyle*) is included in materials lodged by the Respondent (T82). This matter involved the refusal by the Anti-Discrimination Commissioner to grant an exemption under the *Anti-Discrimination Act 1998* (Tas) (the AD Act) to discriminate in the conduct of events against male-bodied humans, regardless of how they identify. The Tribunal distinguished *Peel Hotel* for the reason that it was made under the Victorian Charter [28].

113. Arguments raised by the applicants there included the need for lesbian spaces and the actions of 'trans-identifying males', as well as abuse for being transphobic [80]. It appears the Tribunal in that matter considered factors relevant to the exercise of the discretion as

being framed initially by the purpose and objects of the legislation in question [84], [87]. The Tribunal then determined that, having considered standing exemptions, it was necessary to decide whether the exemption sought was 'otherwise desirable' [93]. This consideration included whether there was evidence that the exemption was 'justifiable'. The Tribunal noted the wider public interest in protecting the rights of all members of the community from discrimination in refusing the application [95].

114. Without citing all of the jurisprudence considered by the Tribunal in *Hoyle*, I note that consideration was given to related jurisprudence from South Australia, on the basis that the discretion in the AD Act was broad and unfettered, as was the counterpart legislation in South Australia. From this reading, the Tribunal determined that an unfettered exemption power in this context '*must be exercised reasonably and consistently with the scope, context and purpose of the Act*' [30].

115. Authorities informing this conclusion include *Minister for Immigration and Citizenship v Li* [2013] HCA 18 (*Li*) and *Kruger v Commonwealth* (1997) 190 CLR (*Kruger*). It was said in *Li*, for example, that where a statutory discretion is confined (only) by the subject matter, scope and purpose of the legislation conferring it, the view of justice in the given case must be reached by a process of reasoning [23]. *Kruger* is cited in the discussion of legal reasonableness in *Li* [29].

116. I raised with the parties briefly at the hearing the decision of the President of VCAT, Bell J, in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (*Lifestyle Communities*). The Respondent's representative noted, correctly, that this decision was made under the Victorian Charter. However, His Honour does address pre-Charter exemption jurisprudence at VCAT, and other related decisions [48]–[74]. His Honour observes that the discretion to grant an exemption under the EO Act must take that Act's purposes into account [30]. His Honour also cites the principles identified in *Stevens v Fernwood Fitness Centres Pty Ltd* [1996] EOC 92-782, noting they have been widely followed in Victoria and elsewhere [50]–[51]. Summarised briefly, I understand these principles to be that consideration be given to whether an exemption is reasonable in the circumstances, and an exemption would be inappropriate if sought for a reason wholly unrelated to the objectives of the legislative scheme (such as commercial advantage).

117. *Lifestyle Communities* relates to a question of age discrimination in the operations of a commercial provider of aged care services, and His Honour goes on to address other decisions including in employment discrimination. The relevance of this part of the decision is its resonance with the submissions for LAG as to the existence of a public interest test. His Honour cites (at [64]) a passage from the decision of Martin CJ writing for the Full Court of the Supreme Court of Western Australia in *Commissioner for Equal Opportunity v ADI Limited* [2007] WASCA 261, [59]. Here, Martin CJ observes that in respect of the equivalent equal opportunity legislation in that state, the legislature recognised some discriminatory conduct can be justified, and that exemption powers exist because the legislature cannot anticipate all circumstances in which discriminatory conduct may be justified.

118. In *Lifestyle Communities*, Bell J distinguishes this approach as a '*very wide formulation*' that appears inconsistent with the purposes of the EO Act [65]. His Honour also places emphasis on the importance of interpreting this legislation consistent with Australia's international obligations, with reference in particular to art 26 of the ICCPR. In His Honour's view, this requires '*any differentiation to be objective, reasonable, for legitimate purposes under that Covenant and proportionate to that purpose*'.

119. I note from a relevant anti-discrimination law text that the scope of exemption powers has been addressed in legal scholarship.[4] The authors observe that there are examples across the state jurisdictions of the grant of exemptions for reasons that can be described as 'antithetical' to the aims of anti-discrimination legislation. They identify a series of decisions arising in what might be described as the international defence supply chain, and the authors refer to these decisions as opening up a public interest criterion, and in doing so note the approach of Bell J in *Lifestyle Communities* that I have set out above.

120. The challenge that arises from the Applicants' submissions about scope of the power is that of potentially expanding the impact of the power in s 44 of the SDA beyond its intended bounds. This includes through reference to the public interest, and – more broadly – to the suite of fundamental rights attaching to the Applicants that it has been argued must be given due consideration. Further, in referring for example to authority on the principle of legality, it appears to me that the Applicants risk losing sight of the fact that the legislation being

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[4] *Australian Anti-Discrimination and Equal Opportunity Law*, 3 ed, The Federation Press, 2018, [5.12.13].

interpreted and applied here is itself a piece of human rights legislation. It is the starting point and the principal reference point for questions of rights.

121. Further, to the extent the Applicants rely on a version of the principle of legality to support consideration of a broad suite of personal rights when construing the power, this argument is misconceived. The discretion in s 44 of the Act is not framed so as to curtail the rights of the Applicants, and their freedom of expression and association is not subject to any restriction. I cannot see any avenue through principles of statutory interpretation that permits the importation here of a range of fundamental rights.

122. Both the full title of the SDA and its objects provision state clearly that the legislation is designed to prohibit and eliminate '*so far as is possible*' discrimination on a wide range of grounds that include sex, gender identity and intersex status. This commitment is made consistent with Australia's international obligations, including under the ICCPR, art 26 of which requires '*the guarantee of equal and effective protection against discrimination on any ground*'.

123. The language of the SDA, I consider, is unambiguous. The legislation operates as and from its coming into effect, to establish a high threshold of intolerance for less favourable treatment of persons who bear specified distinguishing characteristics from other persons. The significance of this threshold is seen in the provisions that make discrimination unlawful, with the assistance of the Criminal Code, such as in the provision of goods and services, and in the provisions permitting special measures directed to achieving substantive equality.

