NOTICE OF FILING

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	7/02/2025 1:15:39 PM AEDT
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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

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 59
Rule 29.02(1)

Affidavit

No. NSD1386 of 2024

Federal Court of Australia

District Registry: New South Wales

Division: Human Rights Division

GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) AND ANOTHER NAMED IN THE SCHEDULE

Applicants

ROXANNE TICKLE

Respondent

Affidavit of: **Katherine Deves**

Address: 1005 Botany Road, Rosebery NSW 2018

Occupation: Legal practitioner

Date: 7 February 2025

Contents

Filed on behalf of Giggle for Girls Pty Ltd & Sally Grover, First & Second Appellants
Prepared by Katherine Deves
Law firm Pryor Tzannes & Wallis Solicitors
Tel 02 9669 6333 Fax
Email Katherine.deves@ptwlaw.com.au
Address for service (include state and postcode) 1005 Botany Road, Rosebery NSW 2018

[redacted]

[Form approved 01/08/2011]

	February 2025.		
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[redacted]

30	Annexure "KD-29", being a copy of an article from Ëureka Street by Erica Cervini *"What does Tickle vs. Giggle mean for single-sex spaces"*, dated 04 September 2024	26	353
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34	Annexure "KD-33", being a copy of an article from The Roxy Epoch by Roxanne *"Tickle v Giggle: The Federal Court finds it is unlawful to discriminate against a woman because she is trans"*, dated 23 August 2024	26	419
35	Annexure "KD-34", being a copy of a media release from The Roxy Epoch by Roxanne *"Tickle v Giggle: Appeal lodged by Giggle for Girls Pty Ltd & Ms Grover"*, dated 7 October 2024.	26	422
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I, Katherine Deves, of 1005 Botany Road, Rosebery NSW 2018, Lawyer, say on oath:

INTRODUCTION

1. I am the solicitor under supervision at Pryor Tzannes & Wallis Solicitors (**PTW**) with day-to-day carriage of this matter on behalf of the Appellants, Giggle for Girls Pty Ltd (**Giggle**) and Ms Sally Grover (**Ms Grover**).

2. This application is made only in respect of costs recoverable by any party in the appeal.

3. The contents of this affidavit are based on my knowledge of the proceedings, my review of the reasons for judgment of the Honourable Justice Bromwich (**the primary Judge**) in *Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553 (**Tickle No 1**) and *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 (**Tickle No 2**) and my clients' instructions.

4. I make this affidavit in support of an application for an order under rule 40.51 of the *Federal Court Rules 2011* (Cth) seeking either a nil costs order in the appeal proceedings or that costs be capped at a maximum of $50,000.

[redacted]

GROUNDS FOR THE APPLICATION FOR MAXIMUM COSTS ORDERS

5. The Appellants do not seek any order as to costs in the Notice of Appeal, and, in the event that the appeal is successful they seek to substitute the costs order below with no order.

6. The Appeal is substantively confined to constitutional and statutory construction issues and does not substantively challenge the findings of fact of the primary Judge.

7. At trial, the primary Judge imposed a costs cap of $50,000 per party for constitutional and statutory construction arguments. **Annexed to this affidavit and marked KD-1 is a copy of the judgment and orders in *Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553 (Tickle No 1).**

8. The financial position of all parties to the appeal supports a costs capping or nil costs order, such that any adverse costs order would be practically unenforceable and would serve no legitimate purpose.

9. I am instructed that Ms Grover is a single mother on single parenting benefits, who owns no real property and has no financial capacity whatsoever to meet an adverse costs order.

10. The evidence before the primary Judge recorded in Tickle No 1 and Tickle No 2, which was accepted was:

    (a) that Giggle has limited financial resources: Giggle has never generated profit, has no assets, and has no income; and

    (b) the Respondent to the appeal has no independent financial resources and has relied entirely on pro bono legal representation.

    Annexed to this affidavit and marked KD-2 is a copy of the judgment in Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960 (Tickle No 2)

11. Giggle is funding its legal costs through public support via its dedicated fundraising platform, (https://gigglecrowdfund.com). Contributions raised through this platform are being used to cover the necessary legal expenses associated with its appeal proceedings and any subsequent hearings. This grassroots fundraising effort reflects the strong public interest in clarifying the legal principles at stake and securing the ability for female-only spaces to exist in law. **Annexed to this affidavit and marked KD-3 is a copy of the Use of Funds page from the gigglecrowdfund.com website.**

12. On 6 February 2025, the Lesbian Action Group (**LAG**), has written to the Court to notify it of its pending appeal against a decision of the Administrative Review Tribunal (**ART**), which upheld the AHRC's refusal to grant an exemption under section 44(1) of the *Sex*

Discrimination Act 1984 (Cth) (**SDA**). The appeal is expected to be filed by 18 February 2025.

13. In the course of deciding LAG's application for an exemption, the ART member applied the reasoning in Tickle No 2, treating it as binding authority. LAG has now formed the preliminary view that its appeal and the appeal in Tickle No 2 will raise overlapping legal questions, including:

    (a) The correctness of the decision in Tickle No 2;

    (b) The proper interpretation of the SDA; and

    (c) The interpretation and application of international instruments that the SDA implements, particularly the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).

14. LAG has notified the Court that it is currently considering seeking the following interlocutory orders:

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

    (b) That its appeal be heard and determined alongside the appeal in Tickle No 2, given the likely overlap in issues and the need for efficient case management under section 37M(2)(b) and (c) of the FC Act.

15. Additionally, LAG is still considering whether it will seek to intervene in the appeal of Tickle No 2 instead of running a separate appeal, given the substantial overlap in legal and policy questions and the direct impact that the Tickle No 2 decision has on LAG's interests.

    Annexed to this affidavit and marked "KD-4" is a copy of the letter from the Feminist Legal Clinic to the Associate to Justice Abraham, dated 6 February 2025

    Annexed to this affidavit and marked "KD-5" is the Administrative Review Tribunal decision 2023/8450 of General Member S. Fenwick, Australian Human Rights Commission -v- Lesbian Action Group, dated 20 January 2025

16. At the commencement of the appeal, PTW provided the appellants a conservative estimate of legal costs of running the Appeal of $340,000 ex GST based on the assumption that the appeal would proceed in a relatively contained manner, addressing only the Appeal proper without significant additional complexities. I do not intend to waive privilege over any legally professionally privileged communication given to the appellants with respect to any matter by referring to this fact. However, since that initial

[redacted]

estimate, the scope of the proceedings has expanded considerably, and the potential cost burden has increased substantially.

17. In addition to the LAG foreshadowed applications, the Sex Discrimination Commissioner (**SDC**) and the Australian Christian Lobby (**ACL**) have sought to intervene. There also remains uncertainty as to whether the Respondent's proposed cross-appeal will proceed.

18. Until the precise scope of the interventions, the cross-appeal, and any procedural consolidations are determined, it is not possible to provide a final cost estimate, but it is clear that the costs will far exceed the initial projections. The estimated cost of the appeal proper of $340,000 ex GST was based on a limited procedural framework, the retention of a senior and junior counsel, and does not account for the additional complexity, time, and legal argument required to respond to multiple interveners, potential cross-appeals, and additional evidentiary burdens arising from a consolidated hearing.

19. The appeal raises substantial public interest issues, as demonstrated by the applications to intervene filed by the SDC, the ACL and, potentially, LAG.

20. Tickle No 2 has generated significant domestic and international media attention, demonstrating the wide-reaching implications of the case and the strong public interest in its resolution. Coverage has come from major international media outlets, legal advocacy organisations, human rights bodies, and policy commentators, reflecting concern over the ruling's impact on sex-based rights, gender identity protections, and constitutional law.

21. The media releases and articles annexed to this affidavit are not exhaustive, but provide a sample of the fact that this case is being closely followed not just in Australia, but globally, reinforcing that the appeal is not merely a private dispute but a matter of substantial legal and public policy importance. The breadth of coverage indicates significant public concern regarding the implications of the Federal Court's ruling on the legal recognition of sex as changeable, the intersection of international treaty obligations with domestic law, and the ability of female-only spaces to exist under anti-discrimination frameworks.

22. The AHRC, the United Nations Human Rights Office, and the United Nations Special Rapporteur on Violence Against Women and Girls have all issued formal statements on the case, highlighting its impact on sex-based rights and gender identity law. The United Nations Special Rapporteur has expressed specific concerns that the ruling erodes protections for female-only spaces and risks misapplying international human rights law.

[redacted]

23. Legal organisations such as Equality Australia, the Grata Fund, and the Human Rights Law Alliance have published legal interpretations and fact sheets, demonstrating the significant legal questions raised by the appeal, particularly in relation to the application of the SDA, the external affairs power, and the interpretation of Australia's treaty obligations.

24. International media outlets have provided substantial coverage of the ruling, noting that Australia's approach to gender identity law could have far-reaching implications for similar legal frameworks in other jurisdictions.

25. Additionally, commentators, including the Respondent, feminist legal groups, and public policy analysts have contributed extensive commentary in various publications.

26. This extensive media and academic commentary and policy engagement demonstrates that the appeal is a matter of significant public interest, not only within Australia but in broader legal and international human rights contexts. The level of attention reinforces the importance of ensuring the legal questions at the core of this case are fully ventilated and properly determined on appeal.

Annexed to this affidavit and marked "KD-6" is a copy of an article from ABC News Australia by Jamie McKinnell "Transgender woman's exclusion from female-only app was unlawful, judge finds", dated 23 August 2024

Annexed to this affidavit and marked "KD-7" is a copy of an article from SkyNews.com.au by Rocco Loiacono "Consequences of Tickle v Giggle transgender judgement are dire, effectively cancelling women's only spaces in Australia", dated 31 August 2024

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[redacted]

Australia finds that a transgender woman was indirectly discriminated against after exclusion from 'women-only' social media app", dated 25 September 2024

Annexed to this affidavit and marked "KD-20" is a copy of an article Law Society Journal Online by Wendy Yang "*Tickle v Giggle: Gender identity discrimination, AI and the human in the loop*", dated 24 September 2024

Annexed to this affidavit and marked "KD-21" is a copy of an article from Human Rights Law Alliance by John Steenhof ""*Women-only safe space" app loses transgender discrimination case*", dated 30 August 2024

Annexed to this affidavit and marked "KD-22" is a copy of a press release from Alliance Defending Freedom ""*Sex is not confined to being a biological concept" rules Australian Court*", dated 23 August 2024

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27. Given the nature of this litigation, it is evident that the costs of seeing this appeal through to its proper resolution will be prohibitive. This is quintessential public interest litigation, raising fundamental legal and constitutional questions, and it is essential that these issues be fully argued and determined without financial constraints limiting the scope of necessary legal advocacy.

28. A nil costs order would ensure that the appeal proceeds fairly and in accordance with principles of access to justice, while preventing a costs burden that is disproportionate to the nature of the appeal.

[redacted]

29. On 5 February 2025, PTW wrote to the solicitors for the Respondent seeking agreement to a costs order in the terms set out in that correspondence. As at the date of swearing this affidavit, no response has been received to this letter.

Annexed to this affidavit and marked "KD-35", is a copy of the letter from Pryor Tzannes & Wallis Solicitors & Notaries, to Barry Nilsson Lawyers, dated 5 February 2025.

Sworn by the deponent)
At Rosebery)
in New South Wales)
on 7 February 2025)
Before me:)

Signature of deponent

Signature of witness

Joel Alexander Johnson
Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

[redacted]

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

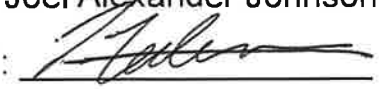
(Respondent)

ANNEXURE SHEET

The following 28 pages comprise the document referred to as Annexure KD-1 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

FEDERAL COURT OF AUSTRALIA

Tickle v Giggle For Girls Pty Ltd [2023] FCA 553

File number:	NSD 1148 of 2022
Judgment of:	**BROMWICH J**
Date of judgment:	1 June 2023
Catchwords:	**HUMAN RIGHTS** – gender discrimination – where the applicant alleges unlawful discrimination in breach of s 22 of the *Sex Discrimination Act 1984* (Cth) (**SD Act**) on the basis of gender identity within the meaning of s 5B of the SD Act – where the complaint was terminated under s 46PH(1B) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) by a delegate of the President of that Commission due to there being no reasonable prospects of the matter being settled by conciliation **PRACTICE AND PROCEDURE** – adjudication of four interlocutory disputes, being three interlocutory applications and a notice of objection to competency – where each arise out of s 46PO(1) of the AHRC Act – whether the Court has jurisdiction under the *Federal Court Rules 2011* (Cth) to adjudicate upon the notice of objection to competency – whether the grant of extension of time is in the interests of the administration of justice – consideration of whether there is an arguable case for unlawful gender discrimination – held: the notice of objection to competency is dismissed and the applicant's extension of time application is granted **COSTS** – security for costs application by respondents – where the application is brought by the respondent under s 56 of the *Federal Court Act 1976* (Cth) and r 19.01 of the *Federal Court Rules* against the applicant who is a natural person – maximum costs application by the applicant under r 40.51 – where application is brought in relation to costs of both applicant and respondents – consideration of principles guiding the exercise of the Court's discretion under r 40.51 to grant a maximum costs order – held: the respondent's security for costs application is dismissed, the applicant's maximum costs application is granted only in relation to costs of and incidental to the preparation and hearing of the competing arguments as to constitutional validity and statutory construction up to a sum of $50,000; respondents to pay the applicant's costs for all four interlocutory disputes
Legislation:	*Australian Human Rights Commission Act 1986* (Cth) ss

	46PO(1), 46PO(2), 46PH, 46PH(1B), 46PH(2) *Federal Court of Australia Act 1976* (Cth) ss 31A, 56 *Sex Discrimination Act 1984* (Cth) ss 5B, 5C, 7B, 7D, 22 *Migration Act 1958* (Cth) s 477A *Federal Court Rules 2011* (Cth) rr 19.01, 26.01, 31.05, 31.24, 31.31, 33.30, 36.72, 40.51
Cases cited:	*Etnyre v Australian Broadcasting Corporation* [2021] FCA 610 *Ferguson v Tasmanian Cricket Association (trading as Cricket Tasmania) (No 3)* [2022] FCA 1269 *Houston v State of New South Wales* [2020] FCA 502 *Knight v Beyond Properties Pty Ltd* [2005] FCA 764 *Spencer v The Commonwealth* [2010] HCA 28; 241 CLR 118 *Stepien v Department of Human Services* [2018] FCA 1062 *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCA 28; 403 ALR 604
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	75
Date of hearing:	28 April 2023
Date of last submissions:	18 May 2023
Counsel for the Applicant:	G Costello KC, B Goding and E Nadon
Solicitor for the Applicant:	Barry Nilsson Lawyers
Counsel for the Respondents:	B Nolan and A Costin
Solicitor for the Respondents:	Alexander Rashidi Lawyers

ORDERS

NSD 1148 of 2022

BETWEEN:	**ROXANNE TICKLE** Applicant
AND:	**GIGGLE FOR GIRLS PTY LTD ACN 632152017** First Respondent
	SALLY GROVER Second Respondent

ORDER MADE BY: **BROMWICH J**

DATE OF ORDER: **1 JUNE 2023**

THE COURT ORDERS THAT:

1. Pursuant to s 46PO(2) of the *Australian Human Rights Commission Act 1986* (Cth), the applicant be allowed until 22 December 2022 to make the originating application that was filed on that date.
2. The respondents' notice of objection to competency dated 15 February 2023 and filed 16 February 2023 be dismissed.
3. The applicant's interlocutory application dated 23 March 2023 and filed 24 March 2023 seeking a maximum costs order pursuant to r 40.51 of the *Federal Court Rules 2011* (Cth) be allowed in sum of $50,000, confined to the constitutional validity and statutory construction issues.
4. The respondents' interlocutory application dated 30 March 2023 and filed 31 March 2023 seeking an order pursuant to s 56 of the *Federal Court of Australia Act 1976* (Cth) and r 19.01 of the *Federal Court Rules* that the applicant provide security for costs and related relief be dismissed.
5. The respondents pay the applicant's costs of and incidental to the applications heard on 28 April 2023, including the post-hearing submissions, such costs to be assessed by a registrar on a lump sum basis unless agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

1 This is an adjudication of four interlocutory disputes, being three interlocutory applications and a notice of objection to competency, each arising out of an application made under s 46PO(1) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). The application alleges unlawful discrimination, following the termination of a complaint made by the applicant to the Australian Human Rights **Commission** by a delegate of the President of that Commission.

