

# **LGB** ALLIANCE AUSTRALIA

81-83 Campbell Street  
Surry Hills, NSW 2010

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## LGB ALLIANCE AUSTRALIA RESPONSE TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION'S NOTICE OF PRELIMINARY VIEW ON APPLICATION FOR TEMPORARY EXEMPTION: LESBIAN ACTION GROUP

### *Introduction*

1. LGB Alliance Australia notes with concern the Australian Human Rights Commission's (**hereafter "the commission"**) notice of a preliminary view on an application for a temporary exemption (**hereafter "The CPV"**) by the Lesbian Action Group (**hereafter "LAG"**). The gravamen of the CPV holds that the word "lesbian" no longer means a same sex attracted adult human female and that granting an exemption to allow lesbian political assembly in the terms sought is not "appropriate" or "reasonable" because it involves the lesbians making "distinctions"<sup>1</sup> as between same sex attracted adult human females and others. We regard this as a remarkable and regressive position.
2. The CPV renders homosexual political assembly in public such as is proposed unlawful. We consider this to be a grave position for our minority communities and we urge the commission to fundamentally reconsider (i) the merits of this application according to law (ii) the degree to which the CPV contravenes basic public law principles of fairness and balance and (iii) the wider natural justice and human rights considerations of seriously curtailing public lesbian political and social assembly.
3. We consider it proper to set our observations against clear evidence from LAG that lesbian political and social assembly in public has been effectively outlawed for 20 years, a position which many might consider remarkable. The LAG originating application states that as of 2003 a predecessor organisation (emphasis added):

*"made the decision to **only organise and hold private lesbian meetings and gatherings** over these past 20 years to avoid any more challenges by the Transgender community which would have lead to **litigation** which we can ill afford. This has meant, because we have been unable to publicly advertise our lesbian gatherings as we had in the past, that these meetings and gatherings have been much smaller in numbers and we have very much regretted the ability to reach out to younger lesbians as we used to be able to do in the past."<sup>2</sup>*

The application goes onto state the following:

*"In fact, this current situation is very similar to the discrimination Lesbians faced in the 1950s and 1960s when they could be sacked from their jobs, refused accommodation and given*

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<sup>1</sup> CPV Paragraph 7.41

<sup>2</sup> LAG originating application, Page 4

*shock treatment and therefore only met in private to protect themselves. **Nowadays, Lesbians who publicly speak out about Lesbians rights are also sacked from their jobs, ridiculed and threatened with all kinds of abuse, a situation that is untenable and one we want to address with this application for an Exemption.***<sup>3</sup>

4. We consider that the LAG originating application sets out an extraordinary position in a Western democracy in 2023 which should be of serious concern to any human rights body charged with responsibility for protecting lesbians from discrimination. Moreover, the Commission appear to accept this evidence with the CVP reading as follows, *“The Commission acknowledges that lesbians in Australia have faced structural and entrenched discrimination, both historically and in the present day. The Commission agrees that it may be important and beneficial for lesbians to gather together as a community to celebrate their culture and discuss issues of special relevance to their community”*<sup>4</sup>. It is thus extremely difficult to reconcile that statement by the Commission with a CPV that renders the public gathering proposed unlawful.
5. Beyond the serious lesbian human rights concerns we raise, the CPV raises serious public law/natural justice issues in the following respects:
  - a. The CPV It fails to adequately identify and address the issue in the case
  - b. It adopts a definition of sex unknown to law
  - c. The commission’s duty to exercise statutory discretion in conformity with the subject matter, scope and purpose of the legislation fails to give due (or any) weight to the interests of lesbians
  - d. The CPV is unclear one way or the other as to whether it considers this a case in which acceding to the application would qualify as an exemption being “granted lightly” (contrary to the practice of the commission)
  - e. The CPV adopts an unreasonable and one-sided view in it’s consideration of the significance of International Lesbian Day
  - f. The CPV fails to give any reasons as to why it takes the view that it is unreasonable and inappropriate for lesbians to “make distinctions” as to attendance at an event
  - g. The commission requires the LAG to effectively set out a 5 year schedule of activities, in so doing, it unreasonably places an obligation on this small group so onerous that amounts to indirectly discriminating against it
  - h. It indulges in speculation as to how LAG might effectively organise and secure an event
6. We address each of these issues below.

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<sup>3</sup> LAG originating application, Page 8

<sup>4</sup> CPV Paragraph 7.43

*The CPV It fails to adequately identify and address the issue in the case*

7. There are two issues in this case, they are these:
  - a. Whether a gathering of lesbians in public, in and of itself, amounts to discrimination of persons outside the category of same-sex attracted adult human females given the good and services provision of s.22 of the SDA; and
  - b. If the answer to “A” is yes, whether the Commission should exercise its statutory discretion in light of the subject matter, scope and purpose of the SDA **in a case where all relevant identity characteristics are equally protected by the act**

The commission takes the approach that the answer to the first question is “yes” and goes onto answer the second without reference to the equal protection feature of this case.

8. We invite the commission to consider carefully whether the correct answer to the first question can possibly be in the affirmative. If this is the case in law, then any public single sex homosexual gathering such as is proposed is a *de facto* unlawful act. Further, by the logic of paragraph 7.41 of the CPV any gathering restricted to trans identified males would similarly be unlawful. This would represent a radical departure from basic freedom of assembly principles with the state, in effect, regulating the circumstances in which women and trans identified males may and may not gather in public.
9. With regard to the second question, namely “whether the Commission should exercise its statutory discretion in light of the subject matter, scope and purpose of the SDA in a case where all relevant identity characteristics are equally protected by the act”, we suggest this is a matter unresolved in the CPV. The CPV cites and recites evidence tending to suggest both groups suffer marginalisation<sup>5</sup> but then proceeds to prefer the submissions of one group over the other without establishing a basis for so doing beyond what is said at paragraph 7.21 to the effect that lesbian only events “make distinctions” such that granting an exemption would not be “appropriate and reasonable”. That is an opaque basis in a clear conflict of rights case and all parties are thus left unclear as how it is that the interests of one group have come to be preferred over the interests of another.

*The CPV adopts a definition of sex unknown to law*

10. The CPV makes reference to “women based on their cisgender or transgender experience<sup>6</sup>”. Section 4 of the SDA notably defines “gender identity” and “sexual orientation” but not the terms “man” or “woman”. The 2013 Australian Government Guidelines on the recognition of sex and gender say the following (emphasis added):

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<sup>5</sup> CPV Paragraphs 7.34 and 7.42 respectively

<sup>6</sup> CPV Paragraph 7.41

11. For the purposes of these Guidelines, sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex.

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13. Gender is part of a person's personal and social identity. It refers to the way a person feels, presents and is recognised within the community. A person's gender may be reflected in outward social markers, including their name, outward appearance, mannerisms and dress.

14. Although sex and gender are conceptually distinct, these terms are commonly used interchangeably, including in legislation

These guidelines are directed principally at the collection of data and public record keeping.

11. The Commission has recently interceded as amicus in the case of *Giggle v Tickle* submitting a brief arguing for a definition of sex such as present in the CPV<sup>7</sup>. Paragraph 18 reads as follows (emphasis added):

*"In summary, the Commissioner **submits** that the word "sex" is not a biological concept referring to whether a person at birth had male or female physical traits. Nor is it a binary concept, limited to the "male" or "female" sex."*

In taking this position in other proceedings and adopting precisely the same in the CPV the commission is applying a bias to its decision making. It is noteworthy that the amicus brief above is phrased a **submission** to the court, and the brief makes clear it is a submission that is opposed. The Commission is therefore in the invidious position of being a partisan litigant in one case (opposed by the defendant) but applying the same logic as judge and jury to this. This is fundamentally unfair. Elementary fairness in this case requires that the commission recognise that organisations such as ours and LAG fundamentally dispute the definition of sex being applied. It is a basic point of procedural fairness that in the absence of available law on the point, the tribunal take an impartial approach and is open to submissions based on the biological reality of sex, the language (such as terms unknown to statute like "cisgender"), logic and approach of the commission suggests real and problematic bias.

