



'The Answer is Human Rights', AHRC Adelaide seminar
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Transcript

Panel members

- AHRC Chief Executive Leanne Smith
- AHRC Age Discrimination Commissioner Robert Fitzgerald

VICKY ROSE, AAWAA MEMBER: This question is for you, Ms Smith. The Australian Human Rights Commission's written submission to the Federal Court in the Lesbian Action Group appeal states, "The Commission submits that the appeal should be dismissed with costs." At Senate Estimates, the Commission said it had not sought costs, but there is a distinction between seeking costs and being awarded costs. Can you please clarify the Commission's understanding of the costs matter? Thank you.

LEANNE SMITH: Thanks for your question. I will do my best — but will confess that this is not my area of responsibility at the Commission. So it would probably be best if I got a response from our lawyers, which I'll be very glad to share with you. But to my understanding, the Commission did its job. That went to the Administrative Review Tribunal and then to the Federal Court. And as with any matter in the Federal Court, costs are distributed. And they were ... We did not seek costs, but that's just the normal practice of the court. But actually, Robert, you might know more ...

VICKY ROSE: Actually, I thought I thought they did seek costs.

LEANNE SMITH: [unclear] ... in the Federal Court, that when you're a party in it, costs would be awarded depending on the outcome of the case. That's the best I can do. I'm sorry.

VICKY ROSE: That's all right. Thank you for answering the question.

LEANNE SMITH: Thank you for your question.

VICKY ROSE: Thank you.

STACEY McCAIN, LAG MEMBER: Hello, My name is Stacey McCain and I am a member of the Lesbian Action Group, and actually ...

LEANNE SMITH: You know about this than me. *[laughter]*

STACEY McCAIN: Costs *were* sought. Costs *were* sought. They were not just awarded, they were asked for and sought. So thank you for the question. And I just want to [inaudible] which is written down here. So, it's really on this same topic. As a member of the Lesbian Action Group, which actually for those of you that don't know, is a small voluntary group of women who have wanted on one occasion, to hold a celebration of International Lesbian Day and applied for an exemption, and were refused. And we ended up in the Federal Court as women who are protected under the Sex Discrimination Act. Being ... sorry I'm a bit shaky ...

LEANNE SMITH: No, take your time, that's all right, go ahead, please

STACEY McCAIN: And the Sex Discrimination Act was written because women are in need in our community — where there's a lot of violence against women, women need protection, and that's recognised by the Act. And same-sex discrimination is recognised by the Act. So that within the Act there is provision to allow exemptions for people to meet in distinct groups. And that's what we wanted. We wanted one day, and one room, and a celebration of lesbians who are same-sex attracted — so lesbians born female, not people who identify as women. So, we, that was taken, that was refused, sorry the permission was refused. We appealed, and the Australian Human Rights Commission came in to fight against lesbian rights. Which seemed to me seemed particularly bizarre.

LEANNE SMITH: Would you mind coming to your question, please?

STACEY McCAIN: Sorry, yeah, I'm meant to be quick, yeah. So, I want to know what follow-up's been done by the Human Rights Commission, for the reasons they will defend a man who who identifies as female or being a woman.

AUDIENCE MEMBER (MALE): Seriously? Seriously, you're not even stating ...

STACEY McCAIN: Excuse me, it's my question, my life.

LEANNE SMITH: Please get to your question so I can answer it.

STACEY McCAIN: OK. So, now I've been thrown off. There was, what I want to know is what studies have been done about the impacts of that change in this legislation that have been unforeseen by the powers that, by the Human Rights Commission and the lawmakers — that there have been some real disadvantages inflicted by changing the legislation to [unclear] to favour one group over another. And [unclear] Under human rights law, one group's rights should not dominate another group's human rights. Thank you.

LEANNE SMITH: Thank you for the question. And I know that was difficult to ask. And I'll do my best. Robert said earlier that human rights are not about privileging one person or one group's set of rights over another, and that is absolutely the perspective we take as Australia's National Human Rights Institution. The Sex Discrimination Act was changed in the 2010s — I think it was 2013; I wasn't here — to extend definitions and to include transwomen as women under the Sex Discrimination Act. And so it's our responsibility as the National Human Rights Commission to implement that legislation and to ensure that everybody included under that Act is protected. So this legal case was never about

privileging one set of rights over another. And I hope that you can believe that every one of us working at the Australian Human Rights Commission will stand up and defend women's rights to the day we die, because it's our bread and butter and it's what we all care about doing. So we need — this is probably the pointiest end of the stick when we're talking about sharing rights in Australia at the moment — and we will apply international human rights law to do our best to make sure that everyone is protected under that legislation. So thank you for the question.

ROBERT FITZGERALD: So can I just make a comment? Every time the Human Rights Commission is asked to deal with an exemption, it could be said that you're preferencing one over another every time you make a decision. That's not how it operates at all. And yet that's how people see it. Because every time you want an exemption, it's an exemption that's doing something different to the law. So, to say that in this particular case or in any other case the Human Rights Commission sits down to privilege one over the other completely misunderstands both the law and completely misunderstands the approach we take. But the challenge in Australia is: if we continue to see my right and your right as being in conflict, then it's almost impossible to see how we embrace human rights. And yet human rights benefits everyone in this room. And as you get older, as you start to lose your cognition, you will want to be protected by those rights. So every time we try to show that it's a privileging, it's a taking away, we damage the very rights that are going to be important to you later in life as they are early in life. So, I don't want to comment on the individual issue, but fundamentally, if you think the Human Rights Commission or the equal opportunity commissions in the states sit there and talk about privileging, it misunderstands completely the way that these processes are designed. But are there choices and challenges in the decision-making? Absolutely. And sometimes we will get it right and sometimes we will get it wrong. You know, the Commission's been around for 40 years. I'm sure we've made mistakes during that. But I'm sure we've also got a lot of things right. What I really do urge is not to see this thing as a privileging of one over the other. It will not advance your rights and it will not advance the rights of those most in need of protection.