2 The complaint to the Commission was made in December 2021. Section 46PH(1B) of the AHRC Act provides that the President of the Commission must terminate a complaint if satisfied that the complaint is trivial, vexatious, misconceived or lacking in substance, or there is no reasonable prospect of the matter being settled by conciliation. The respondents declined to participate in conciliation, as discussed in greater detail below. For that reason, the delegate was satisfied that there was no prospect of the matter being settled by conciliation. The delegate terminated the complaint on 5 April 2022 and gave notice of that termination to the applicant the same day.

3 Section 46PO(1) of the AHRC Act provides that if a complaint has been terminated under, inter alia, s 46PH, and notice of that termination has been given, an application may be made to this Court or to Division 2 of the Federal Circuit and Family Court of Australia (**Federal Circuit Court**). Section 46PO(2) provides that such an application must be made within 60 days after the issue of the termination notice, or within such further time as the court concerned allows.

4 On 6 June 2022, the applicant filed an application in the Federal Circuit Court, but filed a notice of discontinuance on 4 July 2022, before the first directions hearing scheduled to take place on 8 July 2022. The applicant's reason for discontinuing that proceeding was a concern at being unable to pay a costs order if the application did not succeed.

5 On 21 December 2022, the applicant was given an indemnity against an adverse costs order of up to $50,000 by a specialist non-profit litigation funder known as the Grata Fund. The next day, 22 December 2022, the applicant filed the present application. That application also seeks an extension of time in which to bring the proceeding under s 46PO(2) of the AHRC Act.

Key provisions of the SD Act

6 Section 22 of the of the *Sex Discrimination Act 1984* (Cth) (**SD Act**) provides:

22 Goods, services and facilities

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.

7 As relevant to s 22, what constitutes discrimination is described in earlier sections of the SD Act, specifically:

(a) s 5 as to sex discrimination;

(b) s 5A as to sexual orientation;

(c) s 5B as to gender identity;

(d) s 5C as to intersex status;

(e) s 6 as to marital or relationship status;

(f) s 7 as to pregnancy or potential pregnancy; and

(g) s 7AA as to breastfeeding.

Background

8 The originating application sufficiently details the claim brought by the applicant for present purposes as follows:

> The Applicant claims that:
>
> [1] The Applicant is a woman residing in New South Wales. The Registry of Births, Deaths and Marriages in Queensland (the Applicant's state of birth) has issued the Applicant with an updated birth certificate which designates her gender as female, following her transition from male to female.
>
> [2] In or around February 2021, the Applicant downloaded a digital application ('app') to her mobile device known as 'Giggle', which is marketed as a platform exclusively for women to share experiences and speak freely in a 'safe space'.
>
> [3] Giggle is wholly owned by the first named respondent, Giggle for Girls Pty Ltd (the **First Respondent).** The CEO of the First Respondent is Ms Sally ('Sall') Grover (the **Second Respondent).**
>
> [4] To access to the app, users are required to provide information including a self-taken photograph of their face (a 'selfie') and upload it to the platform. It is clearly

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stated that a person must be a woman in order to gain access to the platform.

[5] Once uploaded, the 'selfie' is assessed by third-party artificial intelligence **(AI)** software that determines whether the aspiring user is a man or a woman. If the AI accepts the 'selfie' as that of a woman, the user is provided full access to the platform.

[6] The Applicant undertook this process upon downloading the app. The AI determined that the Applicant was a woman, and she was provided with full access to the app's functions.

[7] Between February 2021 and September 2021, the Applicant enjoyed full access to the app's features and used the app to read content posted by other users.

[8] In late September 2021, the Applicant logged into the app and found that she could no longer post content, read or comment on posts made by other users on the platform. When the Applicant attempted to purchase the 'Premium' features available on the app, she received a 'User Blocked' message.

[9] In late September 2021, the Applicant attempted to contact the First Respondent via an in-app contact form to raise the issue. She received no response from either the First Respondent or Second Respondent.

[10] In October 2021, the Applicant sent a total of six emails to the First Respondent regarding her restricted access to the app. The Second Respondent, Ms Grover, replied to one of the Applicant's emails and requested that the Applicant provide her with her phone number. The Applicant did so but did not receive any phone call from Ms Grover.

[11] In late October 2021, the Applicant attempted to contact the phone number listed in the Second Respondent's email signature via SMS and two phone calls. She received no response.

[12] On 5 December 2021, the Applicant made a complaint to the Australian Human Rights Commission **(AHRC)** under section 22 of the *Sex Discrimination Act 1984* (Cth) **(SDA),** naming both the First Respondent and the Second Respondent. It was the Applicant's assertion that in being granted limited functionality to the app, she was being discriminated against on the basis of her gender identity. The Applicant wrote:

> *I believe that I am being discriminated against by being provided with extremely limited functionality of a smart phone app by the app provider compared to that of other users because I am a transgender woman. The app provider appears to not recognise transgender women as female. I am legally permitted to identify as female.*

[13] On 20 January 2022, the AHRC sent a copy of the complaint to the Respondents.

[14] On 3 March 2022, the Feminist Legal Centre **(FLC)** sent a reply to the AHRC on behalf of the Respondents.

[15] The Respondents asserted that:

a. The Applicant was considered male based on a visual inspection of the selfie provided and was removed [from] the app on that basis. Further, the Applicant's gender identity was not known to the Second Respondent or other Giggle personnel at the time of removal and did not inform the decision to preclude the Applicant from the app

b. Giggle constitutes a special measure aimed to achieve substantive

equality between men and women and its exclusion of males is reasonable in the circumstances; as such, the exclusion of males by Giggle falls within the exceptions provided pursuant to sections 7N, 7D and 32 of the SDA.

[16] On 21 March 2022, the Second Respondent tweeted from the twitter account @salltweets, '[i]n January 2022, I received an Australian Human Rights Commission complaint against both Giggle and me personally, from a **trans-identified male** who wants to use a social networking app for females & for me to be re-educated on sex and gender.' [emphasis added].

[17] On 1 April 2022, the AHRC advised the Applicant that the Respondents had declined to participate in conciliation.

[18] On 5 April 2022, a delegate of the President of the AHRC provided the Applicant with notice that they were terminating the complaint pursuant to section 46PH(1 B)(b) of the *Australian Human Rights Commission Act 1986* (Cth) **(AHRCA),** on the grounds that they were satisfied there was no reasonable prospect of the matter being settled by conciliation.

[19] On 1 April 2022, *The Australian* newspaper published an article entitled *Orwell: in threat of women's rights and safety* by Angela Shanahan. The subject of the article was the Applicant's complaint to the AHRC, whereby the Second Respondent is quoted saying, '*the person was removed from the Giggle app because they are male, no other reason. The removal was manual. I looked at the onboarding selfie and I saw a man. The AI software had let them through, thereby making a mistake that I rectified.*'

[20] On 6 June 2022, the applicant filed an application in the Federal Circuit and Family Court (SYG808/2022) with the assistance of her then legal representatives, the Inner City Legal Centre **(ICLC),** seeking orders pursuant to s 46PO(4) of the AHRCA.

[21] The matter was listed for a Directions Hearing before Her Honour Judge Laing on 8 July 2022.

[22] On or around late June/early July 2022, comments posted on the Second Respondent's Twitter feed led the Applicant and her representatives to believe that the Respondents intended to raise constitutional issues in their defence. These issues were not particularised, but the Second Respondent commented that she was willing to 'take the matter all the way to the High Court'.

[23] Being unwilling to bear the risk of an adverse costs order in the High Court on 4 July 2022 the Applicant filed a Notice of Discontinuance with the Court and the matter was discontinued.

[24] The Applicant subsequently received limited funding to cover any adverse costs order that may be made against her and now wishes to pursue her claim.

[25] The Applicant now seeks leave of the Court to bring this application out of time.

9 An earlier aspect of the applicant's case relying upon the intersex provisions in s 5C of the SD Act as pleaded in the original statement of claim, has not been maintained in the amended statement of claim filed by leave on 4 May 2023. The case is now only brought in reliance of s 5B, alleging discrimination on the ground of gender identity. Section 5B provides that a person discriminates against another person on the ground of gender identity if, by reason of that person's gender identity, or a characteristic that appertains generally to the persons who have the same gender identity, or a characteristic that is generally imputed to persons who have

the same gender identity, if that discriminator treats the person less favourably than a person who has a different gender identity in circumstances that are the same or not materially different.

10 It is important to note that s 5B of the SD Act is subject to ss 7B and 7D. Section 7B addresses indirect discrimination and a test of reasonableness in relation to a condition, requirement or practice that has a disadvantaging effect. Section 7D allows for special measures for the purposes of achieving substantive equality between, for example and relevantly to the case that is advanced by the respondents, men and women.

11 The amended statement of claim uses the term cisgender. That term refers to a person whose gender corresponds to the sex registered for them at birth, to be contrasted with a person whose gender does not so correspond, which can be described as transgender to reflect that difference. By contrast, the respondents' defence uses the terms adult male human and adult female human, which in contest adheres to the sex of a person registered at birth.

12 The burden of the applicant's case, not presently dealing with more technical aspects of jurisdiction or liability, is that:

(a) a condition was imposed by the first respondent, on the instruction of or at the will of the second respondent;

(b) the condition was that to be allowed ordinary access to the Giggle App, a user had to be a cisgendered female, or be determined as having cisgendered physical characteristics by the second respondent on a review of a photograph provided by the applicant during the process of applying to use that App;

(c) in breach of s 22 of the *SD Act*, either respondent or both of them discriminated against the applicant on the basis of gender identity within the meaning of s 5B(1) by imposing that condition, by excluding the applicant from using and assessing the App which was otherwise available to cisgender women and by not responding to the applicant's requests for access;

(d) the applicant was treated less favourably than cisgender women because the applicant is a transgender woman;

(e) there was a breach of s 22 of the SD Act of discrimination on the basis of gender identity by imposing the condition, which has disadvantaged and will continue to disadvantage transgender women because they will not be able to gain ordinary access to the App and are vulnerable to disparaging conclusions and exclusion based on appearance;

(f) unlike a transgender woman, cisgender women would not have their access to the App restricted or physical appearance questioned by either or both of the respondents, and either or both of them would have engaged with cisgender women and responded to their queries regarding access to the App.

13 The respondents' case is that the applicant was granted ordinary access to the App via the artificial intelligence (**AI**) assessment process, and that the applicant was removed from the platform (that is to say, use of the App) because the applicant was an adult human male, evidently rejecting the use of the word woman to describe the applicant. All of the allegations summarised above are flatly denied in that context.

14 It is apparent that a key dispute is one of characterisation of what has taken place, with the respondents essentially taking issue with the applicant's characterisation having any validity. That is manifested in part by the respondents' constitutional challenge to the constitutional validity of s 5B as being beyond the legislative power of the Commonwealth, and in part by the interpretation they give to the operation of ss 5 and 5B of the SD Act.

15 As to the interpretation question, the respondents contend that the applicant's case as pleaded, while purporting to engage the discrimination jurisdiction in s 5B of the SD Act, is instead addressed to the definition of sex discrimination in s 5. That is said to be that the statement of claim (since amended, but in ways that are not material to this argument), elides the two attributes of sex and gender, conflating the two. The substance of the argument is that sex is a "multidimensional construct", referring essentially to biological features which produce a binary position of man or woman, while gender is directed to a person's individual identity as characterised by how a person signals their gender to others, referring essentially to behavioural features and questions of psychology and society.

16 The substance of the objection by the respondents concerns the statement of claim using the terms "*cisgender*" and "*transgender*" when neither is referred to in the SD Act, asserting that this term is only apposite to the sex discrimination definition in s 5. They contend that s 5 precludes the applicant's case being brought under s 5B.

17 The applicant's response is to agree that for the purposes of s 5 of the SD Act, a person's sex is that of a man or a woman, and it is for that reason that the case is not framed by reference to s 5, noting that there is no barrier to a transgender woman being a woman for the purposes of sex discrimination. Rather, the applicant argues, the case alleges gender discrimination on the basis that the applicant is a transgender woman, not a cisgender woman. The case is instead brought under s 5B because the condition complained about is that it has allowed a transgender

woman to be treated less favourably than a cisgender woman. The applicant alleges being removed from the App upon the basis of gender identity as a transgender woman, which does not, on that case, in any way pertain to the treatment of a man.

18 The difference between the applicant's case and the respondents' case is stark and wholly irreconcilable. One will ultimately be found to be right, and the other wrong. This is not the point at which that determination is to be made unless the applicant's case is manifestly untenable. The arguments for the respondents do not go so far as to convince me that is so, largely because the SD Act deliberately draws a distinction between sex discrimination and gender discrimination, for which the metes and bounds of the latter have not been tested. Nor can they be appropriately tested in the course of a relatively short interlocutory dispute.

19 For the purposes of the interlocutory applications under consideration, all that is required to be determined is that the applicant's case is reasonably arguable. It does not entail finding that the respondents' argument is not reasonably arguable as well. I express no view on that. I consider that the applicant's case is at least reasonably arguable, and accordingly it is a trial issue. That does not involve making any prediction or determination of which argument will ultimately prevail.

The interlocutory disputes

20 The four interlocutory disputes requiring adjudication are:

(a) the applicant's application under s 46PO(2) of the AHRC Act for an extension of time to 22 December 2022 to bring this proceeding, being the date upon which the originating application was filed (the application for an extension of time is contained in that originating application);

(b) a notice of objection to competency filed by the respondents, dated 15 February 2023 and filed 16 February 2023;

(c) an interlocutory application dated 23 March 2023 and filed 24 March 2023, by which the applicant seeks a maximum costs order pursuant to r 40.51 of the *Federal Court **Rules** 2011* (Cth);

(d) an interlocutory application dated 30 March 2023 and filed 31 March 2023 by which the respondents seek an order pursuant to s 56 of the *Federal Court of Australia Act 1976* (Cth) and r 19.01 of the *Rules* that the applicant provide security for costs and related relief.

Notice of objection to competency

21 It is convenient to deal with the notice of objection to competency first, because it is easily disposed of. That is because, ironically, the notice itself was ultimately effectively conceded to be incompetent.

22 The *Federal Court of Australia Act 1976* (Cth) makes no reference to notices of objection to competency, that being left to the *Rules*. An important purpose of a notice of objection to competency provided for by the *Rules* is to enable certain limited classes of trial and appeal proceedings that manifestly do not engage the jurisdiction of the Court to be dismissed upon that basis. Such a notice can be heard upon an interlocutory basis and before a final hearing, thereby avoiding or at least reducing the incurring of costs and the waste of court time. Bringing such an application at an early stage is encouraged, so much so that if an application or appeal is later dismissed because it is not competent, and no notice of objection to competency has been filed, the respondent, most often a Commonwealth Government legal entity given the classes of proceedings for which this procedure is available, is ordinarily not entitled to any costs of the application or appeal.

23 Both the option of filing a notice of objection to competency and the potential costs burden of failing to do so, are confined to the limited classes of proceedings to which the *Rules* refer. If a proceeding does not fall within the scope of one of the classes of proceedings for which this procedure is available, jurisdictional objections fatal to the bringing of the proceeding or appeal cannot be taken in this way. Rather, that must either be left to the ordinary processes of the Court, for example as part of a final hearing or as a separate question, or can be advanced by way of a summary dismissal application brought under s 31A of the *Federal Court of Australia Act* (and/or r 26.01 of the *Rules*).

24 A summary judgment application is subject to the breadth and limitations identified by the High Court in *Spencer v The Commonwealth* [2010] HCA 28; 241 CLR 118 at [49]-[60] as to application of the test of there being no reasonable prospects of success and this being a step that is not taken lightly. If the presence or absence of jurisdiction is really contestable, and therefore a trial issue, that will ordinarily be when it is left to be addressed. As considered in more detail below, my present view is that the question of jurisdiction is contestable, such that a summary dismissal application is unlikely to succeed.

25 The *Rules* refer to objections to competency in five places, none of which apply to this proceeding. The five rules dealing with notices of objection to competency are:

(a) r 31.05 for applications made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth);

(b) r 31.24 for applications made under the *Migration Act 1958* (Cth);

(c) r 31.31 for applications arising under s 57 of the *Australian Crime Commission Act 2002* (Cth);

(d) r 33.30 for appeals from the Administrative Appeals Tribunal; and

(e) r 36.72 for appeals generally.

26 The costs consequences for not filing a notice of objection to competency apply to each of those types of proceeding, other than applications arising under the *Australian Crime Commission Act*: see rr 31.05(4), 31.24(4), 33.30(4) and 36.72(4). This proceeding does not fall within any of those rules, such that no provision is made either for filing a notice of objection to competency or for any costs consequences for the respondents for failing to do so. There are, however, the ordinary costs consequences for seeking to bring a kind of interlocutory application that was never available.

27 The respondents ultimately accepted that the invalid notice of objection to competency had to be dismissed, and only resisted a costs order to the extent that the arguments advanced in support of it arose in relation to any of the other interlocutory applications.

Extension of time

28 Section 46PO(2) provides that an application must be made within 60 days after the date of issue of the notice of termination under s46PH(2), "*or within such further time as the court concerned allows*". Strictly speaking, there is no obligation that the Court be satisfied that the extension of time is, for example, "***necessary** in the interests of the administration of justice*", as is the case for an extension of time under s 477A of the *Migration Act*, considered by the High Court in ***Tu'uta Katoa** v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] HCA 28; 403 ALR 604. However, even if necessity is not required, the interests of justice more broadly are ordinarily relevant to any decision made by this Court, and in most cases will be self-evident.

29 In *Tu'uta Katoa* at [10], Kiefel CJ, Gageler, Keane and Gleeson JJ identified "*the length of the applicant's delay, reasons for the delay, prejudice to the respondent, prejudice to third parties and the merits of the underlying application*" as particularly relevant among the myriad of potential relevant facts and circumstances pertaining to the consideration of an application for an extension of time. Their Honours noted that the presence of the threshold of the extension

of time being *necessary* in the interests of the administration of justice meant that it is not enough that the extension of time sought is merely desirable. Meeting that or another higher threshold is not mandated by s 46PO(2), but such a consideration may be taken into account in the exercise of the otherwise unfettered discretion. As already noted, the interests of justice will always be a generally relevant consideration, but a threshold of the extension being necessary for that purpose may not always be appropriate in the absence of that being mandated.

30 In *Stepien v Department of Human Services* [2018] FCA 1062, Mortimer J (as the Chief Justice then was) observed:

> [20] The Court has a discretion under s 46PO(2) to extend the time in which an application can be made under s 46PO(1). The discretion is unconfined, save by reference to the scope, subject matter and purpose of the discretionary power: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 40 (Mason J).
>
> [21] Discretionary powers such as the one in s 46PO(2) inevitably involve consideration of what is in the interests of the administration of justice, that being the Court's core function.
>
> [22] In this sense, the discretion in s 46PO(2) is of the same character as that to be found in s 11 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), considered by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 186; 3 FCR 344. As I observed in *MZABP v Minister for Immigration and Border Protection* [2015] FCA 1391; 242 FCR 585 at [41]-[42], *Hunter Valley* has become the classic authority on the kinds of considerations which should be taken into account by a court in determining how to exercise a discretion to extend time. In *Hunter Valley* at 348-350, Wilcox J reviewed the matters which had been treated as relevant by the authorities to that point. That list of factors has been endorsed repeatedly in this Court as providing guidance on how the exercise of such a discretion might be approached, and has been regularly endorsed and applied to similar discretions to extend time, including that in s 46PO(2): see *Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1325 at [21]-[24]; *Ingram-Nader v Brinks Australia Pty Ltd* [2006] FCA 624; 151 FCR 524 at [11]-[12].
>
> [23] The three principal matters Wilcox J found that a court takes into account are: any explanation for the delay, any prejudice to the respondent or other parties which might be occasioned if the extension of time were granted and the prospects of success of the appeal if an extension of time were to be granted.

31 In ***Ferguson*** *v Tasmanian Cricket Association (trading as Cricket Tasmania) (No 3)* [2022] FCA 1269, Bromberg J, after quoting from *Tu'uta Katoa* at [10]-[12], observed:

> [10] Taking into account and applying those observations, to my mind, the primary purpose of s 46PO(2) is to impose a time limit on the making of an application. However, the power there given to extend time recognises that the imposition of a rigid time limit may inflict injustice upon a prospective applicant. To avoid or ameliorate that potential for injustice, an extension of time may be granted but only where the interests of the administration of justice so require. To assess what the interests of the administration of justice require, a broad inquiry may be necessary which takes into account "a myriad of facts and circumstances", including those which have often been

regarded as the primary (though non-exhaustive) considerations identified in *Tu'uta Katoa* as:

(1) the length of the applicant's delay;

(2) the reasons for the delay;

(3) any prejudice to the respondent or third parties; and

(4) the merits of the underlying application.

[11] Other considerations which may be relevant, given the subject matter of a prospective application which alleges a contravention of the SD Act, may include the seriousness of the allegations of discrimination which are sought to be pursued and whether the allegations raise matters of public importance or of general application: see *James* [*James v WorkPower Inc* [2018] FCA 2083] at [38].

32 The thrust of the argument advanced by the applicant is that:

(a) the delay is not significant, being in the order of six months, rather than some longer time, such that the dispute has not "*festered*", citing *Ferguson* at [20];

(b) there is no identified prejudice of the relevant kind identified by the respondents, with there being none of the common features of concern with delay, such as loss of memory by witnesses, this being a largely documentary case in a narrow compass, albeit with significant legal issues;

(c) a proceeding had originally been commenced within time in the Federal Circuit Court and had only been discontinued before the first court date because of fears about costs;

(d) there is a reasonable explanation for the delay in bringing a second application, namely being able to secure a partial indemnity of $50,000 towards any adverse costs order, with the application being filed immediately upon that being put in place;

(e) the underlying issues are of public importance, being the interpretation and application of provisions rendering discrimination upon the basis of gender identity unlawful (this not having previously been litigated);

(f) the constitutional challenge brought by the respondents serves only to heighten the public importance aspect;

(g) the opportunity to bring the case is also important to the applicant personally in terms of identification as a woman as recognised by an undated birth certificate issued by the Registry of Births, Deaths and Marriages in Queensland, and being recognised as a woman by the artificial intelligence deployed by the first respondent in allowing access to the App;

(h) In *Tu'uta Katoa* at [17], it was noted that it will often be appropriate to assess the merits for the purposes of an extension of time application at a reasonably impressionistic

level, because those interests are likely to be advanced by granting the additional time to an application with "*some merit*", depending on other relevant factors.

33 The respondents' opposition to the extension of time sought principally relies upon arguments also advanced in support of the notice of objection to competency, with only passing reference to the arguments advanced by the applicant summarised above, namely:

(a) that the phrase "*an application*" in s 46PO(1), coupled with such a reading being consistent with primacy of conciliation and prompt commencement of proceedings if that does not succeed, and the undesirability of the alternative of introducing the notion of a freestanding cause of action inconsistent with the statutory constraints on the bestowing of curial jurisdiction, means that only a single application could be made following the termination of the complaint by the delegate of the President of the Commission, such that this had been exhausted and thereby extinguished once the application was made to the Federal Circuit Court and discontinued; and

(b) a lack of merit because s 5B of the AHRC Act was not engaged.

34 Section 2 of the *Acts Interpretation Act 1901* (Cth) provides:

> **2 Application of Act**
>
> (1) This Act applies to all Acts (including this Act).
>
> Note: This Act also applies to legislative instruments, notifiable instruments and other instruments: see subsection 13(1) of the *Legislation Act 2003* and subsection 46(1) of this Act.
>
> (2) However, the application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention.

35 Section 23(b) of the *Acts Interpretation Act* provides:

> **23 Rules as to gender and number**
>
> In any Act:
>
> (a) words importing a gender include every other gender; and
>
> (b) words in the singular number include the plural and words in the plural number include the singular.

36 The respondents contend that s 23(b) does not apply because the SD Act manifests a contrary intention, in the words of counsel for the respondents, "*in circumstances where the statutory purpose allows parties to bring complaints with promptitude in circumstances where they are exercising a special statutory creature of rights, cluster of rights, such that if we were to allow them to recommence and recommence on that action, they could constitute vexation and that is not the purpose of these provisions*". I did not find this argument persuasive.

37 A seminal case is *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651, a Privy Council decision on appeal from the High Court in which it was found that a provision of a corporations statute dealing with a power to acquire the shares of dissenting shareholder following a successful takeover. The provision referred to a single company and it was found that the provision applied according to its terms only to a single company, not to two companies. This meant that the then New South Wales equivalent to s 23(b) of the *Acts Interpretation Act* did not apply to make it applicable to more than one company, adopting, as did the High Court, the conclusion of the Chief Judge in Equity that the provision only contemplated singularity. Lord Morris of Borth-y-Gest said of the equivalent to s 23(b) and the approach to be taken in departing from it, at 656:

> Such a provision is of manifest advantage. It assists the legislature to avoid cumbersome and over-elaborate wording. Prima facie it can be assumed that in the processes which lead to an enactment both draughtsman and legislators have such a provision in mind. It follows that the mere fact that the reading of words in a section suggests an emphasis on singularity as opposed to plurality is not enough to exclude plurality. Words in the singular will include the plural unless the contrary intention appears. But in considering whether a contrary intention appears there need be no confinement of attention to anyone particular section of an Act. It must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole.

38 The above passage was quoted with approval in *Walsh v Tattersall* [1996] HCA 26; 188 CLR 77, a case dealing with duplicity of criminal charges, finding by majority that the South Australian equivalent to s 23(b) of the *Acts Interpretation Act* did not apply. Gaudron and Gummow JJ reasoned at 90–91 that this precluded charging more than one offence in a single charge. The issue did not arise on the analysis of the dissentients, Dawson and Toohey JJ, upon the basis that only one offence had been charged.

39 The above passage from *Blue Metal Industries Ltd v Dilley* was partially quoted in *Pfeiffer v Stevens* [2001] HCA 71; 209 CLR 57, a case involving the power of a Minister to extend the period of time for the operation of an interim local law, and the question of whether that sunset period could be extended more than once. By majority it was found that the Queensland equivalent of s 23(b) of the *Acts Interpretation Act* did apply. Gleeson CJ and Hayne J at [25] said that the phrase in question, "*a longer period*", was neutral on the question, so as not to exclude the operation of the plural. McHugh J at [59] reasoned that to read the Act in question as giving the power to extend the sunset period more than once did not change the character of the legislation, and still had to be done in accordance with and for the purposes of that Act. That has direct application to the present situation, it not being argued, let alone compellingly

so, that allowing more than one application to be made, and only by leave if outside the 60 days, in any way changes the character of the SD Act.

40 In all three cases of *Blue Metal Industries Ltd v Dilley*, *Walsh v Tattersall* and *Pfeiffer v Stevens*, the statute in question presented compelling reasons for departing, or not departing, from the equivalent to s 23(b) of the *Acts Interpretation Act*. They do not support any reason at all, let alone a compelling reason, for s 23(b) of the *Acts Interpretation Act* not to apply to s 46PO(1) of the AHRC Act. To the contrary, the other statutes referred to below would likely need to be read in this way if this argument were to succeed. There is a manifest advantage in having s 23(b) apply to "*an application*" in s 46PO(1), namely to keep open the remedial provision of the SD Act, which in any event requires a court to permit a second application to proceed if it is outside the 60 day time limit. The ordinary provisions for abuse of process are ample to protect this outcome being misused.

41 I am unable to accept that the use of the singular "*an*" before "*application*" in s 46PO(1) goes anywhere in any event. Quite apart from s 23(a) of *Acts Interpretation Act* providing for the singular to import the plural and vice versa, there is no proper basis for reading down the right to bring a second application in this way. The phrase "*an application*" is frequently used in Commonwealth legislation, such as the *Bankruptcy Act 1966* (Cth), the *Administrative Decisions (Judicial Review) Act*, the *Australian Securities and Investments Commission Act 2001* (Cth), the *Corporations Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth) to name but a few, which tell against such a phrase indicating that only one such application may be brought, or that discontinuing such an application and seeking later to start again is not legally possible.

42 Nor is the need for prompt commencement of a proceeding unique, with 60 days being both shorter and longer than allowed in other Commonwealth statutes. The ordinary 60 day limit is real and substantial, but it is clearly not an insurmountable barrier, because of the wide discretion for an application to be brought out of time if the Court allows it, which is a substantial control on any abuse of the process brought about by a proliferation of applications, but not a substantial hurdle to overcome in an appropriate case. The presence of that discretion does not detract from that being a real barrier, such that there is no freestanding cause of action as the respondents suggest. In any event, leave can also be sought to bring an application, which suggests that the legislature did not intend that a time limit was to be immutable or to operate more strictly than the language deployed in s 46PO(2).

43 Moreover, the very presence of discontinuance being automatically fatal to bringing fresh proceedings would have a tendency to deter discontinuing proceedings, which it is difficult to accept would be allowed by such an interpretative side wind. It is enough that any second application after discontinuance would likely need to rely upon the exercise of the Court's discretion to allow more time.

44 For all of those reasons, this first argument by the respondents must fail.

45 The respondent's second argument entails conducting a mini trial of the central legal issues raised, largely upon the basis of little more than assertion. On my perusal, and as noted earlier in these reasons, there is at least an arguable case for a contrary view, as advanced by the applicant. It is not appropriate to endeavour to determine this trial question on an extension of time application. Applying the impressionistic view authorised (but not mandated) by the High Court in *Tu'uta Katoa*, I consider that there is sufficient merit in the case that the applicant seeks to bring for this to be a reason in favour of granting the extension of time.

46 I consider it best not to go further in assessing the prospect of the application being successful, so as to avoid any impression of pre-judgment of the ultimate issue. I have not formed a preliminary concluded view either way, not least because the point has not yet been properly argued or fully developed, beyond the general impression of it being arguable. The trial issue raised is not so clearly required to be determined in the respondents' favour for this to be a barrier to the grant of the extension of time sought.

47 The respondents have not put forward any compelling argument in answer to the case advanced for an extension of time as summarised above. I consider that there is not just a private interest on the part of the applicant to seek to vindicate a claim of unlawful discrimination, but also a public interest in having a determination of the metes and bounds of the prohibition determined in a context where the scope for any substantial factual dispute appears at this stage to be quite limited. I am therefore satisfied that it is appropriate and generally in the interests of justice to allow the extension of time sought.

48 It follows that the extension of time sought by the applicant is granted. The respondents must pay the applicant's costs of and incidental to this aspect of the hearing on 28 April 2023.

Maximum costs order

49 The applicant applies for a maximum costs order under r 40.51 of the *Rules*, in the sum of $50,000, in relation to the costs flowing both ways. That is, if the order was made, it would

cap the costs exposure of both the applicant and the respondents. The respondents oppose the order being made.

50 Rule 40.51 provides as follows:

> **Maximum costs in a proceeding**
>
> (1) A party may apply to the Court for an order specifying the maximum costs as between party and party that may be recovered for the proceeding.
>
> Note: ***Costs as between party and party*** is defined in the Dictionary.
>
> (2) An order made under subrule (1) will not include an amount that a party is ordered to pay because the party:
>
> (a) has failed to comply with an order or with these Rules; or
>
> (b) has sought leave to amend pleadings or particulars; or
>
> (c) has sought an extension of time for complying with an order or with any of these Rules; or
>
> (d) has not conducted the proceeding in a manner to facilitate a just resolution as quickly, inexpensively and efficiently as possible, and another party has been caused to incur costs as a result.

51 The principles in relation to such an application were succinctly summarised by Griffiths J in *Houston v State of New South Wales* [2020] FCA 502:

> [17] There was substantial agreement between the parties as to the relevant principles guiding the exercise of the Court's discretion under r 40.51. The discretion is to be exercised judicially, having regard to all the relevant circumstances. Those circumstances include the nature of the relief sought, the complexity of the litigation and the interests of the parties in both prosecuting and defending the litigation, whether the applicant's claims are reasonably arguable, whether a party would otherwise be forced to abandon a proceeding if such an order were not made, whether there was a public interest element to the proceeding, the costs which are likely to be incurred in the proceeding, the timing of the maximum costs application and whether the party opposing the making of the orders has been uncooperative and/or delayed the proceedings.
>
> [18] I emphasise that those factors are not exhaustive. In my view, another relevant factor is the normal rule in civil litigation that costs are awarded to the successful party, not to punish the unsuccessful party but rather to compensate the successful party against the expense to which it has been put by reason of the legal proceedings. It is well settled that this normal rule can be displaced in an appropriate case. The applicant's application for a maximum costs order effectively seeks to displace the normal rule at this relatively early stage of the proceeding, rather than defer the matter of costs to when the proceeding has been determined.
>
> [19] It has been acknowledged in various cases relating to r 40.51 that the principal purpose of the provision (and its predecessor, order 62A) was not so much a desire to limit the exposure of a respondent to an adverse costs order in complex and lengthy commercial litigation, but rather with concerns as to access to justice, public interest, and a desire to limit the costs of all parties, particularly in less complex and shorter cases. As Drummond J noted in *Hanisch v Strive Pty Ltd* [1997] FCA 303; 74 FCR 384 at 387:

> The principal object of O 62A is to arm the Court with power to limit the exposure to costs of parties engaged in litigation in the Federal Court which involves less complex issues and is concerned with the recovery of moderate amounts of money, although it may be appropriate for an order to be made under O 62A in other cases…
>
> [20] I respectfully agree with those observations. Subject to the overarching requirement to avoid unduly narrowing the discretion under r 40.51, I also respectfully agree with Beach J's observations in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 2)* [2019] FCA 215 at [74] that "if the proceeding is complex forensically and also lengthy then this may militate against the making of such an order".

52 The parties both refer to the non-exhaustive considerations identified by Griffiths J and elsewhere in support of an opposite conclusion.

53 The applicant contends that the application is reasonably arguable and not frivolous. For the reasons already given, I am satisfied that is so, and reject the contrary argument advanced by the respondents.

54 The applicant contends that the application for a maximum costs order has been brought promptly. I accept that the application has been brought at a reasonably early juncture. The respondents did not seriously contend otherwise.

55 The applicant contends that there is a public interest in the application because it concerns alleged overt discrimination on the basis of gender identity. The applicant submits that it is reasonable to expect that the wider public will be interested in the outcome, amplified by the absence of any case thus far to have considered s 5B of the SD Act in a context of a gender diverse person, being something of a test case. The respondents counter by characterising this case as being predominately to advance the private interests of the applicant, seeking to align this case with the outcome in *Houston* in which his Honour found, at [27], that while persons other than the applicant in that case may have an interest in whether the legislation there under consideration was valid, that was not sufficient to characterise the matter as involving public interest litigation. His Honour considered that an equally important factor was that it could not be said that the applicant, Mr Houston, had no private interest in the proceeding, because he was facing criminal prosecution for what was alleged to be illegal land clearing, and if successful, he would avoid the financial consequences associated with fines, remediation orders or conservation agreements flowing from a conviction.

56 The conclusion I reach is that this case is neither a purely public interest proceeding, nor a purely private interest proceeding. It has features of both. It has a more of a private interest dimension insofar as the applicant seeks access to a service, and more of a public interest

dimension insofar as that access, and the application of any finding that denial of such access in these and legally like circumstances is unlawful or lawful, would be likely to have wider application than the facts and circumstances of this case. That in turn is largely driven by the validity and scope of the legislation. It does have a test case quality to it, either way.

57 Viewed in another way, the public interest factor is strongest in relation to the question raised by the respondents as to constitutional validity and statutory construction. That has three collateral features assisting in the conclusion that this aspect is appropriate for a maximum costs order. First, the question of the validity and the scope of the legislation by way of its interpretation are the points of greatest public interest. Of itself, resolution of those relatively abstract issues is likely to go some way in ascertaining the metes and bounds of the legislation.

58 Secondly, both constitutional validity and statutory construction are in a relatively narrow ambit in terms of time and effort as they will not turn on evidence to any marked degree, if at all, so should take relatively less resources and therefore cost.

59 Thirdly, the Sex Discrimination Commissioner seeks to leave to appear amicus curiae on these issues, but not on the question of whether what took place was unlawful. Although I have not heard from the parties on whether or not to grant that leave, I would need some persuading not to do so. If that leave is given, then the logical way to advance those arguments would be to have the Sex Discrimination Commissioner go first in terms of submissions and any evidence that is needed, and for that purpose to assemble, order and furnish to the parties such authorities and other materials as will assist in determining those questions, without precluding the parties from asking for certain material to be included by the Commission, or supplementing it themselves. This too will help to contain the costs of the parties.

60 Fourth, constitutional invalidity and adverse statutory construction arguments are the aspects of the case most stridently advanced by the respondents as barriers to the case proceeding in the first place. Proceeding on this aspect first has much of the content and effect, but not the form, of a summary judgment application. I would also be open to considering this aspect of the case in a cost-effective way, including possibly being framed by one or more separate questions, and perhaps by reference to certain baseline agreed facts to contextualise the legal arguments to be advanced.

61 The private interest aspect is strongest in relation to the unlawful aspect alleged by the applicant. This phase of the proceeding will only take place at all if the legislation is both constitutionally valid and if it is interpreted in a way that permits the applicant's case to be brought by properly engaging s 5B of the SD Act. If that point is reached, this aspect is more

concerned with the applicant's personal interest as to unlawfulness and as to remedies, although the wider public interest is not altogether irrelevant. It would involve evidence, albeit it seems likely that this will be largely documentary and in a narrow ambit. But nonetheless, it will likely take:

(a) preparation time for the evidence and any opening submissions;

(b) hearing time to adduce that evidence, for the purpose of establishing any disputed facts;

(c) preparation time for closing submissions, including on the facts that are asserted to be established by the evidence and whether such facts do, or do not, establish unlawful conduct; and

(d) hearing time to advance those submissions.

62 Weighing up all the competing considerations, I have reached the conclusion that the application for a maximum costs order should:

(a) not succeed in relation to the costs of and incidental to the interlocutory hearing that took place on 28 April 2023;

(b) succeed in relation to the costs of and incidental to the preparation and hearing of the competing arguments as to constitutional validity and statutory construction, which I propose to cap at $50,000 as being an ample sum for essentially legal arguments;

(c) not succeed in relation to the costs of and incidental to the preparation and hearing of the remainder of the proceeding, if that is reached.

63 As I consider that the applicant has had substantial success in the maximum costs application, the respondents should pay the applicant's costs of and incidental to this aspect of the hearing on 28 April 2023.

Security for costs

64 The respondents seek a security for costs order, acknowledging that it is unusual for such orders to be made against natural persons, although not unheard of. I accept that the application has been made sufficiently promptly, so will focus on the merits.

65 The respondents rely upon the summary of the circumstances in which such an order will be made by Lindgren J in ***Knight*** *v Beyond Properties Pty Ltd* [2005] FCA 764 at [33] (bold emphasis in original), to which I add [32]:

> [32] Many cases can be cited for the proposition that there is a disinclination to order an applicant who is a natural person to provide security, at least, in the absence of some factor in addition to impecuniosity. Cases which can be cited against the

ordering of security and in favour of allowing natural persons, even impecunious ones, free access to the courts, include *Hinde v Haskew* (1884) 1 TLR 94; *Pearson v Naydler* [1977] 1 WLR 899 (Megarry VC) at 902; *Orr v Lusute Pty Ltd* (1987) 72 ALR 617 (Sheppard J) at 622: *Morris v Hanley* [2000] NSWSC 957 at [15]; *The Airtourer Co-operative Ltd v Millicer Aircraft Industries Pty Ltd* [2004] FCA 1400 (Branson J) at [22]; *Chang v Comcare Australia* [1999] FCA 1677 (Moore J) at [25]; *James v Australia and New Zealand Banking Group Ltd (No. 1)* (1985) 9 FCR 442 (Toohey J) at 445; *Weston v Beaufils* (1993) 43 FCR 292 (Burchett J) at 298; *Famel Pty Ltd v Burswood Management Ltd* (1989) 11 ATPR 40-962 (French J) at 50,514; *Cameron's Unit Services Pty Ltd v Kevin R Whelpton and Associates (Australia) Pty Ltd* (1986) 13 FCR 46 (Burchett J) at 53; *Gartner v Ernst & Young (No. 3)* [2003] FCA 1437 (Mansfield J) at [36].

[33] In the cases in which natural persons have been ordered to provide security, some factor in addition to impecuniosity has been present; cf *Barton v Minister for Foreign Affairs* (1984) 2 FCR 463 (Morling J) at 594 (impecuniosity **and** residence outside Australia); *Cunningham v Olliver* (unreported, Burchett J, 21 November 1994) (but for delay, security would have been ordered on ground of impecuniosity **and** bringing of claim to a significant extent for benefit of others); *Chang v Comcare Australia* [1999] FCA 1677 (Moore J) at [32] (impecuniosity **and** lack of prospects of success); *Loque v Hansen Technologies Ltd* [2003] FCA 81 (Weinberg J) (impecuniosity **and** residence outside Australia); *Morris v Hanley* [2000] NSWSC 957 (Young J) at [21], [38] and [39] (but for delay, Young J would have ordered security on grounds of impecuniosity **and** lack of prospects of success **and** large costs involved to defendants. Young J's decision was reversed on appeal on the ground that defendants had not adequately explained their delay in moving for security, but the Court of Appeal did not consider other aspects of his Honour's reasons: see *Morris v Hanley & Ors* [2001] NSWCA 374 at [30]-[31]); *Melville v Craig Nowlan & Associates Pty Ltd* (2002) 54 NSWLR 82 (CA) at [132] (per Heydon JA) (impecuniosity **and** applicant's failure to show that order would stultify proceeding **and** sum ordered by primary Judge not oppressive).

66 A more recent summary of the overall principles, including those articulated in *Knight*, was provided by Abraham J in *Etnyre v Australian Broadcasting Corporation* [2021] FCA 610 at [6]-[17], which I adopt without reproducing.

67 Among the key issues advanced by the respondents are the quantum of risk that a costs order will not be satisfied, whether the order would be oppressive by stifling a reasonably arguable claim, whether any impecuniosity arises out of the conduct complained of, the prospects of success, whether there were aspects of public interest which weigh in the balance against such an order and whether there are any particular discretionary matters peculiar to the circumstances of the case.

68 With the maximum costs order for the constitutional validity and statutory interpretation arguments, and having regard to the indemnity that the applicant has secured, I am not satisfied that there is any substantial risk that a costs order will not be satisfied, but that even if there was such a risk, it has been limited by the maximum costs order and is not of itself a sufficient reason to order security for costs. Given that the applicant previously commenced and discontinued a proceeding in the Federal Circuit Court, I am willing to infer that making a

security for costs order is, on the balance of probabilities, likely to stifle a claim that I have already found is reasonably arguable. In this instance, the past is the best guide to the future.

69 I am satisfied that there is a distinct public interest in the constitutional validity and statutory interpretation aspects. I am presently unable to form any concluded view as to the prospects of success or failure of those aspects, such that this is a neutral consideration. There do not appear to be any other discretionary matters of note. All of these factors are sufficient to refuse to grant the application for security for costs.

70 There is a further factor which reinforces this conclusion, although not determinative of itself. That factor is that the respondents declined to participate in conciliation as invited to do so by the Commission. As already noted, this led to the sole reason why the complaint was terminated, namely that the delegate was satisfied that there was no prospect of the matter being settled by conciliation.

71 I received post-hearing evidence and submissions from both the respondents and the applicant on the reasons why the respondents declined to participate in conciliation. The respondents largely confined the circumstances in which they declined to participate in conciliation as not being a reason to make a maximum costs order, while the applicant advanced these circumstances as reasons both to make a maximum costs order and not to make a security for costs order. I did not find it necessary to have regard to the respondents declining to participate in conciliation as any part of the reason to make the maximum costs order.

72 At the interlocutory hearing, it was submitted that the respondents had declined to participate in conciliation because of pregnancy-related illness on the part of the second respondent. Unfortunately, the evidence did not establish that this was so. Rather, the evidence established that the pregnancy of the second respondent and recovery from an unrelated illness was the reason advanced for seeking, and obtaining, an extension of time of a month to respond to the complaint. There is no evidence that these medical issues were renewed with the Commission. To the contrary, the express reason given in writing by email for not participating in the conciliation was disappointment at the Commission finding that there was a reasonably arguable claim of discrimination such that conciliation appeared appropriate, instead of finding as the respondents had sought that the complaint was unfounded, vexatious and other related objections. No medical issue was cited as any part of the reason for declining to participate in conciliation.

73 The respondents contend that it is wrong to characterise them declining to participate in conciliation as in any way leading to the commencement of this proceeding. Instead, the

substance of the argument seems to be that the applicant simply had a binary choice to commence this proceeding, or not to do so, and that accordingly the respondents declining to participate in conciliation was irrelevant. While this may not be a complete representation of the argument, the undeniable fact is that the dispute might have been able to be resolved, or at the very least, narrowed, by conciliation. Given that was not attempted, it ill behoves the respondents to seek security for costs when a no-costs avenue available to both sides was rejected by the respondents. However, this conclusion was not necessary to decide to refuse the making of a security for costs order. It does no more than reinforce the conclusion already reached that such an order should not be made.

74 I am not satisfied that a security for costs order should be made. The respondents should pay the applicant's costs of and incidental to this aspect of the hearing on 28 April 2023

Conclusion

75 The applicant has succeeded in obtaining the extension of time and substantially succeeded in obtaining a maximum costs order. The respondents have failed in relation to both the invalid notice of objection to competency and the application for security for costs. It follows that the respondents must pay the applicant's costs of and incidental to the interlocutory hearing on 28 April 2023, including the post-hearing submissions.

I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich.

Associate:

Dated: 1 June 2023

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

No: NSD 1148 of 2022

ROXANNE TICKLE
Applicant

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

ORDER

JUDGE: JUSTICE BROMWICH

DATE OF ORDER: 01 June 2023

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. Pursuant to s 46PO(2) of the *Australian Human Rights Commission Act 1986* (Cth), the applicant be allowed until 22 December 2022 to make the originating application that was filed on that date.
2. The respondents' notice of objection to competency dated 15 February 2023 and filed 16 February 2023 be dismissed.
3. The applicant's interlocutory application dated 23 March 2023 and filed 24 March 2023 seeking a maximum costs order pursuant to r 40.51 of the *Federal Court Rules 2011* (Cth) be allowed in sum of $50,000, confined to the constitutional validity and statutory construction issues.
4. The respondents' interlocutory application dated 30 March 2023 and filed 31 March 2023 seeking an order pursuant to s 56 of the *Federal Court of Australia Act 1976* (Cth) and r 19.01 of the *Federal Court Rules* that the applicant provide security for costs and related relief be dismissed.
5. The respondents pay the applicant's costs of and incidental to the applications heard on 28 April 2023, including the post-hearing submissions, such costs to be assessed by a registrar on a lump sum basis unless agreed.

Date that entry is stamped: 1 June 2023

Registrar

Schedule

No: NSD 1148 of 2022

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

Second Respondent SALLY GROVER

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

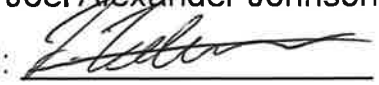
(Respondent)

ANNEXURE SHEET

The following 91 pages comprise the document referred to as Annexure KD-2 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

FEDERAL COURT OF AUSTRALIA

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

File number: NSD 1148 of 2022

Judgment of: **BROMWICH J**

Date of judgment: 23 August 2024

Catchwords: **HUMAN RIGHTS** – gender identity discrimination – s 5B and 22 of the *Sex Discrimination Act 1984* (Cth) (**SDA**) – where transgender woman excluded from a woman's only social media application – construction of "sex" in s 5 of the SDA – construction of s 5B of the SDA – construction of s 7D (special measures exception) of the SDA – whether respondents had engaged in direct or indirect gender identity discrimination – where applicant removed on visual inspection of a photograph submitted to the social media app in question – whether evidence established awareness of applicant's gender identity on the part of the respondents – whether respondents effected a policy of excluding transgender women – HELD: respondents had engaged in indirect gender identity discrimination against the applicant

CONSTITUTIONAL LAW – whether s 22, to the extent it prohibits discrimination on the ground of gender identity, not supported by head of Commonwealth legislative power – external affairs power – corporations power – operation of s 9 on construction of provisions of the SDA – *Convention for the Elimination of All Forms of Discrimination Against Women* (1979) (**CEDAW**) – Art 26 of the *International Covenant on Civil and Political Rights* (1966) (**ICCPR**) – meaning of discrimination against women under CEDAW – whether gender identity is a status for the purposes of Art 26 of the ICCPR – whether Giggle for Girls Pty Ltd is a trading corporation – whether CEDAW and/or Art 26 of the ICCPR support the prohibition of gender identity discrimination in s 22 – HELD: s 22, to the extent that it prohibits discrimination on the ground of gender identity, supported by the external affairs power as an enactment of Art 26 of the ICCPR – s 22, to the extent that it prohibits discrimination on the ground of gender identity, also supported by the corporations power in application to the respondents as Giggle for Girls Pty Ltd is a trading corporation and the second respondent its officer

CONSTITUTIONAL LAW – whether s 24(4) of the *Births, Deaths and Marriages Registration Act 2003* (Qld)

invalid for inconsistency with the SDA under s 109 of the *Constitution* – HELD: legislation not inconsistent

DAMAGES – limitation of s 46PO(3) on Court's jurisdiction to award remedies under s 46PO(4) of the *Australian Human Rights Act 1986* (Cth) – availability of aggravated damages for subsequent conduct in discrimination claims – HELD: declarations made and compensation awarded under s 46PO(4) *Australian Human Rights Act 1986* (Cth)

Legislation:

Constitution ss 51(xx), (xxix), 109, 122

Acts Interpretation Act 1901 (Cth) ss 15 (rep), 11B(1)

Australian Human Rights Commission Act 1986 (Cth) ss 46P, 46PH(1B)(b), 46PO(1), (3), (4), 46PV

Disability Discrimination Act 1992 (Cth)

Evidence Act 1995 (Cth) ss 41, 76, 79, 161(1)

Judiciary Act 1903 (Cth) s 78B

Federal Court of Australia Act 1976 (Cth) ss 21(1), 23

Sex Discrimination Act 1984 (Cth) ss 3, 4, 5, 5A, 5B, 5C, 7A, 7AA, 7B, 7C, 7D, 9(4), (10), (11), (13), 10(3), 11(3), 22, 28B(2), 94

Convention for the Elimination of All Forms of Discrimination Against Women (1979) Arts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

International Covenant on Civil and Political Rights (1966) Art 26

Optional Protocol to the Convention for the Elimination of All Forms of Discrimination Against Women (1999)

Vienna Convention on the Law of Treaties (1969) Arts 31, 32

Anti-Discrimination Act 1991 (Qld) ss 7(1)(f), 14(1)(b), 119

Births, Deaths and Marriages Registration Act 1996 (Vic) s 30A

Births, Deaths and Marriages Registration Act 2003 (Qld) s 24

Births, Deaths and Marriages Registration Act 2023 (Qld) s 142

Cases cited:

AB v Registrar of Births, Deaths and Marriages [2007] FCAFC 140; 162 FCR 528

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic

Republic of the Congo) [2010] ICJ Rep 639 at 664

Alexander v Home Office [1988] 1 WLR 968 at 975; [1988] 2 All ER 118

Attorney-General (Cth) v Kevin and Jennifer [2003] FamCA 94; 172 FLR 300

Cassell & Co Ltd v Broome [1972] AC 1027

Charles v Fuji Xerox Australia Pty Ltd [2000] FCA 1531; 105 FCR 573

Clarke v Nationwide News Pty Ltd [2012] FCA 307; 201 FCR 389

Commissioner of Stamps v Telegraph Investment Co Pty Ltd (1995) 184 CLR 453

Commonwealth v Tasmania [1983] HCA 21; 158 CLR 1 (*Tasmanian Dam Case*)

CRI026 v Republic of Nauru [2018] HCA 19; 92 ALJR 529

Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, ICJ Reports 2009, p. 213

Elliott v Nanda [2001] FCA 418; (2001) 111 FCR 240

Ewin v Vergara (No 3) [2013] FCA 1311; 307 ALR 576

Greenhalgh v National Australia Bank Ltd (1997) EOC ¶92-884

Grigor-Scott v Jones [2008] FCAFC 14; 168 FCR 450

Hall v A & A Sheiban Pty Ltd (1989) 20 FCR 217

Hanson v Burston [2022] FCA 1234

Houda v New South Wales [2005] NSWSC 1053

Hughes (t/as Beesley and Hughes Lawyers) v Hill [2020] FCAFC 126; 277 FCR 511

Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd (1993) 46 FCR 301

Jacomb v Australian Municipal Administrative Clerical and Services Union [2004] FCA 1250; 140 FCR 149

Jones v Toben [2002] FCA 1150; 71 ALD 629

LibertyWorks Inc v Commonwealth [2021] HCA 90; 274 CLR 1

McIntyre v Tully (1999) 90 IR 9

Poniatowska v Hickinbotham [2009] FCA 680

Purvis v New South Wales [2003] HCA 62; 217 CLR 92

Queensland v Commonwealth [1989] HCA 36; 167 CLR 232

R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc) [1979] HCA 6; 143 CLR 190

R v JS [2007] NSWCCA 272; 230 FLR 276

Riley v Commonwealth [1985] HCA 82; 159 CLR 1

Secretary, Department of Social Security v SRA (1993) 43

FCR 299

Sklavos v Australasian College of Dermatologists [2017] FCAFC 128; 256 FCR 247

Taylor v August and Pemberton Pty Ltd [2023] FCA 1313

Tickle v Giggle for Girls Pty Ltd [2023] FCA 553

Triggell v Pheeny (1951) 82 CLR 497

United Firefighters Union of Australia v Country Fire Authority [2015] FCAFC 1; 228 FCR 497

Victoria v Commonwealth [1996] HCA 56; 187 CLR 416 (*Industrial Relations Act Case*)

Whittle v Paulette (1994) EOC ¶92-621

Work Health Authority v Outback Ballooning Pty Ltd [2019] HCA 2; 266 CLR 428

Wotton v Queensland (No 5) [2016] FCA 1457; 352 ALR 146

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	Third Committee of the UN General Assembly, 16th sess, 1099th meeting, UN Doc A/C.3/SR.1099 (10 November 1961) Third Committee of the UN General Assembly, 16th sess, 1101st meeting, UN Doc A/C.3/SR.1101 (13 November 1961)
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Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	283
Date of hearing:	9 – 11 April 2024
Counsel for the Applicant:	Ms G Costello KC, Ms B Goding and Ms E Nadon
Solicitor for the Applicant:	Barry Nilsson Lawyers
Counsel for the Respondents:	Ms B Nolan and Ms A Costin
Solicitor for the Respondents:	Alexander Rashidi Lawyers
Counsel for the Intervener:	Ms Z Heger and Ms Z Graus
Solicitor for the Intervener:	Australian Human Rights Commission

ORDERS

NSD 1148 of 2022

BETWEEN:	**ROXANNE TICKLE** Applicant
AND:	**GIGGLE FOR GIRLS PTY LTD** First Respondent
	SALLY GROVER Second Respondent
	SEX DISCRIMINATION COMMISSIONER Intervener

ORDER MADE BY: **BROMWICH J**

DATE OF ORDER: **23 AUGUST 2024**

THE COURT ORDERS THAT:

1. The parties confer and within 7 days provide to the chambers of Justice Bromwich an agreed draft, or competing drafts, of a declaration of contravention by way of indirect gender discrimination.
2. The first and second respondents pay to the applicant a sum of $10,000 within 60 days.
3. The respondents pay the applicant's costs.
4. The component of the costs awarded by order 3 which relate to the constitutional validity and statutory construction issues, be capped at $50,000, being the cap imposed in respect of those issues by order 3 made on 1 June 2023, for the reasons given in *Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

PART 1: INTRODUCTION AND SUMMARY OF CONCLUSIONS

1 The applicant, Roxanne Tickle, by an originating application and amended statement of claim, sues the first respondent, **Giggle** for Girls Pty Ltd, and the second respondent, Sally (Sall) Grover, the founder and chief executive officer (**CEO**) of Giggle, for alleged unlawful gender identity discrimination in the provision of services, contrary to s 22 of the *Sex Discrimination Act 1984* (Cth) (**SDA**). These reasons refer to Giggle and Ms Grover collectively as the **respondents**.

2 The topic of the gender identity of a person, as distinct from the sex that a person had or was assigned at the time of birth, is one that Roxanne Tickle regards as straightforward and supported by the SDA and other legislation, as well as international law, including treaties to which Australia is a party. The respondents regard only sex at birth as being a valid basis on which a person may claim to be a man or woman. The respondents do not accept that a person's sex can be a matter for self-identification. Correspondingly, they do not accept either the validity or legitimacy of the gender identity discrimination provisions of the SDA. This Court is confined to determining, only to the extent necessary, the validity, meaning and application of the SDA, including in particular whether there has been a contravention of the proscriptions on gender identify discrimination.

3 Roxanne Tickle was of the male sex at the time of birth, but is now recognised by an official updated Queensland birth certificate, issued under the *Births, Deaths and Marriages Registration Act 2003* (Qld) (**Qld BDM Registration Act**), as being of the female sex. This followed from, and was predicated on, sexual reassignment surgery, being the term used in the Qld BDM Registration Act, which will be used in these reasons. Roxanne Tickle's updated birth certificate gives rise to an entitlement to be referred to by female pronouns. Accordingly, in these reasons I will refer to her as **Ms Tickle**.

4 The term *cisgender* features in Ms Tickle's amended statement of claim and appears in numerous places in these reasons, but does not appear in the SDA. As I noted in *Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553 (***Tickle v Giggle No 1***) at [11], cisgender refers to a person whose gender corresponds to the sex registered for them at birth. That is to be contrasted with a person whose gender does not correspond with their sex as registered at birth, commonly

referred to as transgender. The respondents do not accept the legitimacy of the terms cisgender and transgender.

5 The gender identity discrimination asserted by Ms Tickle is in relation to the provision of services, alleging both direct discrimination as defined in s 5B(1) of the SDA, and indirect discrimination as defined in s 5B(2). The conduct said to constitute both direct and indirect discrimination arises from Ms Tickle being prevented by the respondents from using a mobile phone digital software application, commonly known as an App, marketed for social communication between women (the **Giggle App**). While both direct and indirect discrimination may be alleged in the alternative, only one of the two can ever succeed in relation to a given allegation of discrimination. While both are alleged, Ms Tickle confirmed at the hearing that her allegations of direct and indirect gender identity discrimination were advanced as alternatives.

6 Ms Tickle seeks declarations of contravention, damages (including aggravated damages), a published written apology and an order to allow Ms Tickle to access the Giggle App on the same terms offered to other female users. The claim for aggravated damages was not particularised, nor well evidenced. Ms Tickle's pleadings were not well drafted.

7 The distinction between direct and indirect discrimination in s 5B of the SDA is considered in some detail later in these reasons. It suffices at this stage to note that:

(a) direct discrimination is discrimination *by reason of* gender identity, whether it be that actual gender identity, or a characteristic that appertains to, or is generally imputed to, persons who have that gender identity;

(b) indirect discrimination is the imposition, or proposed imposition, of a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging a person relative to another person or persons who have a different gender identity.

8 The respondents do not deny that Ms Tickle was prevented from using the Giggle App. Instead, they challenge the constitutional validity of the gender identity discrimination provisions of the SDA inserted in 2013. That was principally achieved by the addition of the phrase "*gender identity*", defined in s 4, to the grounds for discrimination in the provision of goods or services in s 22, and the corresponding stipulation of what constitutes direct or indirect discrimination on the ground of gender identity as described in s 5B.

9 The respondents deny in any event that they engaged in any unlawful discrimination by way of either direct or indirect gender identity discrimination. The respondents deny that the

applicant is entitled to any relief, and in the alternative contend that any damages awarded should be minimal. The respondents also challenge the validity of the provisions of the Qld BDM Registration Act that allow the change to a person's registered sex on the basis that those provisions are in conflict with the SDA and thus inoperative by reason of the operation of s 109 of the Constitution. As will be dealt with in detail later in this judgment, that challenge is misconceived and must fail.

10 I have concluded that the gender identity discrimination provisions in the SDA are valid because they are supported by s 51(xxix) of the Constitution (**external affairs power**) as an enactment of Australia's obligations under Art 26 of the *International Covenant on Civil and Political Rights* (1966) (**ICCPR**). Their application in the present case is also supported by the power in s 51(xx) of the Constitution (**corporations power**), by reason of Giggle being a trading corporation and Ms Grover, its officer.

11 The SDA according to its objects seeks to give effect to the *Convention for the Elimination of All Forms of Discrimination Against Women* (1979) (**CEDAW**), and the respondents argued that CEDAW does not and cannot support the gender identity discrimination provisions in the SDA. It has not been necessary to decide whether s 22, when read with s 5B, is generally supported by CEDAW, via the external affairs power. This is because the kind of discrimination that Ms Tickle complains about does not engage CEDAW in relation to the SDA any event, not being discrimination in favour of a man or men. It is well established that questions of constitutional validity should ordinarily only be determined if they properly arise on the case that has been brought: *LibertyWorks Inc v Commonwealth* [2021] HCA 90; 274 CLR 1 at [90].

12 For the reasons that follow, I have decided that the outcome of Ms Tickle's suit should be as follows:

(a) Ms Tickle's claim of direct discrimination fails, which was not really the case that she brought;

(b) Ms Tickle's claim of indirect discrimination succeeds, being the substance of the case that she did bring based on a condition being imposed for the use of the Giggle App that she was required by that condition to have the appearance of a cisgender woman;

(c) Ms Tickle is entitled to a declaration of contravention for indirect identity discrimination;

(d) Ms Tickle's claim for general damages succeeds, but her claim for separate and additional aggravated damages fails;

(e) the respondents must pay Ms Tickle compensation in the sum of $10,000;

(f) Ms Tickle's claim for an apology fails because it is futile and inappropriate to require an inevitably insincere apology to be made; and

(g) the respondents must pay Ms Tickle's costs;

(h) the costs in respect of the constitutional validity and statutory construction issues is limited to $50,000, being the cap imposed in respect of those issues by order 3 made on 1 June 2023, for the reasons given in *Tickle v Giggle No 1*, though I will allow either party to make an application for an alternate order within 14 days, or such further time as I may allow.

PART 2: OVERVIEW OF THE CASE

(a) Leave to the Sex Discrimination Commissioner to appear amicus curiae

13 Under s 46PV of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), on 16 June and 8 August 2023 I granted leave to the Sex Discrimination **Commissioner** to appear as amicus curiae (that is, as a friend of the Court) and to make submissions on the following topics:

(a) the construction, meaning and scope of provisions of the SDA dealing with discrimination on the grounds of sex and gender identity;

(b) the construction, meaning and scope of provisions of the SDA dealing with special measures;

(c) the constitutional validity of the amendments to the SDA made by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (the **2013 SDA Amendment**), based on the respondents' amended notice under s 78B of the *Judiciary Act 1903* (Cth) dated 30 June 2023 (**amended s 78B notice**), understood by the Commissioner to be limited to the validity of s 5B in its application to s 22 of the SDA; and

(d) whether s 24(1) of the Qld BDM Registration Act is inconsistent with ss 5, 5B, 7B, 7D and 22 of the SDA by operation of s 109 of the Constitution, an issue also raised in the respondents' amended s 78B notice.

14 The Commissioner did not appear for or with either side in this proceeding, and was not a party to the proceeding. The Commissioner did not make any submission on the question of whether or not gender identity discrimination had in fact taken place. Rather, the Commissioner, via counsel, assisted the Court on key legal questions, especially in relation to the interpretation of

the SDA and its constitutional validity. I was substantially assisted by counsel for the Commissioner.

15 Ms Tickle largely adopted the Commissioner's submissions on the above topics with little addition, while the respondents opposed them, but did not fully or even adequately address them. Not every aspect of the Commissioner's submissions needed to be considered, especially on the topic of reliance on CEDAW to support the gender identity discrimination provisions of the SDA, because of the nature of the Ms Tickle's case which did not allege any gender identity discrimination in favour of a man or men.

(b) Overview of the evidence

16 The essential facts as to what took place are largely not disputed, as briefly summarised below, and detailed further later in these reasons as necessary.

17 In about February 2021, Ms Tickle downloaded the Giggle App. The Giggle App had been marketed as being a means for women to communicate with one another in what was described as a digital women-only safe space. Ms Tickle undertook a registration process to gain access to the Giggle App, which including providing information and uploading a self-taken photograph of her face, commonly known as a **selfie**.

18 The photograph provided by Ms Tickle to Giggle was assessed by third-party artificial intelligence (**AI**) software, designed to distinguish between the facial appearance of men and women. The trial evidence from Ms Grover, which I accept, established that the AI software was deliberately set to less than its maximum reliability, so as to err on the side of inclusion of a user who identified as a woman rather than exclusion of a user because they were identified by the AI software as a man. If that AI software accepted the photograph, access was granted to the Giggle App. Ms Tickle gained access to the Giggle App.

19 In the period between February and sometime in September 2021, Ms Tickle had access to the Giggle App's features and used it to read content posted by other users. In September or early October 2021, Ms Tickle logged on to the Giggle App, but found that she could no longer post content or comment on other users' posts, or read comments on posts made by other users. That is, the functionality of the Giggle App had become limited for her as a user. When she attempted to purchase premium features on the Giggle App, she received a "*User Blocked*" message. Her attempts to contact Giggle via the in-App contact form received no response.

20 In October 2021, Ms Tickle sent a series of eight emails about being blocked to a general Giggle email address and Ms Grover. Ms Grover responded by replying to the first of those

emails, requesting that Ms Tickle provide her phone number. That email from Ms Grover included, as part of her email signature block, a **mobile** telephone **number**. Ms Tickle provided a mobile number by reply email, but says she did not receive any response, an assertion that is only correct if this is understood as meaning that no subsequent conversation or email response took place, because her affidavit evidence states that she later missed a call from Ms Grover. In late October 2021, Ms Tickle tried to contact Ms Grover by SMS and two phone calls, at the number listed in Ms Grover's email signature. Other than the missed call, there was no response.

21 On 5 December 2021, Ms Tickle made a complaint to the AHRC under s 46P of the AHRC Act, naming both respondents, and asserting that, by being given limited access to the Giggle App, she was being discriminated against on the basis of her gender identity. The original complaint did not specify the provision of the SDA that she alleged had been breached.

22 On 20 January 2022, the AHRC sent a copy of the complaint to the respondents. On 3 March 2022, the respondents replied, declining to participate in AHRC conciliation processes.

23 The Giggle App enabled there to be a later examination by a Giggle staff member of any photographs submitted, assessed and accepted by the AI software for the purposes of user access. That staff member could reach a different conclusion as to whether a person was female, which could result in a user being denied access to the Giggle App. A substantial number of persons whose photographs were accepted by the AI software were subsequently examined and were denied user access to the Giggle App. Ms Grover's evidence was that a large number of men had attempted to access the Giggle App. However, given her belief as to what the word man means, it is unclear if this included transgender women, and if so, whether this formed any part of the reason for denying access. This could have been tested or clarified in cross-examination, but was not.

24 It is most likely that Ms Tickle was denied user access to the Giggle App as a result of a general review process by a natural person of the AI acceptances of registration, rather than by reason of her being singled out. This was probably carried out by Ms Grover herself despite her having no specific recollection of having done so, but may have been done by someone else at Giggle, to the extent that such assistance was provided. Again, this could have been clarified in cross-examination, but it was not.

25 On 8 March 2022, the AHRC advised Ms Tickle that the respondents had declined to participate in conciliation. On 5 April 2022, a delegate of the President of the AHRC provided Ms Tickle with notice that the complaint was being terminated pursuant to s 46PH(1B)(b) of

the AHRC Act, on the ground that they were satisfied that there was no reasonable prospect of the matter being settled by conciliation.

26 The making of the complaint to the AHRC and it being terminated enabled Ms Tickle to bring a gender identity discrimination proceeding in a designated Court, being either this Court or Div 2 of the Federal Circuit and Family Court of Australia (formerly the **Federal Circuit Court**, and for convenience referred to by that name): see s 46PO(1) of the AHRC Act.

27 Ms Tickle initially brought and then discontinued a proceeding in the Federal Circuit Court in the short period between June and July 2022, as explained in *Tickle v Giggle No 1* at [4]. She then commenced this proceeding in this Court in December 2022, and was granted an extension of time for the bringing of this second proceeding for the reasons given in *Tickle v Giggle No 1* at [5].

28 In August 2022, between the end of the first proceeding in the Federal Circuit Court in June to July 2022 and the commencement of the proceeding in this Court in December 2022, Giggle ceased to make the Giggle App available to anyone. The respondents asserted that this would remain the position unless and until their conduct was found to be lawful. That intention was not challenged. I therefore accept that to be the position, even if it might later change.

29 In her amended statement of claim, Ms Tickle alleges, and the respondents admit, the following background facts:

(a) Giggle is an Australian proprietary company, limited by shares, and is wholly owned by, and operated through, a holding company, WADD Holdings Pty Ltd. However, the respondents deny that Giggle is a trading corporation or is subject to the SDA, including by reason of, relevantly, s 9(11) and (13), engaging the trading corporation aspect of the power in s 51(xx) of the Constitution. As foreshadowed, I ultimately found that Giggle was a trading corporation at the time of the conduct the subject of this proceeding.

(b) Ms Grover is the sole director and CEO of Giggle and was at all material times its controlling mind.

(c) Ms Grover uses the Twitter (now X) social media platform, with the username Sall Grover and handle @[redacted], and describes herself as the "*Founder and CEO of Giggle, a female social network*".

(d) At all relevant times, Giggle owned and operated the Giggle App.

30 The respondents principally deny any allegation of fact that describes Ms Tickle as a woman or any other allegation which directly or indirectly entails acceptance that this is so. I am satisfied that this reflects a genuinely held belief by Ms Grover and thus by Giggle, rather than reflecting any malice towards Ms Tickle, although manifested in the use of language that is unfortunate and unnecessary. However, that stance is not capable of meeting or denying the operation of the provisions proscribing gender identity discrimination if they are valid.

(c) Key provisions of the SDA

31 The key provisions of the SDA are as follows.

32 Section 4 defines gender identity:

> ***gender identity*** means 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.

33 Section 5B describes the circumstances in which a person will discriminate against another person on the ground of gender identity, with sub-s (1) describing direct discrimination and sub-s (2) describing indirect discrimination:

> **5B Discrimination on the ground of gender identity**
>
> (1) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's gender identity if, by reason of:
>
> (a) the aggrieved person's gender identity; or
>
> (b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or
>
> (c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;
>
> the discriminator treats the 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 has a different gender identity.
>
> (2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's gender identify if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.
>
> (3) This section has effect subject to sections 7B and 7D.

34 The effect of s 8 is that conduct that occurred for more than one reason can still be caught as direct discrimination under s 5B(1), conduct will be "*by reason of*" a matter referred to in paras

(a) to (c) if it was the only, or one of two or more reasons for that conduct, whether or not it was the dominant or substantial reason for that conduct.

35 Section 22 proscribes discrimination in the supply of goods and services on a number of grounds, including gender identity:

> **22 Goods, services and facilities**
>
> 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.

36 Section 5B(3), reproduced above, provides that s 5B applies subject to ss 7B and 7D:

(a) Section 7B provides a reasonableness test in relation to conduct otherwise constituting indirect discrimination as defined by s 5B(2), whereby that conduct will not be discriminatory if the condition, requirement or practice is reasonable in the circumstances, considering the matters set out in s 7B(2):

> (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
>
> (b) the feasibility of overcoming or mitigating the disadvantage; and
>
> (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

(b) Section 7C provides that the burden of proving reasonableness in the circumstances, for the purposes of s 7B, lies on the person who did the otherwise discriminating act.

(c) Section 7D allows persons to take special measures for the purpose of achieving specified kinds of "*substantive equality*", but only until equality is achieved: s 7D(4). These special measures are deemed not discriminatory under other provisions of the SDA by the operation of s 7D(2), provided that the sole, dominant or substantial purpose of the special measure is to achieve a form of substantive equality specified in s 7D(1): s 7D(3). The forms of substantive equality listed in s 7D(1) are:

A person may take special measures for the purpose of achieving substantive equality between:

(a) men and women; or

(aa) people who have different sexual orientations; or

(ab) people who have different gender identities; or

(ac) people who are of intersex status and people who are not; or

(b) people who have different marital or relationship statuses; or

(c) women who are pregnant and people who are not pregnant; or

(d) women who are potentially pregnant and people who are not potentially pregnant; or

(e) women who are breastfeeding and people who are not breastfeeding; or

(f) people with family responsibilities and people without family responsibilities.

37 The respondents' pleaded defence does not rely on s 7B. In closing submissions, their lead counsel made reference to reliance on the provision, but made no attempt to explain how it applied in this case, let alone any attempt to discharge the burden of establishing that was so required by s 7C. I am therefore unable to understand how it is even conceptually able to be advanced that the imposed condition was reasonable in the circumstances, let alone be satisfied that the burden of establishing that this was so has been discharged.

38 Because the Commonwealth Parliament has no direct head of power by which to implement anti-discrimination laws, the SDA relies upon a creative suite of powers to overcome this. Section 9 of the SDA has the evident purpose of ensuring the operative provisions are given only that effect that is properly supported by a head of Commonwealth legislative power: *AB v Registrar of Births, Deaths and Marriages* [2007] FCAFC 140; 162 FCR 528 (***AB v Registrar of BDM***) at [76] (Kenny J, Gyles J agreeing). Section 9(4) provides that certain "*prescribed provisions*" in Div 3 of Part II and Part II of the Act are to "*have effect as provided by sub-section (3) of this section and the following provisions of this section and not otherwise.*" Many of those following provisions refer to powers that have no application in the present case, such as the Territories power in s 122 of the Constitution and many others besides.

39 The heads of power pertinent to this proceeding are the trading corporations aspect of the corporations power in s 51(xx), and the external affairs power in s 51(xxix) of the Constitution, insofar as it is relied upon to implement international instruments, such as conventions, to which Australia is a party: see s 9(10) for the external affairs power, and s 9(11)-(14) for the

corporations power. The respondents assert that neither of those heads of power can be relied upon to support the gender identity discrimination provisions of the SDA, which necessarily focusses on s 22 as the operative provision relied upon. The arguments both ways and their resolution are addressed at Part 5(a) below.

40 The legislative history of the provisions reproduced or summarised above, the construction of the legislated concept of gender identity in the context of that history, and the special measures exception to discrimination are considered in Part 3 of these reasons below.

(d) Pleadings

41 Ms Tickle's case, as pleaded in her amended statement of claim in aspects that did not change with the amendments, did not clearly or coherently distinguish between direct and indirect discrimination, instead confusing the two. In particular, Ms Tickle pleaded reliance on s 5B(1) (direct discrimination) by reference to being discriminated against "*on the basis of her gender identity*", rather than the words in s 5B(1) "*by reason of*" that identity, and then particularised the conduct by reference to an imposed condition, which is a feature of s 5B(2) (indirect discrimination). That is, the terms of the two different forms of discrimination were conflated. The asserted imposed condition is that a person must be a cisgender woman or be determined as having cisgendered female physical characteristics by Ms Grover on review of their photograph.

42 The pleading of indirect discrimination refers to the outcome of not being able to gain ordinary access to the Giggle App by reason of the imposed condition, and to disparaging conclusions and exclusion based on appearance. The requirements of the imposed condition do not truly relate to indirect discrimination, referring to the adoption of a policy of direct discrimination instead.

43 None of these shortcomings were identified by the respondents and no objection was taken to the amended statement of claim until these issues were raised by the Court during closing submissions. When these pleading problems were pointed out in the course of closing submissions, senior counsel for Ms Tickle maintained claims of both direct and indirect discrimination, asserting that these were pleaded in the alternative, but the substance of the case advanced ultimately only really relied upon indirect discrimination.

44 As adverted to earlier in these reasons, the amended statement of claim uses the term cisgender, a word used in the community and in particular in discourse concerning gender identity, but not in the language of the SDA. As noted earlier in these reasons, the term cisgender refers to

a person whose gender corresponds to the sex registered for them at birth: *Tickle v Giggle No 1* at [11]. That is to be contrasted with a person whose gender does not correspond with their sex as registered at birth, a status commonly described as transgender to reflect that difference, although Ms Tickle's preference is simply to describe herself as a woman without that qualification or explanation. By contrast, the respondents' defence uses the terms "*adult male human*" and "*adult female human*", adhering to the sex of a person as registered at birth, disregarding legislative language in the SDA to the contrary, and ignoring recognition of changes to sex pursuant to the Qld BDM Registration Act as a basis for being called female (or male) under the SDA.

45 The respondents object to the use of the terms cisgender and transgender. They anchor all the terminology they use to a person's sex at birth, contending the word "*man*" can only mean an adult human male, and the word "*woman*" can only mean an adult human female. They do not accept that this can ever change, contending that biology at birth permanently dictates the language that must be used to describe a person, irrespective of legislative departures from this stance. They assert that s 5 of the SDA, describing sex discrimination, precludes Ms Tickle bringing a case relying upon s 5B, describing gender identity discrimination, an argument to which I will return.

46 Doing the best that I can with the pleadings, given the deficiencies identified above, Ms Tickle alleges that:

(a) a condition was imposed by Giggle, on the instruction, or at the will, of Ms Grover – that is, she primarily makes a claim of indirect discrimination by the imposition of a condition;

(b) the condition was that, to be allowed ordinary access to the Giggle App, a user had to be a cisgendered female, or be determined as having cisgendered female physical characteristics by Ms Grover on a review of the selfie photograph provided by a prospective App user during the process of applying to use the Giggle App – this aspect of Ms Grover reviewing photographs at the registration stage, as opposed to a later review of the AI approvals, is not supported by the evidence;

(c) in breach of s 22 of the SDA, Giggle and/or Ms Grover discriminated against Ms Tickle on the basis of her gender identity by imposing that condition, excluding her from using and assessing the Giggle App which was otherwise available to cisgender women and by not responding to her requests for access;

(d) by the imposed condition, Ms Tickle was treated less favourably than cisgender women because she is a transgender woman – noting that this very pleading seems inherently not just a claim of indirect discrimination, but abandoning a claim of direct discrimination, and also noting that it has to be one or the other (or neither), but cannot be both at the same time as they are mutually exclusive: see *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; 256 FCR 247 at [14]-[16] (Bromberg J, Griffiths and Bromwich JJ agreeing on this point), and the authorities there cited;

(e) imposing that condition constituted a breach of the prohibition of discrimination on the ground of gender identity in s 22 of the SDA, as the condition disadvantaged transgender women because they are not be able to gain ordinary access to the Giggle App and are vulnerable to disparaging conclusions and exclusion based on their appearance;

(f) unlike transgender women, cisgender women would not have their access to the Giggle App restricted, or their claim to be a woman questioned on the basis of their physical appearance by Giggle and/or Ms Grover, and either or both of them would have engaged with cisgender women and responded to their queries regarding exclusion from the Giggle App – again, apparently not advancing a claim of direct discrimination.

47 Ms Tickle points to two requirements that make up the imposed condition she alleges gave rise to indirect discrimination: the requirement that Giggle App users be cisgender women, and the requirement that they appear, on examination of their photograph, to be cisgender women. The difficulty for the first requirement in the indirect discrimination claim is twofold:

(a) it more properly relates to a direct discrimination claim, requiring proof of both the existence and application of a policy of excluding transgender women; and

(b) more importantly, it does not engage with how she was actually removed from being able to use the Giggle App, which was on the examination of her selfie photograph only after she had been granted access.

48 Neither difficulty was averted to by the respondents. That leaves the second requirement, being the true thrust of Ms Tickle's indirect discrimination case, being that the respondents imposed a condition on users, on inspection of their photos by Ms Grover, that they appeared to be cisgender women.

49 The respondents' substantive case, drawn more from their submissions than their pleading which is largely an exercise in blanket denial, is that Ms Tickle was granted ordinary access to the Giggle App via the AI assessment process, and that she was removed from the Giggle App

because she was an adult human male, the respondents rejecting altogether the use of the word woman to describe Ms Tickle. All of Ms Tickle's allegations summarised above are flatly denied in that context. Importantly, the respondents deny that they were aware of Ms Tickle's gender identity at the time she was removed from the Giggle App. As will be seen, this would be capable of being a complete answer to Ms Tickle's case of direct discrimination, but does not address Ms Tickle's case of indirect discrimination. To the contrary, as advanced by their pleaded defence and the way in which they ran their case, they have tended to help Ms Tickle to establish indirect discrimination.

50 It is apparent that a key dispute is not one of what has taken place, except on the periphery, but rather one of characterisation, with the respondents essentially taking issue with the very concept of gender identity. They appear to contend that a claim of gender identity discrimination can be answered by asserting that sex discrimination occurred, and that the kind of sex discrimination they engaged in is a special measures exception under s 7D of the SDA. That is manifested in part by the respondents' constitutional challenge to the validity of s 5B (really a challenge to the validity of s 22) as being beyond the legislative power of the Commonwealth, and in part by the interpretation they give to the operation of ss 5 and 5B of the SDA. That challenge, addressed below, is in part a reflection of the respondents having no real answer to the case of indirect discrimination on the undisputed and proven facts.

51 The parties' competing arguments as to the interpretation of ss 5 and 5B, as put in relation to the respondents' objection to competency, were summarised in *Tickle v Giggle No 1* at [15]-[17], and noted at [18] to be irreconcilable:

> [17] The applicant's response is to agree that for the purposes of s 5 of the SD Act, a person's sex is that of a man or a woman, and it is for that reason that the case is not framed by reference to s 5, noting that there is no barrier to a transgender woman being a woman for the purposes of sex discrimination. Rather, the applicant argues, the case alleges gender discrimination on the basis that the applicant is a transgender woman, not a cisgender woman. The case is instead brought under s 5B because the condition complained about is that it has allowed a transgender woman to be treated less favourably than a cisgender woman. The applicant alleges being removed from the App upon the basis of gender identity as a transgender woman, which does not, on that case, in any way pertain to the treatment of a man.
>
> [18] The difference between the applicant's case and the respondents' case is stark and wholly irreconcilable. One will ultimately be found to be right, and the other wrong. This is not the point at which that determination is to be made unless the applicant's case is manifestly untenable. The arguments for the respondents do not go so far as to convince me that is so, largely because the SD Act deliberately draws a distinction between sex discrimination and gender discrimination, for which the metes and bounds of the latter have not been tested. Nor can they be appropriately tested in the course of a relatively short interlocutory dispute.

52 The respondents' position on that issue was put more cogently and coherently at that interlocutory stage than at trial. Given that deficiency, I presume in their favour that their position remained unchanged in relation to the substantive hearing in this matter. They contend that Ms Tickle's case as pleaded, while purporting to engage the gender identity discrimination jurisdiction in s 5B of the SDA, is really directed to the definition of sex discrimination in s 5, and that the now amended statement of claim conflates sex and gender.

53 The respondents' position remains, as best as I was able to determine given the way in which it was presented, which failed to substantially engage with the real legal issues and facts in this case, that sex refers *only* to biological features which produce an immutable and binary position of man or woman, while gender identity is directed *only* to a person's individual identity as characterised by how a person signals their gender to others, referring to behavioural features, psychology and society. I similarly presume that Ms Tickle maintains her agreement with an aspect of that stance, as articulated in her submissions on the respondents' interlocutory notice of objection to competency (which was itself incompetent), being that, for the purposes of s 5 of the SDA, a person's sex is that of a man or a woman. It is for that reason that her case is not framed by reference to s 5, as her sex is now that of a woman. In the same submissions, she noted that there is no barrier to a transgender woman being a woman for the purposes of sex discrimination claims (a point that seems to be correct, but does not require adjudication in these reasons).

54 Ms Tickle's position remains that she alleges gender identity discrimination on the specific basis that she is a transgender woman, and thus a woman. Her case is brought relying upon s 5B of the SDA, not s 5, because the discrimination complained of resulted in her, as a transgender woman, being treated less favourably than a cisgender woman. She alleges that being removed from the Giggle App on the basis of her gender identity as a transgender woman does not in any way pertain to the treatment of a man, which is the concern of s 5. It is therefore necessarily no part of her case that she was discriminated against as or compared to a man, a point of importance when it comes to the role of CEDAW in supporting the gender identity discrimination provisions in the way that she seeks to rely upon them, via the external affairs power in s 51(xxix) of the Constitution.

55 On the proper construction of s 5, the Commissioner submits, and I accept, the following propositions grounded in logic and long-standing authority. *First*, sex is not confined to being a biological concept referring to whether a person at birth had male or female physical traits, nor

confined to being a binary concept, limited to the male or female sex, but rather takes a broader ordinary meaning, informed by its use, including in State and Territory legislation.

56 *Secondly*, and accordingly, sex can refer to a person being male, female, or another non-binary status and also encompasses the idea that a person's sex can be changed, citing *Secretary, Department of Social Security v* ***SRA*** (1993) 43 FCR 299 at 304-305 (Black CJ), 325 (Lockhart J), and 328 (Heerey J, agreeing with Black CJ and Lockhart J); noting that *SRA* was cited with approval by the Full Court of the Family Court in *Attorney-General (Cth) v* ***Kevin and Jennifer*** [2003] FamCA 94; 172 FLR 300 at [211]-[224], [374]-[375]; and referring also to *AB v Registrar of BDM* at [4] (Black CJ, dissenting, though not on this point).

57 *Thirdly*, for the purposes of the SDA, the determination of the sex of a person may take into account a range of factors, including biological and physical characteristics, legal recognition and how they present themselves and are recognised socially.

58 *Fourthly*, although the relevant portion of s 5 of the SDA was not altered by the 2013 SDA Amendment, it must be read in context of the changes that were made: ***Commissioner of Stamps*** *v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 463 (Brennan CJ, Dawson and Toohey JJ), 479 (McHugh and Gummow JJ); see also the discussion in Thomas Prince and Perry Herzfeld, *Interpretation* (Thomson Reuters, 2nd ed, 2020) at 296 [11.60] and [11.70]. That is, the amended Act must be treated as a whole, with the text and provisions added and the text and provisions removed being able to have an effect on the meaning of the provisions that have not changed.

59 This accords with principle, noted by all five High Court justices in *Commissioner of Stamps* as being the modern approach almost 30 years ago. At the federal level this principle was also legislatively expressed in a declaratory way by s 15 of the *Acts Interpretation Act 1901* (Cth), noting s 15 was repealed in 2011, and is now s 11B(1). These changes made by the 2013 SDA Amendment do not require the Court to resort to inference or difficult points of construction. The changes were overt and deliberate. They included not just the introduction of the gender identity discrimination provisions, but also the change of all references to "*the opposite sex*" to "*a different sex*" and the repeal of the definitions of "*man*" and "*woman*" (which had referred to members of the male and female sex, respectively). Those amendments all point forcefully to an understanding of sex, as it is deployed in the SDA, that is changeable and not necessarily binary, contrary to the respondents' submissions.

60 That conclusion is fortified by the 2013 SDA Amendment's Explanatory Memorandum, which emphasises:

> These definitions are repealed in order to ensure that 'man' and 'woman' are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA.

61 Those observations were not merely aspirational, but accurately reflect the changes to the SDA that were made and therefore supports the interpretation that the Commissioner contends for: cf *R v JS* [2007] NSWCCA 272; 230 FLR 276 at [143]-[144].

62 I also accept the Commissioner's submission in substance to the effect that I do not need to determine the metes and bounds of the meaning of sex in these reasons. I need go no further than accept, as I do, that it is legally sufficient that Ms Tickle is recorded as female on her updated Queensland birth certificate for her to be, at law, of the female sex. This is in accordance with the Queensland provisions that were in place at the time of the alleged discrimination, being in substance the same in all the other States and the two Territories, with certain differences that do not presently need to be considered (such as New South Wales being the only jurisdiction that still requires sexual reassignment surgery as a requirement to change a person's registered sex): see s 24(4) of the Qld BDM Registration Act. This legislation in Queensland, mirrored in like legislation nationwide, reinforces the view already established by the authorities cited above of *SRA*, *Kevin and Jennifer* and *AB v Registrar of BDM*, that in its contemporary ordinary meaning, sex is changeable.

63 The concept of sex has broadened further over the 30 years since *SRA*, especially by reason of the wide scope that now exists for legally changing the sex of a person on official birth records. The acceptance that Ms Tickle is correctly described as a woman, reinforcing her gender identity status for the purposes of this proceeding, and therefore for the purposes of bringing her present claim of gender identity discrimination, is legally unimpeachable.

64 The construction of s 5 proposed by the respondents is fundamentally at odds with the text, broader context and purpose of the SDA with the gender identity discrimination provisions added and the other changes made. The respondents' construction of s 5 cannot be accepted. The respondents' contention that Ms Tickle was discriminated against as a man misunderstands the concept of sex in s 5. I therefore reject the argument that her case is incorrectly pleaded as one of gender identity discrimination. I further consider the construction of s 5B later in these reasons, at Part 3(b).

PART 3: INTERPREATION OF KEY PROVISIONS OF THE SDA

(a) History of amendments to the SDA

65 Given their relevance to several questions that arise in this judgment, it is necessary to set out a brief history of certain key amendments to the SDA, being relevant to the interpretation and application of the key provisions summarised or reproduced in Part 2(c) of these reasons above.

66 The SDA was enacted in 1984, the year after Australia ratified CEDAW. At the time, the SDA prohibited discrimination on only three grounds: sex, marital status and pregnancy. Despite amendments, the SDA has retained its basic structure. Key among them, Pt I contained and still contains the operative definitions of terms used throughout the Act, including discrimination on the grounds of sex, marital status and pregnancy; and Pt II contained, and still contains, prohibitions of those forms of discrimination, as well as certain exceptions to their effect.

67 As noted above, s 4 used to contain a number of definitions of key terms that were repealed with the introduction of the gender identity discrimination provisions, including the removal of the following definitions of the words man and woman:

> "man" means a member of the male sex irrespective of age;
>
> "woman" means a member of the female sex irrespective of age.

68 The word sex was, and remains, undefined in the SDA.

69 Section 9(4) originally provided that certain **prescribed provisions** of Div 1, 2 and 3 of Pt II were to be given effect as provided by the other provisions in s 9. Section 22 is among the prescribed provisions. At the time of enactment, s 9(10), which referred to the external affairs power, provided that:

> if the Convention [CEDAW] is in force in relation to Australia, the prescribed provisions of Part II, and the provisions of Division 3 of Part II, have effect in relation to discrimination against women, to the extent that the provisions give effect to the Convention [CEDAW].

70 In 2011, amendments were made to section 9 to provide that the Act had a wider scope of constitutional support: *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth). This included expanding the number of international instruments referred to in s 9(10). Section 9(10) of the SDA now provides that the prescribed provisions have effect to the extent that they "*give effect to a relevant international instrument*". Section 4 defines "*relevant international instruments*" as several international instruments to which Australia is party, including CEDAW and the ICCPR. The combined effect of sub-ss 9(4) and (10) is that s 22

will be given effect to the extent that it implements Australia's obligations under relevant international instruments: *AB v Registrar of BDM* at [96] (Kenny J, Gyles J agreeing).

71 The 2013 SDA Amendment made several further changes to the SDA, expanding the kinds of prohibited discrimination to include discrimination on the grounds of sexual orientation, intersex status and, relevantly to the present proceeding, gender identity. These amendments inserted definitions of these new grounds of prohibited discrimination, and inserted references to those forms of discrimination in the prohibition provisions in Part II of the Act. The word "*gender*" was not defined, but a definition of "*gender identity*" was inserted into s 4 (excerpted at [32] above). Section 3 of the SDA was also amended to add these forms of prohibited discrimination to the list of kinds of discrimination whose elimination is an object of the SDA: s 3(b).

72 As already noted, this package of amendments removed the definitions of man and woman from section 4, in order to better support the purpose of the gender identity discrimination provisions: see above at [59].

73 Along with those amendments, references to the opposite sex were also replaced with references to a different sex. The Explanatory Memorandum notes that sex is not a binary concept, and that the new terminology was consistent with the protection of gender identity and intersex status, and so recognises that a person may be, or identify as, neither male nor female.

(b) Construction of gender identity and s 5B

74 As noted above, Ms Tickle treats it as straightforward that the term gender identity in the SDA can refer to a person's transgender identity and, accordingly, s 5B can refer to discrimination on the ground of being transgender. Gender identity is identified broadly in s 4, as encompassing a person's gender-related identity, appearance or mannerisms or other gender-related characteristics, with or without regard to the person's designated sex at birth. That definition is plainly capable of referring to a person's transgender identity, which refers to the position where a person's current gender differs from their assigned sex at birth. That conclusion is fortified by the Explanatory Memorandum to the 2013 SDA Amendment Bill at [12], which clarifies that the definition is intended to apply to transsexual and transgender persons, and such express language was not used only to ensure it was not read in a limited way. The corollary to that is that gender identity can also refer to a person's status as cisgender, which is relevant in identifying a comparator with a different gender identity for the purposes of indirect discrimination as described in s 5B(2). The definition appears broad enough to

encompass other kinds and aspects of gender identification, though it is not necessary to consider that issue further in these reasons.

75 The respondents' arguments barely engaged with the construction of s 5B, insisting that direct discrimination *had* occurred, *not* on a proscribed basis, but rather on the basis of Ms Tickle's sex, which they consider to be synonymous with her assigned sex at birth. That is a defence akin to claiming, as the Commissioner put it in general argument, rather than this case specifically:

> I wasn't discriminating against that person on the basis of their gender identity. I discriminated against them on the basis of their biological conception.

76 As already outlined, the respondent's contention that Ms Tickle's claim was properly one of sex discrimination under s 5 misunderstands the meaning of the word "*sex*" in the SDA, and must be rejected. The gender identity discrimination provisions cannot be evaded by creating false distinctions that are not supported by any of the terms of the SDA, properly understood.

77 The respondents' argument is contrary to the express terms of s 5B as well. The words *by reason of* in s 5B(1) point to the requirement for a causal connection between a person's gender identity, or a characteristic that generally appertains or is imputed to persons of that gender identity, and the less favourable treatment by the alleged discriminator: *Human Rights and Equal Opportunity Commission v* ***Mt Isa Mines*** *Ltd* (1993) 46 FCR 301 at 322 (Lockhart J). It is not a "*but for*" test as this would be to improperly focus on the consequences for the complainant, rather than the "*real reason*" for the alleged discriminator's conduct: ***Purvis*** *v New South Wales* [2003] HCA 62; 217 CLR 92 at [166] (McHugh and Kirby JJ). Identifying whether the treatment occurred *by reason of* gender identity requires an examination of the relevant circumstances, but there is no requirement for a specific kind of intention or motive: *Mt Isa Mines* at 322. As Gummow, Hayne and Heydon JJ noted in *Purvis* in part of [236]:

> the central question will always be — why was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it "because of", "by reason of", that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression "because of".

78 It is implicit in s 5B(1) that the discriminator actually be aware of a person's gender identity, or the characteristic that generally appertains or is imputed to persons of the same gender identity. But that awareness is different from a requirement that a person have some additional belief about the legitimacy of that gender identity. In short, if it were established that the respondents had been aware of Ms Tickle's gender identity, but dismissed its legitimacy and

for that reason excluded her from the Giggle App, her case of direct discrimination would likely have succeeded.

79 I should also note that Ms Tickle's direct discrimination case is pleaded as discrimination on the basis of her gender identity, not a characteristic imputed or appertaining to it. It follows that it is therefore necessary for her to establish that the respondents had knowledge of her gender identity.

80 Less attention was paid to s 5B(2) by both sides, despite it being the real thrust of Ms Tickle's case. Section 5B(2) provides that indirect gender identity discrimination involves the imposition of a condition, practice or requirement that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person. The provision is largely directed to kinds of discrimination that are facially neutral, but have a discriminatory effect, intended or otherwise. It requires identification of a comparator group by which the disadvantage of persons who share a gender identity with the aggrieved person can be compared. In this case, the comparator is self-evident: cisgender women. That enables the treatment of transgender women to be compared to the treatment of cisgender women by the application of the imposed condition as to appearance.

(c) The special measures exception to discrimination

81 Paragraph 1 of Art 4 of CEDAW provides:

> Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

82 Section 7D is the enactment of this part of CEDAW in 1995 as domestic law and, at the time it was inserted into the SDA, CEDAW was the only international instrument on which that Act relied as a source of Commonwealth legislative support. As such, construction of Art 4 of CEDAW was influential in relation to the construction of s 7D: see ***Jacomb*** *v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250; 140 FCR 149 at [40]-[44]. Section 7D replaced the previous exception from discrimination created by s 33 for action taken to ensure "*equal opportunities*" for women, pregnant persons and people of a particular marital status, aligning the SDA's language more closely to that of Art 4.

83 While the SDA now relies upon a broader suite of international instruments, that source remains important for interpretive purposes, even if CEDAW itself is not, or cannot be, relied upon to support the gender identity discrimination provisions in this case due to the nature of

the discrimination Ms Tickle alleges (see findings at Part 5(a)(i) below). The point of the special measures exception is to achieve not just the appearance of equality by treating people in the same way despite their lack of real equality in fact, but substantive equality to address underlying disparities. As Crennan J pointed out in *Jacomb*, at [44]:

> A "special measure" as referred to in s 7D, and as construed by reference not only to the ordinary meaning of words repeated from the Convention [CEDAW], but also by reference to the context, object and purpose of the Convention [CEDAW] is one which has as at least one of its purposes, achieving genuine equality between men and women. The phrase "special measure" is wide enough to include, what is known as, affirmative action. A special measure may on the face of it be discriminatory but to the extent that it has, as one of its purposes, overcoming discrimination, it is to be characterised as non-discriminatory. …

84 It follows from the express text of s 7D(1), that to be a special measure, the conduct in question must be done for the purpose of achieving substantial equality, or in the language of paragraph 1 of Art 4 of CEDAW, accelerating *de facto* equality; that is, equality in fact.

85 The respondents rely upon the very existence of the Giggle App as a special measure for the purpose of achieving substantive equality between men and women. That may well have been successful if a cisgender man had claimed s 5 sex discrimination by reason of being excluded from using that App, and the special measures exception did apply. But that is not the present situation. The respondents contend that a special measure will not amount to discrimination if it advances any of the other provisions in the nine paragraphs to s 7D(1), corresponding to the eight provisions describing different types of what would otherwise be discrimination listed in s 7D(2), being ss 5, 5A, 5B, 5C, 6, 7, 7AA and 7A. That is, the respondents contend that a special measure done for the purpose of achieving substantive equality between men and women will avoid, by operation of s 7D(2), being gender identity discrimination for the purposes of s 5B.

86 That contention is plainly untenable. It is obvious and logical to read s 7D(1) and 7D(2) together, so that a special measure falling within s 7D(1)(a) (discrimination between men and women) does not constitute discrimination only as described in s 5 (sex discrimination). Any other interpretation would be unworkable and nonsensical. It simply cannot be that a special measure of advancing substantive equality between men and women provides any shield from gender identity discrimination, any more than it would provide a shield against discrimination on any of the other grounds listed in s 7D(2). The respondents' contention must fail.

PART 4: EVIDENCE AND FACTUAL CONCLUSIONS

(a) Ms Tickle

87 Ms Tickle identifies, and is legally recognised, as a woman. She was male sex at birth, and since about June 2017 she has lived as a woman, which has been a gradual process of transitioning her gender including social, medical and legal components. She began to use the name Roxy Tickle and told friends, family and her workplace of her transition. She began taking testosterone blockers, oestrogen and progesterone with the effect, as she described, of inducing a second puberty, and changing most parts of her body. She began to use female changing rooms and started playing in a local women's hockey team. She began shopping from the women's side of clothing stores and began a process of removing her facial hair.

88 On 19 May 2018, the **Queensland Register** of Births, Deaths and Marriages reissued her birth certificate with the name she now uses. In October 2019, she underwent gender affirming surgery, specifically a labioplasty and vaginoplasty. On 18 September 2020, her birth certificate was again reissued by the Queensland Register, now with a female sex marker.

89 In 2021, she downloaded and registered with the Giggle App. Her subsequent exclusion from it gave rise to this proceeding, as detailed earlier in these reasons.

(b) Ms Grover

90 Ms Grover is the founder and CEO of Giggle. In her affidavit evidence, Ms Grover states she conceived the idea for the Giggle App following trauma therapy for sexual abuse she had experienced, where the value of a strong support network was emphasised to her, and discussions with her parents, where they agreed a women's only app would be valuable. Following further discussions about what such an app might entail, Ms Grover's father began learning how to develop one. The development process is discussed further below.

91 It was Ms Grover's father who found the AI system, **Kairos**, that offered a gender detection service by scanning photos of users (see further discussion at [101] below). In relation to the use of this AI in the Giggle App, Ms Grover stated in affidavit evidence:

> I believed the discovery of Kairos meant the endeavour to create an App exclusively for women would be possible, at the time I believed it was a perfect way to do it. I did not believe the process AI facial recognition was controversial because it was the digital equivalent of what human beings do every day in perceiving sex, in particular male sex.
>
> At this time, I had absolutely no idea that males could be considered to be women. I had not heard or read anything in the media or on social media about this issue. It had never occurred to me to check if men were considered women in law.

...

> I did not consider the use of the word "gender" in the context of its "gender detection feature" to mean anything other than the detection of biological sex.

92 There is some inconsistency between this evidence and her account expressed in a blog post dated 19 July 2020 and titled "*I Guess I'm a Terf Then – part II*", which was admitted into evidence as an annexure to Ms Tickle's affidavit without objection. The term TERF in the title is an acronym for Trans Exclusionary Radical Feminist. In the blog, Ms Grover says that she had "*fought for trans women's rights during the early days of Giggle's development*" and that "*When other [Giggle] team members were saying "NO!" I was saying, "Come on! It's 2020! What are you thinking!?*" In the blog post, she clarifies that she had intended "*transitioned*" transgender women to be granted access to the Giggle App, but not "*self-ID only*" transgender women. It is not entirely clear what is meant by both terms, though I infer "*transitioned*" transgender women to mean those who have undertaken sexual reassignment surgery, and "*self-ID*" transgender women to refer to those who have not. As Ms Grover describes in the blog post, in around June 2020 Giggle had adopted a view that no transgender women should be given access that Giggle App. Ms Grover's evidence was open to challenge on the basis of that apparent inconsistency, but this did not take place.

93 Ms Grover's views on sex and gender by the time of the trial were clear. In cross-examination, Ms Grover maintained her position that she views Ms Tickle as a biological male. In cross-examination, Ms Grover was asked whether she would accept as a woman a person who was assigned male at birth but has since transitioned genders medically, socially and legally by having gender reassignment surgery, dressing and making changes to their appearance that align with what is generally considered more female appearance, introducing and describing themselves as a woman and legally changing their birth certificate to have their sex recorded as female. