

20 August 2023

Professor Anna Cody
Sex Discrimination Commissioner (appointed)
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

By email to: legal@humanrights.gov.au

Dear Professor Cody,

Re: Section 44 Application for Exemption by ‘Lesbian Action Group’ of Melbourne

Rainbow Rights Watch ABN 18 623 114 152 welcomes the opportunity to make submissions in relation to an application from ‘Lesbian Action Group of Melbourne’ (the “**Application**”) for a Section 44 temporary exemption to the *Sex Discrimination Act 1984* (Cth) (the “**Act**”). For the reasons set out below, we consider that the application for exemption is misconceived, lacking in substance, unnecessary and unreasonable, and should be refused.

About Us:

Rainbow Rights Watch is an incorporated not-for-profit organisation dedicated to reducing the unconscionable rates of prejudice, discrimination, health disparities, sexual victimisation, and socio-economic inequality experienced by transgender, intersex, and gender diverse Australians. Our members come from diverse backgrounds and include a variety of gender identities, sexes, nationalities, sexual orientations, and identities.

Today, transgender Australians, and especially transgender children, are amongst the most vulnerable and marginalised members of society:

- A peer-reviewed national [study](#) in 2017 by Beyond Blue, Telethon Kids Institute, and the University of Western Australia examining the welfare of Australian transgender children and adolescents found that 89% experienced peer rejection, 74% experienced bullying, 22% had been kicked out of home by intolerant parents or otherwise experienced homelessness, and 48% had attempted suicide;
- A peer-reviewed 2021 [study](#) by Melbourne University found that 68% of adult transgender Australians had experienced verbal assault and 23% had experienced physical assault. The report found that unemployment amongst transgender Australians was more than 3 times the national average rate. 35% of respondents reported experiencing discrimination in the workplace. The report also found that 64% of adult transgender Australians had experienced self-harm and 43% had attempted suicide;

- A peer-reviewed 2019 [study](#) by the Kirby Institute at UNSW found that 53% of transgender Australians had experienced sexual assault, rape, or sexual coercion (more than 4x the rate of the general population);;
- A peer-reviewed 2014 [study](#) by Beyond Blue, ARCSHS, and the University of New England found that 66% of transgender Australians had experienced verbal abuse on the basis of their transgender status, and 21% had experienced physical abuse. A further 31% had experienced other forms of abuse. Over 90% of transgender Australians who experienced physical abuse had thought about suicide;
- A 2021 inter-agency [report](#) of UN Women, UN Aids, and the UNDP found that the HIV risk amongst transgender women is 13x higher than the general population

For these reasons, the protections provided in Section 5B and 5C of the Act play a crucial role in reducing the scourge of discrimination and social division which adversely and disproportionately affects transgender and intersex Australians today. We submit that the Commission should consider carefully the merits of any application to discriminate against a person on the basis of gender identity or intersex status. Some of our transgender members who identify as lesbians have expressed interest in participating in these types of events of cultural significance to the lesbian community, and may be lawfully precluded from doing so if the exemption were to be granted. We are not aware of any equivalent and alternative event that would be made available to our members by the Applicant.

The Applicant's Standing

The Application purports to fall within the scope of powers granted to the Australian Human Rights Commission under Section 44(1) of the Act, which provides:

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.

The provision makes clear that the Commission, acting *intra vires*, may grant an exemption to a “person”. It is trite to say that the term “person” has an expansive meaning that includes both corporeal and corporate persons. Section 2C(1) of the *Acts Interpretation Act 1901* (Cth) establishes that, in any Commonwealth Act, “expressions used to denote persons generally (such as ‘person’...) include a body polity or body corporate as well as an individual.”

To establish proper standing to bring an application within the ambit of Section 44 of the Act, the Applicant would need to show that it is a “person”, either corporeal or corporate. The application does not appear to

be brought by a corporeal person or a body polity. The Application also does not establish that the Applicant is a corporation or voluntary association. The letter of Application does not contain any ABN or ACN, the name of a registered company, or even the name of a duly appointed signatory or company officer.

Our searches of the ASIC corporations register could not identify any registered corporation (or registered partnership) under the name “Lesbian Action Group, or “Lesbian Action Group of Melbourne” within Australia. We could not find any website for the Lesbian Action Group. We have been entirely unable to identify any evidence of any legal entity at all under the name ‘Lesbian Action Group’ that would be capable of bringing a Section 44 Application.

The Applicant is required to establish its standing to bring an application. It has failed to establish that it is a proper legal entity capable of legal action in its corporate name and style. Accordingly, the granting of any exemption would fall outside the Section 44 jurisdiction of the Commission, and must be refused.

The Exemption Sought

The Application, as drafted, fails to enumerate which provisions of the *Sex Discrimination Act 1984* (Cth) the Applicant seeks to be temporarily exempted from and why an exemption is necessary (ie why the proposed conduct is otherwise proscribed). That alone is sufficient reason to refuse the application.

However, absent cogent, intelligible submissions from the Applicant, the Commission may attempt to infer the nature of the exemption sought from the Application’s contents. Some aspects of the proposed exemption are obvious from the Application’s contents. For example, the Commission may reasonably infer that the Applicant seeks to be exempted from Section 5B of the Act which prohibits discrimination on the ground of sexual orientation, given that the event purports to be directed to the exclusive benefit of ‘lesbians’.

However, other elements of the Application are not adequately expressed as to be actionable by the Commission. For example, “born-woman” is not a prescribed attribute pursuant to the Act. The term is wholly ambiguous, medically and socially problematic, and imprecise. There is no medical or biological characteristic at-birth that applies universally to all females. The issue of what constitutes a ‘born-woman’ raises the following questions which cannot be resolved sufficiently to allow the Commission to proceed to consider the Application further:

- The event purports to be for the benefit of lesbians. Is the Applicant seeking an exemption from Section 5? Does it propose to discriminate against transgender, intersex, and gender diverse individuals who were medically assigned female at birth, but are legally re-assigned male for the purposes of Section 5, and identify as lesbians?
- Is the Applicant seeking exemption from Section 5C which protects intersex individuals with mixed sex characteristics who might NOT be assigned any sex at all at birth.
- How would the Applicant propose to determine whether a person is a ‘born-woman’? Does the Applicant seek an exemption to exclude a person whose birth was registered by ‘certificate of registration’ in Tasmania absent any sex assignment designation altogether?

- How does the Applicant propose to treat a person whose birth certificate contains an uncorrected error, or a person who holds numerous birth certificates with conflicting sex markers?
- If the Applicant does not intend to determine eligibility for 'born-woman' status by reference to medico-legal sex assignment (which is no longer a universal act) how does it intend to determine eligibility? How would it propose to treat a woman born with female reproductive organs and X0, XYY, XXY or XXYY chromosomes? How would it propose to treat a person born with no reproductive organs who has never undergone a karyotype test?

In the absence of these specific details, and given the Act is entirely silent on the nature of a person's "born-woman" status, the Commission is unlikely to be able to resolve the precise nature of the exemptions sought, nor whether they are necessary. Accordingly, the Application is misconceived and lacking in substance, and should be dismissed.

The Applicant's Submissions

The Applicant says that its application should be granted "based on the precedence [sic] in 2003" which the Applicant says was an exemption granted by the Victorian Civil and Administrative Tribunal and "ratified" by the Victorian Government Gazette. The Applicant appears to be making submissions likely to lead the Commission into error. We submit:

- Firstly, that the Commission is not bound by any 'precedent' from any decision of the Victorian Civil and Administrative Tribunal. The Applicant fails to understand the basic doctrines of *ratio decidendi*;
- Secondly, that the 2003 decision referred to in the Application (VCAT application A296/2003 - no medium neutral citation published) was brought under an entirely different legislative instrument (and legislative head of power). The provisions are not statutorily equivalent, there were material differences of fact and law, and the matter is not instructive of the merits of the present Application before the Commission.
- Thirdly, the Victorian Government Gazette does not have any power to "ratify" the decision of a State Tribunal. Ratification is a legal term of art connoting a principal's legal confirmation of an act of its agent. The Victorian Civil and Administrative Tribunal is not an agent of the Victorian Government Gazette. The Victorian Civil and Administrative Tribunal is a plenary legal principal exercising its original jurisdiction under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). It is misconceived to say that the Victorian Government Gazette "ratified" the exemption.
- Fourthly, the Applicant omits material information in relation to the trajectory of that prior application. The exemption was granted on 10 September, 2003. On 30 September, 2003, the exemption was revoked pursuant to Section 83 by Deputy President Urquhart of the Victorian Civil and Administrative Tribunal when it came to light that the applicant had withheld material information from the Tribunal. This is more than a mere 'technicality' as submitted by the Applicant. It cuts directly to the integrity of the Application itself. To assist the Commission, copies of both orders are attached in Appendix A. Full reasons for the decision do not appear to have been published in any major law report or case database, but may be accessible upon request from the Tribunal's registry.

'Reasonableness' and Intersectionality of Protected Characteristics

The Commission is required to evaluate the reasonableness of the Application. It must consider the nature and extent of the discriminatory effect against the reasons advanced by the Applicant in favour of an exemption.

Rainbow Rights Watch submits that same-sex attracted persons of all genders have historically suffered disadvantage, discrimination, the criminalisation of their sexual activity, harassment and abuse. The Australian community has evolved considerably and is today largely accepting of the experience of gay, lesbian and bisexual members of society. Transgender and intersex members of the community have also experienced marginalisation, discrimination, criminalisation, disadvantage, harassment and abuse on the basis of their gender identity.

While addressing a special need or previous disadvantage experienced by lesbians is a relevant consideration in an application for exemption, other aspects of the objects and purposes of the Act “pull in a different direction”¹. This tension between different protected characteristics disproportionately affects individuals who live at the intersection of multiple protected characteristics, such as transgender lesbians, intersex lesbians, disabled lesbians, transgender women of colour, elderly gay people, and intersex Aboriginal Australians.

Unfortunately, the Applicant’s submissions fail to understand how multiple marginalised characteristics and identities compound to amplify experiences of discrimination. The Application appears to be directed towards the exclusion of, and lawful discrimination against, lesbians who are also intersex and transgender. The Application would be equally repugnant if it sought to exclude lesbians who are disabled, Aboriginal, or elderly - all of whom likely experience compounding discrimination on the basis of their multiple intersecting characteristics. Sadly, the Application reflects a disturbing and out-dated form of feminist analysis that seeks to treat each axis of oppression in isolation, without regard for the heightened discrimination and oppression of individuals who live at the intersection of multiple marginalised characteristics - in this case, sexual orientation, gender identity, and intersex status.

Further, the Applicant provides no evidence justifying any bona fide need to exclude lesbians who are transgender or intersex (or disabled, or Aboriginal, or young or elderly) from its events. The Application is not supported by any evidence that cisgender and endosex lesbians experience substantial disadvantages compared to lesbians who are transgender or intersex. The existence of other events directed to the benefit of transgender or intersex (or disabled) Australians, does not, of itself, justify the legal exclusion of people who are transgender or intersex (or disabled) who are also lesbian from lesbian events. Similar issues were traversed recently in the matter of *Jessica Hoyle and LGB Alliance Australia (Review of Refusal of an Application for Exemption)* [2022] TASCAT 142. Although not authoritative, those proceedings are highly instructive of the issues raised in this Application. The matter concerned an application for a Section 56 exemption to the *Anti-Discrimination Act 1998 (Tas)* to exclude lesbians who are transgender from an event promoted for lesbians. Equal Opportunity Tasmania refused the application, finding that the Application ran counter to the purpose and objects of the *Anti-Discrimination Act 1998 (Tas)*. The applicant subsequently sought a merits review by the Tasmanian Civil and Administrative Tribunal. Member Cuthbertson SC affirmed the Commissioner’s decision to refuse the application for exemption, saying in relevant part [94] :

¹ See *Jessica Hoyle and LGB Alliance Australia (Review of Refusal of an Application for Exemption)* [2022] TASCAT 142 [93].

“Further, the applicants have not demonstrated that the provisions of the Act prohibiting discrimination or prohibited conduct on the basis of gender identity would be harsh or burdensome in their particular circumstances. While the applicants may not wish to comply with the Act and find aspects of its application to transgender and transsexual women irksome, particularly in the context of the event they would like to hold, that is not a sufficient justification for granting the exemption”.

The Applicant has failed to establish that the exemption sought is desirable and necessary.

Non-Discrimination Objects of the Act

The Commission must also take into account the manner and degree to which the proposed activities engage the purpose and objects of the Act. Section 3 of the Act provides that its objects include:

“(b) to eliminate, so far as possible, discrimination against persons on the ground of... gender identity... intersex status.. In the areas of work, accommodation, education, the provisions of good and services...”

Sections 5B and 5C of the Act were introduced by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). The Explanatory Memorandum accompanying the Bill makes clear the objective of the operating provisions:

“There is substantial evidence demonstrating that discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) people occurs in the community. This discrimination occurs in a range of areas of public life, including work, accommodation, and the provision of goods and services. This range of conduct is highly detrimental to LGBTI people, manifesting in barriers to how they carry out their day-to-day lives. The purpose of the Bill is to foster a more inclusive society by prohibiting unlawful discrimination against LGBTI people and promoting attitudinal change in Australia. It proposes to prohibit discrimination in all areas of life currently covered by the SDA...”

An exemption would not advance the objects of the act. It would likely cause increased discrimination against transgender and intersex Australians, increase barriers to the full participation of transgender and intersex women, and undermine the provisions’ stated purpose of “fostering a more inclusive society”. Moreover, it would establish a dangerous precedent which would pave the way for future applications to legally discriminate against lesbians on the grounds of their race, age, or disability. Such an exemption would be deeply antithetical to the objectives of the Act.

The Applicant has not established that it would be reasonable, in the whole of the circumstances, to grant an exemption. Accordingly the Application should be refused.

Duration of Proposed Exemption

The Commission is required to consider the proportionality of the duration of the proposed exemption. Exemptions (as opposed to more permanent statutory ‘exceptions’) are intended to be temporary. Section 44(3)(c) empowers the Commission to grant an exemption for a “specific period not exceeding 5 years”.

The description of the proposed activities in the Application relate to a once-off event on Sunday 15 October 2023. The proposed activities include “reading, speaking, music, singing, dancing, food and refreshments” at a venue in Melbourne inner city. Despite only providing a description of a single event in the near future, the Applicant seeks a much broader 5-year temporary exemption and says that once it is given “an Exemption to hold our own events, we won’t want to stop at one.” The Applicant makes little to no effort to minimise the scope (location, time period, frequency) of the harmful effects of discriminating against transgender and intersex Australians. Instead it seeks the broadest scope of discrimination permissible within the jurisdictional limits of the Commission.

Moreover, the Application does not offer any clarity about the frequency, dates, location, and nature of these other future “events”. Nor does it offer any clarity about why it might be necessary to continue discriminating against transgender and intersex people for such a sustained period of time, given the temporary nature of exemptions.

Rainbow Rights Watch submits that the the proposed duration is not proportional to the described activities, and the Commission should not grant a vague exemption for the Applicant to hold an indeterminate number of events, at indeterminate locations and times, over a very long period of time, which discriminate against transgender and intersex Australians. The Application is vague, imprecise, oppressive, and deficit in detail about the continuing activities of the Respondent. The Application should be refused on this basis.

Other Objects of the Act

Beyond offending the objects of the Act directed to (a) reducing discrimination against, (b) increasing inclusion of, and (c) lowering barriers to the participation of, transgender and intersex Australians in society; this Application also offends objects of the Act dealing with harassment on the grounds of sex.

Section 3(c) establishes that a further objective of the Act is:

“To eliminate, as far as possible, discrimination involving sexual harassment, and discrimination involving harassment on the ground of sex, in the workplace, in educational institutions, and in other areas of public activity...”

“Harassment on the ground of sex” is established in Section 28AA of the Act:

(1) For the purposes of this Act, a person harasses another person (the person harassed) on the ground of sex if:

(a) by reason of:

(i) the sex of the person harassed; or

(ii) a characteristic that appertains generally to persons of the sex of the person harassed; or

(iii) a characteristic that is generally imputed to persons of the sex of the person harassed;

the person engages in unwelcome conduct of a demeaning nature in relation to the person harassed; and

(b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The exemption sought in this matter would likely open up the possibility for the Applicants to seek to confirm a person's sex at birth (however so determined; which remains unclear) to establish that person's eligibility to participate in the activities. The Applicants could also seek to clarify the integrity or medical basis of bodily "characteristics generally imputed" to females. This could not be done without intrusive questioning (or worse, bodily inspections) undermining a person's right to privacy concerning information about their transgender or intersex status. In *Peel Hotel Ltd (Anti-Discrimination Exemption)* [2010] VCAT 2005, Senior Member McKenzie remarked, *obiter*, that:

"if the proposal had been that the applicant would determine whether or not to refuse or restrict entry to the hotel by asking prospective patrons whether or not they identified as male homosexual, this would have been ... a very serious interference of a human right."

A reasonable person would anticipate that transgender and intersex people (indeed many cisgender and endosex people too) would be "offended, humiliated, or intimidated" about unwelcome questions about their body and history of medico-legal sex assignment and/or reassignment.

The granting of an exemption is likely to give rise to such forms of conduct, which are antithetical to the objects given in Section 3(c) relating to 'harassment on the ground of sex'.

Similar issues were also traversed in *Jessica Hoyle and LGB Alliance Australia (Review of Refusal of an Application for Exemption)* [2022] TASCAT 142 [93]. There, the Commissioner noted [15] that

"the exemption application made in this case went further than asking a person's sexual orientation, but would require people to provide intimate information about their body to gain access to the proposed events."

And [15], that:

"An exemption should not be granted which seeks to control the types of bodies that are permitted into public spaces in accordance with the sexual preferences of a person, or group of people, who are hosting an event. As a consequence, the Commissioner considered the risk of unlawful conduct occurring under the exemption as sought to be significant. She considered an exemption should not be granted in circumstances where the conduct permitted could foreseeably be in contradiction with the principles of the Act."

The Tribunal affirmed [78-79] the decision of the Commissioner to refuse the application:

Thirdly, the application and supporting information does not indicate how it is proposed to give effect to the exemption if granted to refuse or restrict entry to the event. Reference has already been made in this decision to Peel Hotel. That case, however, traversed considerable evidence

as to how the venue had gone about managing the attendance of people seeking to enter the venue who might adversely alter the character of it as one primarily for gay male patrons. The Tribunal in that case heard evidence that the staff would not ask people whether they identified as gay males and were instructed to explain the nature of the venue to protect prospective patrons as a primarily gay male venue and then leave it to the choice of the person or group whether they wish or do not wish to enter.”

“The Commissioner had identified that the exemption sought in this case would open up the possibility for the applicants to “seek to confirm a person’s biological sex”. The Commissioner could not see how this could be done without intrusive questioning and undermining a person’s right to privacy. The applicants submit that this reasoning was “unsupportable as a matter of fact”. No further explanation was provided for that submission. As noted above, the applicants had asserted in their application for a review that “there would be no need to undermine a person’s right to privacy or intrusive questioning as we can tell the difference between males and females”. This is not further explained.”

The present Application raises materially the same issues. The Applicant does not indicate how it would propose to give effect to the exemption, if granted, without asking intrusive questions that undermine the objects of the Act directed at preventing “harassment on the grounds of sex”.

Other Considerations

In its supplementary submissions, the Applicant further expounds on its concerns about transgender and intersex women, which include:

“Not wanting or being able to discuss personal health-related issues in front of people who are not lesbians born female...”

“Only wanting to share personal stories about domestic violence between lesbians born female...”

“Being too frightened to go into a hospital or nursing home because our request for a female born medical person won’t be met...”

“Because we need female-born support after being raped.”

These submissions are unsettling and are not supported by empirical research or compelling evidence. There is no evidence that the *Sex Discrimination Act 1984* (Cth) compels the Applicants to “discuss personal health related issues” with transgender people, intersex people, or anyone at all.

The Applicant’s submissions further imply that its members are “frightened” of receiving medical treatment from a person who may be transgender or intersex. There is no cogent evidence that transgender and intersex people are incapable as medical practitioners or constitute a specific risk to the health or welfare of patients who are not transgender or intersex. The Applicant’s submissions are reminiscent of an era when people of majority races were “frightened” or upset about receiving medical treatment from a person of a minority race.

The Applicant's submissions on services for survivors, when reduced to their logical nub, argue for the exclusion of women who are transgender from domestic violence shelters, rape crisis centres, and women's shelters. That is particularly unfortunate in circumstances where women who are transgender are four times more likely to experience rape, sexual assault, or sexual coercion than the general population.

We submit that access to survivor services should be provided to women on the basis of need, not biological attributes such as skin tone, intersex characteristics, or transgender history. In 2018, the US *National Task Force to End Sexual and Domestic Violence*, a collective of more than 200 women's rights groups, rape crisis counselling centres, and domestic violence shelters, published a consensus statement opposing discrimination targeted at some women on the basis of their transgender history, saying, in relevant part:

"States across the country have introduced harmful [initiatives] that seek to restrict transgender people's access to genderspecific facilities... Those who are pushing these proposals have claimed that these proposals are necessary for public safety and to prevent sexual violence against women and children. As rape crisis centers, shelters, and other service providers who work each and every day to meet the needs of all survivors and reduce sexual assault and domestic violence throughout society, we speak from experience and expertise when we state that these claims are false..."

"It is natural to be concerned about safety and privacy. As advocates and survivors, we know the threat of sexual assault is real and pervasive. Every time we hear of someone who speaks of their assault or abuse, we feel their pain. The safety fears that many have, especially those who are survivors, are not baseless or irrational, nor should they be dismissed. However, discriminating against transgender people does nothing to decrease the risk of sexual assault."

"Discriminating against transgender people does not give anyone more control over their body or security. Those who perpetuate falsehoods about transgender people and nondiscrimination laws are putting transgender people in harm's way and making no one safer. We cannot stand by while the needs of survivors, both those who are transgender and those who are not, are obscured in order to push a political agenda that does nothing to serve and protect victims and potential victims. We will only accomplish our goal of ending sexual violence by treating all people, including those who are transgender, with fairness and respect."

The overwhelming majority of women's rights groups in Australia have, for a long time, supported the full and equal participation of women who are transgender in all aspects of society. On 20 March, 2023, UN Women Australia, the peak body for the advancement of women's rights in Australia, issued a public statement reaffirming the importance of including transgender and intersex women:

"Gender equality can only be achieved if all women and girls are included. This means trans women too. UN Women continues to stand up for LGBTQIA+ rights, in recognition, respect and celebration of the diversity and resilience of our communities worldwide"

A group of more than 50 women's rights groups in Australia published a statement in 2022 making expressly clear that the full and equal inclusion of transgender and intersex women does not infringe on the rights of women who are cisgender and endosex, saying:

“Stoking hostility, uncertainty and misunderstanding harms trans women and children, preventing their full contribution and participation in our communities. It moves us away from a community that values inclusion, dignity and respect; a community where everyone can feel and be safe. As organisations advocating for gender equity and women’s safety, we denounce this attempt at division. We are united in our support of inclusion, dignity and respect for all women.”