12. This definitional issue is central to the CPV. The logic of paragraph 7.41 is to say that lesbians gathering by definition is engaging in the practice of making "distinctions", subdividing the category of women such that an exemption would not be "appropriate and reasonable". That is a political judgment based on the competing political arguments around the definition of the word "woman". This is fundamentally unfair to the LAG who are, in effect, being told that the word "lesbian" has a meaning other than same sex attracted adult human female.

*The commission's duty to exercise statutory discretion in conformity with the subject matter, scope and purpose of the legislation fails to give due (or any) weight to the interests of lesbians*

13. It is unclear what weight, if any, the CPV gives to the submissions of LAG which chart a concerning development in public life, namely the disappearance of lesbian-only public events since 2003 for fear of litigation. The Commission will note that we supplemented that concern with general comments and reference to our own "Lost Lesbian Spaces" project which we summarised in these terms:

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<sup>7</sup> [https://www.fedcourt.gov.au/\\_\\_data/assets/pdf\\_file/0006/112299/Submission-of-the-Australian-Human-Rights-Commission.pdf](https://www.fedcourt.gov.au/__data/assets/pdf_file/0006/112299/Submission-of-the-Australian-Human-Rights-Commission.pdf)

*“Once, lesbians in Victoria had a thriving community, but over the past couple of decades it has all but disappeared. The ‘[Lost Lesbian Spaces](#)’ project of LGB Alliance Australia maps the lesbian events, venues and organised public groups that used to exist in Victoria – once, more than 100 – and compares them with what is available now: only two existing spaces or organisations are exclusively for lesbians.”*

14. It is difficult to overstate how drastic this change has been for our community or the effect it has had on members of it, and the Commission records a number of individual submissions in favour of the exemption that no doubt make the point that lesbians in 2023 in Australia are a community who report being driven from public political and social activity. We are bound to say that we would expect this to be a matter of great concern, perhaps even alarm for a human rights body. Many lesbians believe the human rights direction of progress is now backwards. We would expect that to be taken very seriously and for the commission in the CPV to do more than simply record the marginalisation of lesbians in the past tense<sup>8</sup>.

*The CPV adopts an unreasonable and one-sided view in its consideration of the significance of International Lesbian Day*

15. We are concerned that areas of the CPV suggest a bias considering only the views of those opposed to the exemption requested. The relevant text of the CPV reads as follows (emphasis added):

*“The Commission has considered the nature of the exemption sought in this Application. The Lesbian Action Group seeks an exemption to hold an event to celebrate International Lesbian Day but to exclude **same-sex attracted women who are transgender, bisexual and queer for whom that celebration may be particularly significant**”<sup>9</sup>.*

16. We are frankly surprised that no consideration appears to have been given as to whether International Lesbian Day might hold particular significance for lesbians. That suggests a fundamental failure to consider and take into account the views of those such as LAG. It is unreasonable as a matter of public law and bias to reflect only the concerns of one side of the argument without considering counter balancing views. We also suggest the word “queer” ought also to be avoided generally speaking, it being entirely unknown to any relevant statute, imprecise and considered offensive by many.

*The CPV fails to give any reasons as to why it takes the view that it is unreasonable and inappropriate for lesbians to “make distinctions” as to attendance at an event*

17. Paragraphs 7.41 and 42, taken together, read as follows:

*7.41 The Commission is not persuaded it is appropriate and reasonable to:*

- make distinctions between women based on their cisgender or transgender experience, or among same-sex attracted women based on the exclusivity of their same-sex attraction at an event of this kind, or*
- exclude same-sex attracted women who are transgender, bisexual and queer from an event of this kind.*

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<sup>8</sup> CPV Paragraphs 7.34

<sup>9</sup> CPV Paragraphs 7.38

*7.42 The Commission notes that the grant of this exemption may lead to the further exclusion of and discrimination against same-sex attracted transgender women. Transgender women are a group who have and continue to experience discrimination, harassment and social exclusion.*

18. Paragraph 7.41 provides no rational at all for why the practice of making distinctions is so inappropriate or unreasonable that an exemption should be refused. It simply proceeds on the ideological basis unknown to law that the word “woman” is capable of subdivision and then on the political basis that lesbians should not be entitled to gather in public lest they by so doing make distinctions. This is a basic failure to give any or adequate reasons for a far-reaching change in the right to public political and social assembly for lesbians. It is an extraordinary ideologically informed approach which reflects one side in this debate against a background of these matters not being settled in law. Accordingly, the decision (so far at it is comprehensible) is not only irrational, but suggestive of clear bias.
19. If paragraph 7.42 is intended to provide the rationale for paragraph 7.41 (and it is not clear whether it is a mere aside or the justification for it) it is nonetheless insufficient as an exercise in reasoning to sustain the far-reaching implications of paragraph 7.41. It is no answer to the marginalisation of one group to cite the parallel and different marginalisation of another. All minorities face unique difficulties, a vague reference to the difficulties suffered by one is not a proper basis for impeding the political and social assembly of the other. Further, the CPV records and accepts that lesbians suffer similar marginalisation (as outlined above) but there is no mention of such matters here as a counterbalance or relevant factor. With the greatest respect to the commission, taken together the paragraphs do not provide a sound or clear basis according to the principles of natural justice for the CPV.

*The commission requires the LAG to effectively set out a 5 year schedule of activities, in so doing, it unreasonably places an obligation on this small group so onerous that amounts to indirectly discriminating against it*

20. LAG is a small and dedicated group, the membership of which is set out in annexure 1 to the CPV. The originating application focuses on a proposal to celebrate International Lesbian Day this year and speaks in hopeful terms thereafter of regular events. Dealing with this matter the CPV states:

*“The Commission does not consider it reasonable to grant a five-year exemption in such broad terms without details of the events and the opportunity for submissions from interested parties to engage with the question of whether it is reasonable in the circumstances to discriminate on the basis of sexual orientation and gender identity at these events.”<sup>10</sup>*

21. We respectfully invite the commission to reflect on whether requiring a small, fledging group to provide a detailed 5-year plan might amount to indirectly discriminating against them. It would not be right that a gathering which might otherwise be perfectly lawful is made impossible with onerous administrative demands placed on the weaker party in the power

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<sup>10</sup> CPV Paragraphs 7.45

relationship. We would also ask the commission to consider whether such a requirement is reasonable and could possibly be met given that any number of contingencies might factor into the development of an event over five years. We respectfully remind the commission of point 4 of its own published guidance headed "How does the Commission process exemptions?" which reads that it can "*Hold discussions with the Applicant and any other interested parties to negotiate the terms and conditions on which an exemption is granted*". Such discussions are perhaps the obvious way to deal with any ambiguities.

*The CPV indulges in speculation as to how LAG might effectively organise and secure an event*

22. Dealing with the above matter the CPV reads:

*"The Application does not describe how the Lesbian Action Group proposes to make distinctions to limit the event, and any future events, to 'lesbians born female'. Limiting participation in the manner proposed may involve questions about an attendee's physical sex characteristics or the exclusivity of their same-sex attraction, which could reasonably be expected to intrude on an individual's privacy and, in some cases, has the potential to amount to sexual or sex-based harassment."*

23. With great respect, the commission here is engaging in speculation which the applicant might reasonably view as a comment suggesting they would engage in sexual harassment. We urge the commission to carefully consider whether this was a proper or fair remark to make in the circumstances. LAG are quite entitled to advertise an event according to rules and boundaries and expect those rules and boundaries be obeyed by a law abiding public. The commission itself holds earlier in the CPV that there is no evidence of putative harassment at such events. If that is correct, then this concern evaporates.

### *Conclusion*

24. For the reasons advanced above, the LGB Alliance Australia respectfully asks the commission to reconsider the CPV, it cannot be right in 2023 for lesbians in Australia to have materially fewer rights than prior to 2003. Political and social assembly in public are key characteristics of open democracies that respect minority rights. It cannot be right as a matter of law or a basic matter of civil rights that lesbians in Australia are no longer permitted to define themselves as a group or peaceably assemble to advance their human rights. It can also not be right or proper for the commission to adopt a definition of sex and same sex attraction outside of the law and which in the context of this case can fairly be described as partisan.

25. We accordingly urge the commission in the strongest possible terms to think again.