124. The Respondent's Guidelines and its submission in this matter adopt the concept of reasonableness in its formulation of the discretion, and the submissions go further and contend that any exemption be reasonable and necessary. The concept of reasonableness also appears to be adopted in related exemption jurisprudence, seen above.

125. I do not consider that including a test of reasonableness is in any fundamental way changing the character of the power in s 44 of the SDA as I understand it. It might best be understood as incorporating the requirement of reasonableness in decision-making consistent with authorities such as *Li*. That is, if consideration is given to arguments raised for and against an exemption, and these are weighed against the objects and purpose of the legislation,

then the ensuing decision is in effect a decision about whether the exemption is 'reasonable'.

126. As has been seen, CEDAW plays a somewhat ambiguous role in this matter. Substantial material and a deal of argument circulates around the place of the convention and its content. I consider the Respondent is correct to point out that this matter does not involve an issue of the validity of the SDA, therefore reference to CEDAW, or other international human rights law, is not required for this purpose. Equally, given the express terms of the SDA, reference to international law is not required to comprehend the range or kind of discrimination the legislation addresses. That is, what CEDAW does or does not say about gender, while not irrelevant, is not germane.

127. The Applicants also seek to import into consideration of the exercise the exemption power and overarching obligation under s 10 of the AHRC Act. 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 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.

128. It is possible, although this was not argued by the Applicants, that s 10A(2) of the AHRC Act might be relied on in support of the public interest test raised in their submissions. This might follow from the reference to the Commission's powers being performed for the greatest possible benefit of the Australian people. Again, I do not consider this reading can be maintained given the nature of s 10A.

Application of the discretion

Applying the SDA as a whole

129. The Applicants' written submissions on the application of the discretion focus exclusively on the significance they argue is found in a suite of human rights. In brief terms, the submissions state that holding a public event is essential to the Applicants' freedom of political communication, facilitates freedom of expression, protects the exercise of cultural rights, facilitates sexual rights and the health of lesbians and upholds equality for lesbians (ASFIC [29]–[39]). Moreover, the Applicants reject the reasoning of the Respondent in the decision under review [40]–[42].

130. At the hearing, the Applicants reiterated their objection to two key points relied upon in the decision under review. That is, it was contended that the proposition that not inviting certain people to an event creates a risk of harm to those individuals should be rejected and is outrageous. It was further contended that the Applicants have advanced substantive evidence demonstrating the risk of harm to lesbians who challenge the trans rights agenda.

131. It is important to recall the form or forms in which the Applicants have expressed the proposed exemption. As noted above, the final form is that found in the proposed terms lodged at the hearing. The notice they anticipate providing in the event of an exemption identifies the exclusion – or in their words, the non-invitation – of people on three grounds of identity or personal characteristics: the male sex; all sexual orientations other than lesbian; and gender, being trans women and those assigned male at birth.

132. The Respondent proposes a three-step process to the exercise of the discretionary power, which commences with consideration of whether the proposed conduct would amount to discrimination (RSFIC [56]). The further steps advanced by the Respondent essentially consist of the exercise of the discretion: consideration of whether the exemption sought is consistent with the purpose of the SDA, and consideration of '*whether the burden imposed on those who would be subject to the discrimination is appropriate and reasonable in the circumstances*'. I dealt with the latter two points above.

133. The starting point is an initial finding on the nature of the act for which an exemption is sought. On its face, it is uncontentious that conducting an activity that explicitly excludes a category of person based upon grounds of sex (s 5), sexual orientation (s 5A), or gender identity (s 5B) meets the definitions of discrimination under the SDA. Under s 7D, however, an act is not discriminatory if it amounts to a special measure taken to achieve substantive equality.

134. No submissions were made for the Applicants on this point in the course of the matter, however they contended in their Particulars document that the correct decision would identify the proposed exemption as a special measure that contributes toward lesbians attaining substantive equality vis-à-vis other sexual orientations [13]. The Respondent's reply to this is that the conduct in question will still amount to discrimination on the basis of gender identity, and this requires an exemption in order to be permissible (RSFIC [71]–[75]). The Respondent refers here to its submissions made in *Tickle No 2*.

135. The Respondent also identifies two relevant authorities on the scope of s 7D of the SDA [109]: *Walker v Cormack* [2011] FCA 861 (*Walker*) and *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250 (*Jacomb*). *Walker* involved a male excluded from an exercise class which was changed from a mixed to a women-only class. *Jacomb* involved a complaint by a male union member about the effect of affirmative action policies for the constitution of various governing bodies of the respondent union.

136. The Respondent here contends that the Applicants are permitted to exclude men and non-lesbians from an event, so long as this is compliant with the SDA. This is said to require first, a subjective intention to achieve substantive equality between men and women and between people of different sexual orientations and, second, an objective assessment of the need for the special measure and whether it has the capacity to achieve substantive equality.

137. The gist of the Respondent's contentions appears to align with the conclusions reached in *Tickle No 2* on the nature of special measures in the SDA [81]–[86]. In this section of the judgment, I understand Bromwich J to find that an action or measure taken to achieve a particular form of substantive equality may nonetheless give rise to a separate, distinct form of discrimination, in which case it is untenable.

138. It follows from the SDA, and from the analysis in *Walker* and *Jacomb*, that it is a pre-requisite to a finding with respect to a special measure that there be an initial finding that a substantive inequality exists. I note that s 7D of the SDA should not be construed in a technical fashion, and it is designed to encourage the taking of special measures (*Walker* [30]).

139. An important theme of the Applicants' submission overall is that they consider the emphasis on discrimination against trans women to arise largely from the pathway the Respondent recommends under the SDA. For this reason, their arguments and evidence have sought to highlight historic disadvantage against lesbians born female, and diminishing freedom of thought and movement in public, at least in part because of the advent of gender discrimination law and associated activism. Some of this evidence, such as that said to be directed at so-called TERFs, could be said to be indicative of discrimination against some lesbians. Needless to say, this approach is comprehensively challenged in the contentions and evidence advanced by the Respondent.

140. That said, I understand from the Respondent's submissions that it agrees the lesbian community has faced, or still faces, substantive inequality, as against men on the basis of sex and more widely on the basis of sexual orientation. To recap the findings of the decision under review, the Commission determined that an event for the lesbian community on International Lesbian Day may well be considered a special measure for the purpose of achieving substantive equality between men and women and between lesbian women and heterosexual women [9.44].

141. Should I come to a similar conclusion, this does not dispose of the question of special measures as regards lesbian women and transgender women, or more relevantly, transgender lesbian women. I consider the Respondent's submission, with respect, to ultimately offer only a form of circular reasoning. An act is not discriminatory unless it is considered a special measure, but it must first amount to discriminatory behaviour. Therefore, I cannot see how it can be argued that a special measure should not also discriminate.

142. The problematic nature of this issue arises from the intersectional features of lesbian identity, meaning the intersection of sexual identity and sexual orientation, and that of transgender persons. The circumstances are far from the rather binary factual contexts of *Walker* and *Jacomb*. Also, quite simply, other than a reference in their Particulars which I have noted, the Applicants did not mount a substantive argument that their proposed actions should be considered a special measure.

143. I also note the context of the actions sought to be undertaken by the Applicants which is, in essence, to meet publicly to discuss issues of particular importance to lesbians born female. I do not disagree with either party that, at a general level, it might be said that lesbian women suffer disadvantage because of their gender and sexual orientation. I am not certain that this rises to the level that demands restrictions upon public activity, particularly given the span of time over which an exemption could run. However, I consider it reasonable to assume that the proposed actions can amount to a special measure for the purposes of achieving substantive equality between men and women, and between lesbian and heterosexual women.

144. Finally, I do not consider the evidence and arguments raised to have made a substantive case that lesbians born female in particular experience substantive inequality compared to lesbian trans women. I must therefore proceed with the further application of the SDA.

145. The Respondent has identified in its written submissions other provisions that require consideration before addressing the need for an exemption (RSFIC [62]–[70]). I set out above the relevant provisions of the SDA. The circumstances of this matter, however, do not raise an issue of discrimination against members of a club, nor is the permitted discrimination in conduct of a voluntary body under s 39 of the SDA in question.

146. The Respondent contends that the circumstances of this matter are a matter, prima facie, of discrimination in the provision of goods and services under s 22 of the SDA. The proposed terms provided by the Applicants are also drafted in this manner. This matter was unfortunately not the subject of more detailed submissions. The wide definition of services in the SDA probably permits the conclusion that in arranging and – in some manner not fully explored – hosting the event proposed, the Applicants could be said to be providing goods and services.

147. I set out above additional provisions which are found in Part VI – Miscellaneous of the SDA. These two provisions, ss 105 and 106, establish liability in those who aid, or permit, an unlawful act, and for the acts of employees and agents. My understanding of the Applicants' position is that they seek to conduct one or more public events in a space booked for that purpose. On this basis, it appears to me an inevitable conclusion that any exemption granted to them could only provide protection under the SDA for services provided by members of LAG. By this I mean that without any contracted provider, be it a venue or any other ancillary service associated with the conduct of the event, also obtaining an exemption, then these other parties are likely to be operating in breach of the SDA.

148. It follows from this analysis that the feasibility in practice, and indeed the lawfulness overall, of any event as proposed by the Applicants is subject to doubt. I include some further consideration of this issue below.

Consideration of exemption

149. I do not consider it necessary to repeat at any length the core submissions for the Applicants. I have already noted the broad human rights agenda they contend is definitive

of the power to grant an exemption. I have also addressed, in outline, the arguments raised in written submissions that the application of the power should also be informed by a suite of human rights, and earlier in these reasons set out a summary of evidence.

150. At the hearing, it was submitted that the ability to freely express in public the views advanced in evidence by Carol Ann was a powerful reason to exercise the discretion in the Applicants' favour. LAG's capacity to accrue political influence was described as fundamental to our civil society. It was also submitted that the Applicants should be in a position to visibly explore their cultural rights, and the particular needs of both older and younger lesbians were identified here. It was contended that the evidence pointed to the reduction in public space for lesbians. The exemption would also permit the facilitation of rights to sexual health.

151. In written submissions, the Respondent addresses the need for an exemption in the form of considerations as to whether it is reasonable and necessary (RSFIC [101]–[126]). These are, in summary, that the exemption:

(a) is too broad and vague as the relevant activities to be undertaken over five years have not been adequately specified [102]–[105];

(b) is not required to meet LAG's objectives, as they can meet, express their views in public and contribute to public policy already [106]–[109];

(c) may not address the Applicants' concerns about remaining safe from harassment as the evidence does not support the view that trans activists pose a threat, and there is no fully effective measure to manage the attendance of participants consistent with the proposed exemption [110]–[117];

(d) is not necessary to protect and promote lesbian culture, particularly as the evidence advanced by the Respondent indicates many ongoing forms of lesbian community action [118]–[121]; and

(e) it may cause harm to trans lesbians, and evidence lodged (including at Annex A to the RSFIC) demonstrates the negative health effects of social exclusion upon the trans community [122]–[126].

152. In closing submissions at the hearing, the Respondent's representative stressed a number of elements in the evidence arising at the hearing. These included, for example, the evidence that LAG is engaging with community members online. It was also contended that an exemption would be unlikely to prevent protest action, nor would it exclude persons attending who disagree with the Applicants' agenda. I have already set out above additional references made to supporting material lodged by the Respondent about the impact of an exemption on the lesbian community.

153. It is necessary to directly address the factors raised in support of the exemption and the evidence supporting them. The principal challenge here is that the factors are couched in the language of human rights. I determined above that, in effect, no particular priority can be attached to these rights under the SDA. This does not rob the Applicants' claims of merit or weight. However, they need to be considered in light of the fact that the SDA prohibits discriminatory conduct.

154. In a simplified form, the factors raised by the Applicants are that they wish to engage in policy debate and reform, meet and communicate as a community, and undertake advocacy around matters of health and welfare. They have raised in support of these objectives a range of personal and opinion-based evidence said to demonstrate marginalisation of the lesbian community, and – in particular – have emphasised hostility said to have been directed at those who espouse their specific views against the recognition of gender diversity in law and policy.

155. Each of the areas of activity, and each of the sources of evidence relied upon, have been countered with arguments and evidence to the contrary. This means that, purely in respect of any fact finding required to support the grant of an exemption, I am faced with largely evenly balanced contentions. This alone raises the threshold of what might be considered acceptable or convincing evidence required to substantiate exercise of the discretion in favour of an exemption. An additional consideration raised in response is the impact of the grant of an exemption upon members of the excluded community group, being trans women.

156. With respect to the matter of the underlying policy behind the SDA, I consider it would be a perverse outcome to grant an exemption on the basis that the Applicants consider the law to be inappropriate, or based on unsubstantiated science, or on other policy grounds that

are no longer considered sustainable. That is, on this particular ground, the grant of an exemption would potentially demonstrate the redundancy of the protected gender characteristic. This cannot be understood as consistent with the scope and purpose of the SDA.

157. In any event, I do not consider the Applicants to have advanced any probative evidence that substantiates their fundamental opposition to gender protections under the law. Professor Jeffreys provided her opinion as a scholar of feminism and political science, but I do not understand her to have relevant scientific or medical expertise with respect to the question of gender identity. Even were her evidence to be considered relevant to a fuller appreciation of the science of gender identity, for the reasons I have just noted, I cannot accept that this ground can be relied upon to substantiate grant of an exemption.

158. With respect to matters of communication, the evidence of the parties diverges to some extent about the nature and impact of social isolation of the lesbian community in general. I do not consider that the challenges made in cross-examination to Dr Jeffreys' expertise damage the value of her evidence overall. It appears to me to be of a similar quality and relevance to that of Professor Jeffreys and, according to Dr Jeffreys, is indeed built upon the Professor's own work (a position not itself subject to further challenge).

159. As noted above, I have accepted as a general proposition that the lesbian community experiences inequality. I consider the more pertinent issue to be whether the evidence of the Applicants is adequate to contribute to justification of the exemption in the context of the matter. On balance, I do not consider there to be sufficiently persuasive evidence that any continuing social marginalisation of the lesbian community in public can contribute to justification of the exercise of the discretion in this case.

160. The Applicants' evidence about matters of health and welfare were not necessarily directly addressed in the body of the Respondent's evidence and material. Some quite important evidence was advanced concerning the support provided by LAG to young women who are experiencing distress from their personal gender transition. This itself, however, does not necessarily present a compelling reason to discriminate against people who have experienced a different form of gender transition. Equally, I accept at a general level that lesbian women may prefer to address matters of sexual health, or health generally, within their own community – albeit also, on the Applicants' case, in a public place. This too does

not present as a substantive argument in support of a specific form of gender discrimination, particularly against individuals who may self-identify also as lesbian.

161. The Applicants have raised strong objection to arguments relied upon by the Commission that the fact of the grant of an exemption may have a detrimental impact upon the mental health of members of the affected community, being trans women. This matter was not addressed in any great detail at the hearing, but I note the evidence of Professor Jeffreys that she did not consider the potential for self-harm among 'men' to be a matter of concern for the Applicants. This subject requires somewhat caution, but for the reasons I come to now I do not consider it is necessary to give this issue any particular weight, notwithstanding that it is likely that an exemption could well have a detrimental effect upon the wellbeing of trans women.

162. It is important to understand that grant of an exemption in the circumstances of this matter would generate one or more instances of discrimination against a clearly identifiable group whose rights are protected by the gender discrimination provisions of the SDA. The Applicants argue that this is simply the result of the Respondent's interpretation of the SDA and that they wish to discriminate more widely, and do not seek to single out any element of the community. This response is somewhat disingenuous since the Applicants' case overall overwhelmingly demonstrates their lack of acceptance of the anti-discrimination framework presently in place under the SDA in respect of gender identity. More specifically, they have demonstrated their disagreement with the extension of protection to trans women, and with the policy and social science behind this.

163. On my interpretation of the SDA and the exemption power, it is no answer to this to seek to rely on the human rights attaching to the Applicants. To do so overturns what I consider to be the ordinary application of this anti-discrimination legislation, as informed by the authorities I have considered. Much of the difficulty in defining and applying the submissions has arisen from the unfettered nature of the discretion, which in practical terms is expressed in exclusive terms rather than inclusive terms. In short, it is challenging to define the proper bounds of such a discretion.

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.

165. Refusal of an exemption does not, in my view, unduly fetter the current or future activities of the Applicants in pursuit of their stated political or policy aims. Refusal also does not prevent them from discriminating in the limited way permitted under the SDA as a small association.

166. For completeness I also address, briefly, the subject of public controversy and protest captured by the concept of the trans-exclusionary radical feminist. I understand the Applicants' position to be that the material lodged and aspects of the evidence at the hearing demonstrate that feminists who challenge the currently accepted legal framework recognising gender are subject to severe criticism, and their safety may be at risk in public events. As noted, some attempts were made by the Respondent at the hearing to challenge the nature and severity of certain instances of public protest.

167. Overall, this issue was also not dealt with extensively at the hearing. While I have a substantial body of material indicating opposition to the broad stance of the Applicants, and those of a similar perspective, with respect to the rights of trans women, I do not consider this to be of particular value in support of the request for an exemption. The material is somewhat non-specific in terms of time, place, and targets of comment. I am therefore not persuaded that it can be given any particular weight in respect of a prospective series of events in unspecified locations.

168. There are also some important practical considerations that would arise from the grant of an exemption. While I do not consider the possibility of public protest to be a sound basis for refusal, the hearing revealed that there is no solution yet identified to ensuring the enforceability of an exemption. The nature of 'control' concerning attendance has been reduced by the Applicants to the level of 'non-invitation', in which case the practical effect of an exemption would be highly questionable; this potentially renders an exemption moot. Equally, I have pointed to provisions of the SDA that are likely to have the effect of limiting the capacity of the Applicants to enjoy the privilege arising from an exemption. This is because of the likelihood that other entities contributing to an event or events may not be subject to the protection arising from an exemption.

169. These matters are relevant to the overall reasonableness of a decision in respect of exercise of the discretion. They too support a finding that the discretion should not be exercised in favour of the Applicants.

CONCLUSION

170. Both the proponents of an exemption and its opponents, including those that participated in the consultation process conducted by the Respondent, have each addressed matters that reflect genuinely and strongly held views. I have set out summaries of these matters from the written and oral evidence in order to provide adequate background to the issues in this matter.

171. The evidence was also in large part based upon lived experience as members of the lesbian community, which raises some challenges in seeking to preference one set of views over another. However, due to the nature of the statutory power in the context of the SDA as I have understood it, it has not been necessary to rely upon a more detailed comparison of arguments for and against the exemption.

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.

DECISION

173. For the reasons given above, the Tribunal affirms the decision under review.

Dates of hearing:	**2 and 3 September 2024**
Counsel for the Applicant	**Mr Leigh Howard**
Solicitors for the Applicant	**Feminist Legal Clinic**
Counsel for the Respondent:	**Dr Daye Gang**
Solicitors for the Respondent:	**Australian Human Rights Commission**

Form 59
Rule 29.02(1)

Exhibit Certificate

This is the exhibit marked **KD-2** now produced and shown to Katherine Dennis at the time of affirming her affidavit on 3 April 2025 before me:

Signature of witness

JORDAN MAREE NICHOLS
Sladen Legal - Tower 2, Level 22, 727 Collins Street, Melbourne.
An Australian legal practitioner within the meaning of the Legal Profession Uniform Law (Victoria)

Filed on behalf of	The Applicant
Prepared by	Sladen Legal
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Address for service	Collins Square, Tower 2, 22/727 Collins Street, Melbourne VIC 3000

KD-2

Form 75
Rules 33.12(1); 33.34; 33.40

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 acordingly?
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.

The Applicant's address is: Suite 129, 585 Little Collins St, Melbourne, 3000.

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

Form 59
Rule 29.02(1)

Exhibit Certificate

This is the exhibit marked **KD-3** now produced and shown to Katherine Dennis at the time of affirming her affidavit on 3 April 2025 before me:

Signature of witness

JORDAN MAREE NICHOLS
Sladen Legal - Tower 2, Level 22, 727 Collins Street, Melbourne.
An Australian legal practitioner within the meaning of the Legal Profession Uniform Law (Victoria).

KD

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Associate to Justice Abraham
Federal Court of Australia
NSW Registry

By email: Associate.AbrahamJ@fedcourt.gov.au

6 February 2025

Dear Associate

NSD1386/2024: GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) & ANOR v ROXANNE TICKLE

1. We write in relation to the case management hearing in the above proceeding, listed for 12 February 2025.

2. We act for the Lesbian Action Group (**LAG**), an advocacy group dedicated to the advancement and protection of the interests of lesbians in the formation of public policy.

3. We wish to notify her Honour of a pending appeal we are instructed that LAG will file in this Court in respect of a decision by the Administrative Review Tribunal (**ART**). The decision to be appealed against can be accessed at this link. The appeal in this Court will be filed by 18 February 2025 at the latest.

4. In very short summary, LAG's application to the Australian Human Rights Commission (**AHRC**) for an exemption pursuant to s44(1) of the *Sex Discrimination Act 1984* (Cth) (**SD Act**) was denied and the decision of the AHRC was subsequently upheld on review by the ART.

5. In the course of deciding LAG's application for review, the ART member was bound, and applied, *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 (**Tickle No 2**).

6. At this preliminary stage, we have formed the view that LAG's appeal proceeding in this Court, and the appeal against *Tickle No 2*, will raise the following common issues:

    a. The correctness of *Tickle No* 2.

b. The proper interpretation of the SD Act.

c. The proper interpretation, and application, of relevant instruments to which the SD Act gives effect, especially the *Convention on the Elimination of All Forms of Discrimination against Women* (**CEDAW**).

7. LAG is presently considering seeking the following interlocutory orders, once its appeal is in this Court:

a. That the LAG appeal be referred to a Full Court by the Chief Justice, pursuant to 20(1A) of the *Federal Court Act 1976* (Cth) (**FC Act**).

b. That the LAG appeal be heard and determined by the same Full Court convened to hear the appeal against *Tickle No 2*, given the likelihood of common issues and having regard to the need for the Court to efficiently use its resources and efficiently manage its caseload (see s 37M(2)(b) and (c) of the FC Act).

8. LAG is also considering whether an intervention in the appeal against *Tickle No 2* is more appropriate, given the overlap, and how LAG's interests are affected by the outcome in *Tickle No 2*.

9. LAG will advise the Court of its proposed course of action as and when its appeal proceeding is filed.

10. We wish to raise this issue for her Honour lest it affects anything to do with the case management of the appeal against *Tickle No 2*, including listing arrangements.

11. We have provided a copy of this correspondence to all parties to the *Tickle No 2* appeal.

LAG does not request to be heard at the 12 February 2025 case management hearing but will appear if requested.

Yours sincerely

Anna Kerr
Principal Solicitor

NOTICE OF FILING

Details of Filing

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Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

IN THE FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: New South Wales Registry

DIVISION: General

NSD 1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017
and another named in the schedule
Appellants

and

ROXANNE TICKLE
Respondent

SUBMISSIONS OF THE RESPONDENT IN RELATION TO THE LESBIAN ACTION GROUP, INC. INTERLOCUTORY APPLICATION TO INTERVENE

TABLE OF CONTENTS

A OVERVIEW

1 By Interlocutory Application (**IA**) filed 3 April 2025, the Lesbian Action Group Inc (**LAG**) seeks leave under the *Federal Court Rules 2011* (Cth) (**FCR**) 9.12(1) to intervene in this proceeding.[1] For the reasons outlined below, the Respondent (**Ms Tickle**) opposes any such intervention (under FCR r 36.32(1), which is the applicable rule).

[1] IA Prayer 1.

B RELEVANT LAW: LEAVE TO INTERVENE IN AN APPEAL

2 FCR 36.32(1) provides that "[a] person who was not a party to the proceeding in the court appealed form may apply to the Court for leave to intervene in an appeal". FCR 36.32(2) then provides that the person seeking leave to intervene satisfy the Court:

(a) that their contribution will be useful and different from the contribution of the parties to the appeal; and

(b) that their intervention would not unreasonably interfere with the ability of the parties to conduct the appeal as they wish; and

(c) of any other matter that the Court considers relevant.

3 Note #1 to FCR 36.32 makes clear that the role of an intervener is solely to assist the Court in resolving the issues raised by the parties.

4 FCR 36.32 reflects the applicable principles outlined in *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [2]-[3] & [6] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).[2] It is ordinarily necessary for a person seeking leave to intervene to demonstrate their interests would be directly affected by a decision in the proceeding, that is, that they would be bound by the decision, such as to ground an entitlement to intervene to "protect the interest likely to be affected", such as "in other pending litigation…likely to be affected substantially by the outcome of the proceedings".[3] However, intervention "will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation".[4] An indirect affection of legal interests does not give rise to any absolute right to intervene, and the less direct the interest of the person seeking to intervene,[5] the more unlikely it will be such intervention is permitted.[6]

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2 See, for example, *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2024] FCA 1104 at [8] (Snaden J).

3 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

4 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 3)* [2015] FCA 542 at [13] (Edelman J); *Sydney Trains v Australian Rail, Tram and Bus Industry Union (Leave to Intervene)* [2024] FCA 1466 at [9] (Wheelahan J).

5 *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 3)* [2015] FCA 542 at [15] (Edelman J, citing *Levy v Victoria* (1997) 189 CLR 579 at 603 (Brennan CJ)).

6 *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 3)* [2015] FCA 542 at [15] (Edelman J, citing *Comcare v Martinez* [2013] FCA 160 at [14] (Robertson J)).

5 The key consideration is whether the person seeking to intervene will make submissions "which the Court should have to assist it to reach a correct determination".[7] Where a party is represented by experienced lawyers, it should "seldom be necessary or appropriate" for leave to be granted to an intervener, and any application for such appointment should identify "with some particularity what it is that the applicant seeks to add to the arguments that the parties will advance".[8] Relatedly, the Court should be cautious in acceding to such applications having regard to the efficient operation of this Court and the capacity of the parties to the proceeding to provide the Court with adequate assistance.[9]

C RELEVANT CONSIDERATIONS

6 Ms Tickle opposes the intervention of LAG on the following discrete bases.

7 ***First***, LAG demonstrates no direct affectation of its legal interests,[10] and the matters it identifies as direct affectation constitute only (weak) indirect affectation at best. LAG adverts to being "bound by the outcome [in this appeal proceeding] just as it was in the hearing before the [Administrative Review Tribunal]".[11] However, LAG made a submission to the Administrative Review Tribunal that the "ratio" of the primary Judgment the subject of this appeal was "not relevant to the matter before the Tribunal",[12] and the Tribunal itself did not consider that the key findings (and the matters which were not resolved) in the primary Judgment to be of direct application to the resolution of the issues for its determination, either.[13] Section 44 of the *Sex Discrimination Act 1984* (Cth) is otherwise not relevantly at

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7 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [6] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ; *Hua Wang Bank Berhad v Commissioner of Taxation* (2013) 296 ALR 479 at [51] (Logan, Jagot & Robertson JJ).

8 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [6] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ); *Hua Wang Bank Berhad v Commissioner of Taxation* (2013) 296 ALR 479 at [51] (Logan, Jagot & Robertson JJ). See, too, in the context of a leave to intervene application, *James Cook University v Ridd* (2020) 278 FCR 566 at [38] (Griffiths & SC Derrington JJ): "…there was no suggestion that the parties to the proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination".

9 *Levy v Victoria* (1989) 189 CLR 579 at 604 (Brennan CJ, citing His Honour's earlier remarks in *Kruger v The Commonwealth,* Transcript of 12 February 1996 at 12 (see footnote #90)); *Sydney Trains v Australian Rail, Tram and Bus Industry Union (Leave to Intervene)* [2024] FCA 1466 at [11] (Wheelahan J, citing with emphasis *Road Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [3] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ) as to "the parties to the particular proceedings **may not present fully** the submissions on a particular issue…". See, too, *Federal Court of Australia Act 1976* (Cth) (**FCA**) s 37M(1).

10 See, Affidavit of Katherine Dennis, affirmed 3 April 2025 at [27]-[30] (**Dennis Affidavit**).

11 Dennis Affidavit at [28].

12 Tribunal's Reasons for Decision at [17], original p 9/50, Dennis Affidavit, Exhibit KD-1 (p 20) and [92], original p 32/50, Dennis Affidavit, Exhibit KD-1 (p 42).

13 See, Tribunal's Reasons for decision at [92]-[100], original pp 31-32/50, Dennis Affidavit, Exhibit KD-1, p 43.

play in the appeal / cross-appeal proceeding.[14] The LAG has otherwise properly conceded it has no interest in the other questions of law raised in the appeal / cross-appeal.[15]

8 ***Second***, LAG has, and has taken up, the opportunity to bring a statutory appeal on a question of law to the decision of the Administrative Review Tribunal.[16] LAG's ability to make submissions about the binding or non-binding nature of the reasons of the primary Judgment[17] *vis-à-vis* its statutory appeal is not materially prejudiced by the mere existence of an appeal (and cross-appeal) being lodged and heard by a Full Court ahead of the hearing of its statutory appeal in the original jurisdiction of this Court. Self-evidently, the outcome of the Full Federal Court appeal / cross-appeal is otherwise a speculative matter, as is what the High Court of Australia might / might not (be called upon to) determine in the future.[18]

9 For completeness, on 31 March 2025, the Chief Justice of this Court advised LAG that its interlocutory application on 18 March 2025 for its statutory appeal to be referred to a Full Court (exercising original jurisdiction) be heard by the same Bench that would hear the appeal / cross-appeal in this proceeding was refused.[19] Having regard to that application having been made under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) (**FCA**),[20] it may be inferred that the Chief Justice considered that the statutory appeal brought by LAG was **not** of sufficient importance to justify a direction that the original jurisdiction of this Court[21] be exercised by a Full Court.

10 ***Third***, LAG's anticipated contribution(s) in this proceeding appear to be no different from the anticipated contribution(s) of the Appellants and/or the Australian Christian Lobby (**ACL**).[22] Ms Tickle otherwise reiterates earlier submissions made in response to the ACL's application to be appointed an amicus curiae as to the "significant assistance" that the Court

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14 Dennis Affidavit at [18]-[20]; *cf* Notice of Appeal dated 1 October 2024 at [2(a)].

15 Dennis Affidavit at [36].

16 See, *Administrative Review Tribunal Act 2024* (Cth) s 172(1): "A party to a proceeding in the Tribunal may appeal to the Federal Court, on a question of law, from the decision of the Tribunal in the proceeding".

17 As to applicable principles about following Judgments of this Court at first instance, see, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* (2021) 287 FCR 181 at [1]-[32] (Allsop CJ).

18 Dennis Affidavit at [29].

19 Dennis Affidavit at [21]-[24].

20 Dennis Affidavit at [21]. FCA s 20(1A) relevantly provides: "If the Chief Justice considers that a matter combing before the Court in the original jurisdiction of this Court is of sufficient importance to justify the giving of a direction under [s 20(1A)], the Chief Justice may direct that the jurisdiction of the Court in that matter, or a specified part of that matter, shall be exercised by a Full Court".

21 Which is ordinarily exercised by a single judge of this Court: FCA s 20(1).

22 See, ACL's Submissions dated 26 February 2025 at [3]-[13]; ACL's Reply Submissions dated 2 April 2025 at [5]; *cf* Dennis Affidavit at [32]-[34]; see, too, the Appellants' Submissions dated 28 February 2025 at [24]-[29]. See, too, Notice of Appeal dated 1 October 2024 at [2].

can reasonably expect from the parties' legal representation, and from the Sex Discrimination Commissioner as amicus curiae.[23] Further, if the Court appoints the ACL as an amicus curiae, it is highly unlikely to be assisted by anything (more) useful or (more) different from the LAG's anticipated contribution(s) than that which it will or may receive from the parties and the two amici.

11 ***Finally***, Ms Tickle reiterates the importance of case management considerations as to the need for caution as to the number of active participants in the appeal/cross-appeal, including managing risks as to the impact on overall costs of the appeal and in limiting any form of potential repetition in submissions (and the associated inefficient use of judicial resources).[24]

12 If the Court is minded to grant leave to the LAG to intervene, respectfully, it ought impose a strict time limit as to its oral submissions at the hearing of the appeal / cross-appeal of no more time than is currently anticipated to be taken up in oral submissions by the ACL, being 25 minutes,[25] and not "perhaps, 1 hour in length".[26] The LAG should otherwise not be permitted to seek any order as to costs arising from its intervention, as volunteered in the evidence in support of its IA.[27] Ms Tickle reserves her position as to any other future case management orders as to the length and timing of written submissions.

4 April 2025

Christopher McDermott
Elodie Nadon
Counsel for the Respondent

Barry Nilsson Lawyers
Lawyers for the Respondent

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23 Ms Tickle's Submissions dated 26 March 2025 at [15]]; *cf* the ACL's Reply Submissions dated 2 April 2025 at [6].

24 Dennis Affidavit at [40]. See, *Lendlease Building Contractors Pty Ltd v Australian Building and Construction Commissioner* [2020] FCA 240 at [24] (Snaden J): "The respondents complain, fairly enough, about the potential for duplication in the submissions to be advanced by Lendlease and the CFMMEU. That potential cannot be discounted entirely; but the CFMMEU has indicated that it does not intend to—indeed, that it will not—repeat any submissions that Lendlease advances. It should be held to that undertaking as closely as is reasonably practical, including by means of appropriate costs orders, if necessary." See further FCA ss 37M and 37N.

25 See, too, FCA s 37P(2) and s 37P(3)(e).

26 Dennis Affidavit at [39]. See, too, IA, Prayer 2.

27 Dennis Affidavit at [44].

NOTICE OF FILING

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Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
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The date of the filing of the document is determined pursuant to the Court's Rules.

Reply Submissions: Intervention by the Lesbian Action Group

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

No. NSD1386 of 2024

Giggle for Girls Pty Ltd (ACN 632 152 017)
Applicant

Roxanne Tickle
Respondent

1. The Respondent (**Ms Tickle**) opposes the intervention of the Lesbian Action Group on a number of bases. Matters that may inform the Court's wide discretion do not appear to be in contest, nothing that both Ms Tickle and the Lesbian Action Group cite Wheelahan J's summary of principles in *Sydney Trains v Australian Rail, Tram and Bus Industry Union (Leave to Intervene)* [2024] FCA 1466 at [6]-[11].

Ms Tickle misunderstands LAG v AHRC [2025] ARTA 34

2. The ratio of *Tickle v Giggle (No 2)* [2024] FCA 960 was not irrelevant to the member's reasoning in *LAG v AHRC* [2025] ARTA 34. The Lesbian Action Group accepted at the AAT that was that Bromwich J's ruling was binding, but made a formal submission that it was wrongly decided for the purposes of preserving its position in any potential appeal. The central finding of the tribunal was that the Lesbian Action Group could not be exempted from the SD Act under s 44 because such an exemption would occasion discrimination on members of the transgender community. The member reasoned this way based upon the meaning that was given to the sex and gender identity based protections in the SD Act by the trial judge in *Tickle v Giggle (No 2)* [2024] FCA 960.

3. By its Ground 3 in its proceeding before Moshinsky J, the Lesbian Action Group seeks to impugn that interpretation. It will be practically deprived of that opportunity, absent intervention in this case.

4. The Lesbian Action Group's opponent, the Australian Human Rights Commission, suffers no such prejudice. By its Sex Discrimination Commissioner, the AHRC has a statutory right to intervene in *Tickle v Giggle (No 2)* [2024] FCA 960. Thus, the AHRC

Filed on behalf of	The Lesbian Action Group
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enjoys the opportunity to advance its preferred construction of the SD Act to this Full Court, unimpeded by what the Lesbian Action Group contends. The AHRC then gets to the opportunity to apply that interpretation before Moshinsky J – again, unimpeded by what the Lesbian Action Group contends, due to the doctrine of precedent.

5. This is demonstrably unfair to the Lesbian Action Group. It should enjoy the same opportunity that is given to the AHRC.

The Lesbian Action Group's interests are obviously affected

6. Ms Tickle's submission that the Lesbian Action Group has a "(weak) indirect affectation" has to be rejected. The Lesbian Action Group's legal interest is precisely that which was identified in *Levy v Victoria* (1997) 189 CLR 579 at 601-602 (Brennan J). The Lesbian Action Group is "affected by operation of precedent … or by the doctrine of stare decisis". The Full Court's determination in this proceeding "will govern proceedings that are pending or threatened .. to which an applicant to intervene is or may become a party."

7. If Ms Tickle is suggesting that the wider interests of the Lesbian Action Group are weak and indirect – then this too much be rejected. At issue in this proceeding is the lawfulness of a service exclusively dedicated to females, which was (in part) intended to be used by lesbians. Lesbian Action Group is established to protect and advances the human rights of lesbians, including the right of lesbians to explore their sexual and cultural needs through such a service. This submission (if it is indeed made) illustrates why the Lesbian Action Group exists in the first place.

8. Ms Tickle is correct to caution against unwarranted speculation about a High Court appeal – but this point counts in favour of intervention. Given the special leave procedure in that court, it is all the more important that the Lesbian Action Group be permitted to intervene at this present stage, so that can best influence the disposition of Ground 3 in its own proceeding that is to be heard by Moshinsky J.

Ms Tickle draws inappropriate inferences about the Chief Justice's determination of its interlocutory application

9. The Full Court cannot, and should not, draw an inference that the Chief Justice decided that the Lesbian Action Group's proceeding was not "sufficiently important".

10. At the hearing of that reference application, Moshinsky J advised the parties that the August appeal sittings was full, and closed to being finalised. His Honour was troubled by a proposed reference in the potential factual complexity of Ground 4 of the Lesbian Action Group's appeal. In light of those concerns, the Lesbian Action Group identified to

his Honour its alternative proposed course, which was an application to intervene in this proceeding, and that the Lesbian Action Group had already sent a letter foreshadowing this potentiality to the chambers of Abraham J. Justice Moshinsky advised the parties that he would identify that alternative course to the Chief Justice.

11. Justice Moshinsky has, himself, brought into account the effect of this proceeding in his own case management. He has listed the proceeding before him on 23-24 February 2026, in anticipation that this Full Court will be able to deliver judgment by that date. In other words, his Honour has appreciated the importance of the Full Court's decision to the proceeding before him, and the likelihood that the outcome of this proceeding will be dispositive of the success of Ground 3.

The Lesbian Action Group's submissions will be useful and different

12. The Lesbian Action Group has particularised its preferred interpretation of the SD Act in Ms Dennis' Affidavit at [30]-[36]. The Lesbian Action Group's interpretive pathway is qualitatively different to the submissions advanced before the trial judge, and different to the trial judge's analysis and conclusions with respect to those submissions. Ms Tickle's submission that the Lesbian Action Group is raising the same arguments as Giggle for Girls Pty Ltd (**Giggle**) just assertion without analysis. With respect, it reveals a miscomprehension of what the Lesbian Action Group intends to put. In any event, Ms Tickle can take comfort in the fact that the Lesbian Action Group has undertaken not to repeat the submissions of any party.

13. The Lesbian Action Group is able to present a unique and intersectional perspective which the principal parties cannot provide through their own lived experiences. Its members are females who are attracted to the same sex. It is best placed to speak to the ramifications of the question before the Court on the rights and protections of same-sex oriented people, and most particularly, same-sex oriented women who experience the intersection of discrimination on grounds of both sex and sexual orientation. The UK Supreme Court had the benefit of hearing from lesbian-based interveners in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, and positively commented on the contribution of the interveners at [34]-[35]. This Court should have the equivalent assistance.

14. Ms Tickle inappropriately seeks to 'stack' the potential submissions of another potential intervener, the Australian Christian Lobby, against the Lesbian Action Group. The Full Court will decide the potential intervention of the Australian Christian Lobby based upon the merits of that application separately, and based upon its own individual merits. The intervention of that organisation is not a reason to refuse the intervention application by

the Lesbian Action Group.

Case management considerations

15. The Lesbian Action Group is conscious to ensure that its intervention will not unduly burden the presentation of Ms Tickle's and Giggle's cases in oral argument. The Lesbian Action Group is content for a time limit to be imposed, which can be managed however the principal parties see fit (e.g. through a limit imposed by the Court, or a hearing timetable, or the like). The Lesbian Action Group undertakes to consult with the legal representatives of both parties for this purpose in the running of the preparation of the appeal.

15 MAY 2025

LEIGH HOWARD
MEGAN BLAKE