Signatories to the statement included Domestic Violence NSW, Women’s Electoral Lobby, Full Stop Australia, End Rape on Campus Australia, Ending Violence Against Women Queensland, Fair Agenda, YWCA Australia, Equality Australia, Transcend Australia, Plan International Australia, Siren: A women in sport collective, Human Rights Law Centre, National Council of Jewish Women Australia, Women with Disabilities Australia, Older Women’s Network NSW, and Harmony Alliance.

The Application demonstrates a desire to discriminate against transgender and intersex women in many other facets of life beyond the one event described in the Application. This is disheartening in light of Rainbow Rights Watch’s ongoing work to reduce and eliminate discrimination against transgender and intersex Australians. It is also regrettable in light of the empirical, peer reviewed evidence about the unconscionable rates of prejudice, violence, sexual victimisation, socio-economic inequality, and health disparities experienced by transgender Australians (see above).

Conclusions

For the following reasons, the Application for a Section 44 exemption should be refused:

1. The Applicant has not established standing to bring an application before the Commission;
2. The Application contains inadequate detail about which provisions the Applicant seeks to be exempted from;
3. The term “born-woman” is vague, unspecific, and cannot be applied to the framework of the Act
4. The duration of the proposed exemption is oppressive and unnecessary;
5. The date, location, and nature for unspecified future events is too vague and indeterminate to allow the Commission to grant the application;
6. The Applicant has failed to establish a bona fide need to exclude transgender and intersex women;
7. The Application is incongruent with the objects of the Act directed at eliminating discrimination on the basis of gender identity or intersex status;
8. An exemption should not be granted which seeks to control the types of bodies that are permitted into public spaces in accordance with the sexual preferences of a person; and
9. The Application is incongruent with the objects of the Act directed at eliminating harassment on the grounds of sex

The Application should be refused.

We also note that the Victorian Pride Centre - the proposed venue for the activities - is private rather than Commonwealth property. State Anti-Discrimination provisions protecting transgender and intersex Australians may concurrently affect the proposed event. For the event to be lawful, the Applicant may need additional Section 89 exemptions from the *Equal Opportunity Act 2010* (Vic), which we would also oppose.

We may be contacted at contactus@rainbowrightswatch.org.au at any time to clarify any aspect of our submissions. Thank you for considering these submissions.

Yours Sincerely,

Claire Southey
Executive Director
Rainbow Rights Watch

APPENDIX A:

Supplementary documents relating to VCAT
application A296/2003 By Ms Carol Ann, Ms Anah
Holland-Moore, and Ms Jean Taylor

EXEMPTION

Application No. A296/2003

The Victorian Civil and Administrative Tribunal has considered an application pursuant to Section 83 of the **Equal Opportunity Act 1995**, by Ms Carol Ann, Ms Anah Holland-Moore and Ms Jean Taylor. The application for exemption is to enable the applicants to organise The National Lesbian Festival and Conference 2004 (also known as Lesfest 2004) — to be held at Dean, Victoria, from 7–14 January 2004 — for lesbians born female only.

Upon reading the material submitted in support of the application and upon hearing submissions from Ms Ann and Ms Taylor, the Tribunal is satisfied that it is appropriate to grant an exemption on the basis of three attributes (sex, sexual orientation and gender identity) from sections 13, 15, 49 and 195 of the Act, to enable the applicants to engage in exempt conduct, such as:

- advertising that Lesfest 2004 is for lesbians born female only;
- excluding from attending the live-in conference those who are not lesbians born female only; and
- employing lesbians to provide any necessary services for Lesfest 2004, such as catering.

In granting this exemption the Tribunal noted:

- that the applicants received a mandate from the 2002 Festival (held in Perth) to organise Lesfest 2004 for female born lesbians only;
- that the applicants expect about 150-200 people to attend Lesfest 2004 at which they will explore issues of special relevance to them through forums, workshops and entertainment;
- that there are many festivals and conferences held for the broader gay community; and
- that by being for lesbians born female only, Lesfest 2004 will provide a sense of security and well-being for those attending and participating in the festival program.

The Tribunal hereby grants an exemption to the applicants from the operation of sections 13, 15, 49 and 195 of the **Equal Opportunity Act 1995** to enable the applicants to advertise and organise Lesfest 2004 for lesbian born females only.

This exemption is to remain in force from the day on which notice of the exemption is published in the Government Gazette until 11 March 2004.

Dated 3 September 2003

Dr G. P. LYONS
Senior Member

Department of Treasury and Finance

SALE OF CROWN LAND
BY PUBLIC AUCTION

Date of Auction: 4 October 2003 at 11.00 a.m. on site.

Reference: 2002/02091.

Address of Property: Corner of Pink & Primrose Streets, Violet Town.

Crown Description: Crown Allotment 2A, Section 17, Township of Violet Town.

Terms of Sale: Deposit 10%, Balance 60 days.

Area: 3794m².

Officer Co-ordinating Sale: Garry McKenzie, Garry McKenzie & Associates Pty Ltd, 1st Floor, City Centre Arcade, 315 Sturt Street, Ballarat, Vic. 3350.

Selling Agent: Brian J. Howe, Estate Agent, 106 Ramage Road, Violet Town, Vic. 3669.

JOHN LENDERS MP
Minister for Finance

Adoption Act 1984

SECTION 21

Application for Approval as an
Adoption Agency

Under the provisions of Section 10(2) of the **Community Services Act 1970** I have been assigned the functions and powers of the Secretary of the Department of Human Services under Section 21 of the **Adoption Act 1984**.

The following welfare organisation has applied for approval as an adoption agency.

Uniting Care Connections, 274 High Street, Windsor 3181.

Principal Officer: Jane Broadhead.

Dated 8 September 2003

GILL CALLISTER
Director
Child Protection and Juvenile Justice

REVOCATION OF EXEMPTION

Application No. A296/2003

The Victorian Civil and Administrative Tribunal has considered an application pursuant to Section 83 of the **Equal Opportunity Act 1995** by Australian Woman Network for the revocation of exemption number A296/2003 granted by the Tribunal on 3 September 2003 to enable the applicants to organise The National Lesbian Festival and Conference 2004 (also known as Lesfest 2004) — to be held at Dean, Victoria, from 7–14 January 2004 — for lesbians born female only.

Upon reading the material submitted in support of the application for revocation and upon hearing submissions from Ms. Gurney for the applicant for revocation and from Ms. Jean Taylor, Ms. Carole Ann and Ms. Anah Holland-Moore for the grantee of the exemption and for the Reasons for Decision given by the Tribunal on 30 September 2003, the Tribunal is satisfied that it is appropriate to revoke the exemption.

The revocation takes effect on and from 30 December 2003.

Dated 30 September 2003

Ms M. URQUHART
Deputy President

Adoption Act 1984

I wish to withdraw the notice from Gazette No. G13 published on 6 April 1995. Specifically, in reference to gazetted worker, Michelle Van Doorn, who has resigned from the Adoption and Permanent Care Team, Department of Human Services.

JOHN LEATHERLAND
Regional Director
Eastern Metropolitan Region

Electricity Industry Act 2000
NOTIFICATION OF VARIATION
TO LICENCE

The Essential Services Commission gives notice under section 30 of the **Electricity Industry Act 2000** that it has, pursuant to section 29(1)(b) of the Act, varied the electricity generation licence of the incorporated partnership trading as Hazelwood Power to delete and vary clauses following the revocation of the Hazelwood Power Corporation generation

licence by the Commission at its meeting of 25 June 2003.

A copy of the licence is available on the Commission's website located at <http://www.esc.vic.gov.au> or a copy can be obtained by calling Ms Julie Schmidt on (03) 9651 0231.

Dated 1 October 2003

JOHN C. TAMBLYN
Chairperson

Evidence Act 1958

DECLARATION PURSUANT TO
SECTION 21 I (2)

I, Penny Armytage, Secretary, Department of Justice, pursuant to Section 21 I (2) of the **Evidence Act 1958**, declare the following persons to be Family Mediators.

- Susan Whitney Gorton;
- Elizabeth Mathew.

Dated 3 October 2003

PENNY ARMYTAGE
Secretary

Health Services Act 1988

DECLARATION OF APPROVED QUALITY
ASSURANCE BODY

I declare the Maintenance of Professional Standards Committee, established by the Australian and New Zealand College of Anaesthetists, is an approved quality assurance body under section 139 for the purposes of part 7 of the **Health Services Act 1988**.

Dated 23 September 2003

BRONWYN PIKE
Minister for Health



Heritage
VICTORIA

Heritage Act 1995

NOTICE OF REGISTRATION

As Executive Director for the purpose of the **Heritage Act 1995**, I give notice under section 46 that the Victorian Heritage Register is amended by including the Heritage Register Number 2031 in the category described as a Heritage place:

MEDIA AND TRANSGENDER VICTORIANS

Through the 1990s and into the early 2000s, media coverage of transgender issues broadly fell into three categories. The first were stories that covered political issues of the day, such as the debates over the anti-discrimination legislation. Generally speaking, this coverage across the mainstream press tended to be objective, notwithstanding some letters to the editor or opinion pieces that expressed colourful, transphobic views.

The second type of stories, when there were not any major legal or political issues, sensationalised transgender people to shock, mock or deride. Sociologist Dave King analysed British newspaper coverage of transgender people from 1950-83 and found that to be newsworthy, transgender people had to do something new and different. Through the sensational language of the 'sex change', the press "introduced its readership to (amongst others) the sex change cop, the sex change bride, the sex change sailor, the sex change prisoner, the sex change burglar, the sex change vicar, sex change surgeons, sex change conferences, sex change tennis."⁶⁴

The *Herald Sun* was especially prone to such stories, with a classic example still remembered by a few transgender people being the July 2003 cover story "Sex Swap Cop." The story reported that Victoria Police had received an application from its first openly transgender candidate. The headline the following day, "Revolt on Swap Cop," reported that a survey of readers – including police officers – revealed mass opposition to permitting transgender people to join the force.⁶⁵

Victoria Police, the state government, premier and Equal Opportunity Commission Victoria all stood by the anti-discrimination protections (though the then-opposition leader expressed his disapproval over permitting the transgender cop). The following year, the *Herald Sun* continued to refer to the transgender police officer as the 'sex-swap cop' when reporting her graduation from the police academy.⁶⁶

The third type of story was the more respectful transgender human-interest story. These were more common in *The Age* or local newspapers, and they, too, needed to have an original hook. In June 2009, *The Age* ran a story about Will – the first openly trans man to play competitive football in the Victorian Country Football League. Will had the support of the league's chief executive and the encouragement of Collingwood Magpies captain Nathan Buckley, who told Will, "Don't be afraid to be yourself."

Will was quoted as saying "I thought, well, if fat blokes who are in their 40s are playing football, surely I can. The only thing stopping me is other people's prejudice."⁶⁷ There were no questions about fairness or sensationalised reports, as would become common in the 2010s when reporting on trans people (or, more often, trans women) in sport.

The most comprehensive coverage of transgender issues was in the LGBTIQ+ press. There had always been inclusion of transgender stories, and from the 1990s the most comprehensive Victorian publications were the weekly or fortnightly *Melbourne Star Observer/Melbourne Star* (1985-2006), *Brother Sister* (1992-2000) and *MCV* (2000-2018).⁶⁸ There were also a plethora of national magazines, smaller newsletters and a few transgender specific publications like Seahorse's monthly newsletter and the Sydney Gender Centre's monthly magazine *Polare*.

These publications all printed opinion pieces from activists and, in addition to reporting on the legislative debates, covered some of the tensions between the transgender and gay and lesbian communities.

In 2003, for instance, one conflict between transgender women and radical lesbians went to the Victorian Civil Affairs Tribunal (VCAT). The organisers of the 2004 National Lesbian Festival and Conference (Lesfest), to be held in Daylesford, successfully applied to VCAT for an exemption from the Equal Opportunity Act to restrict the event for "lesbians born female only." They argued that this was a matter of security for cisgender lesbians, many of whom had been abused by men. The Lesfest organisers purported not to be against transgender people, arguing they could celebrate their transgender identities in other forums.⁶⁹

Not surprisingly, the transgender community erupted in opposition, affirming trans women's identities as women. While there was some coverage in the mainstream press, this story became front-page news in the LGBTIQ+ press and there was deeper engagement with the perspectives of both the lesbian organisers and trans people.

Most letters published in the LGBTIQ+ press supported the trans women, with one arguing

"WHEN AN OPPRESSED GROUP BECOMES AN OPPRESSOR GROUP, SOMETHING IS FUNDAMENTALLY WRONG IN A SO-CALLED DEMOCRATIC SOCIETY"

and another asserting

"THAT WE AS A COMMUNITY CONTINUE TO MAKE TRANSGENDER AND INTERSEX WOMEN FEEL UNWELCOME (OR IN THIS CASE, ACTIVELY EXCLUDE THEM) IS TO OUR GREAT SHAME."⁷⁰

Shannon Dowd wrote an opinion piece in the magazine *Lesbiana* in which she argued: "In putting on a festival that seems encouraging, empowering and energising for all the women involved, it seems a real shame that this group of [transgender] women are prohibited from attending; almost as if the organisers of Les fest perceive transgender women to be some sort of a threat to other lesbians. TG lesbians self identify as lesbian women and should be treated as such."⁷¹

Within a fortnight, VCAT reversed its decision because the Lesfest organisers had not informed the tribunal about a complaint from The WOMAN Network's Karen Gurney. Gurney was reported as saying, "The strong support we received for our full acceptance as the women we are was particularly appreciated by people with transsexualism."⁷² By the 2010s women who challenged trans women's identities became popularly known as trans-exclusionary radical feminists (TERFs). Their influence in Victoria's lesbian and LGBTIQ+ communities has waned significantly, though still they hold sway in some organisations and in 2019 founded a new group called Victoria Women's Guild. Broadly speaking, though, TERF attitudes have not become part of the mainstream of Victoria's LGBTIQ+ community.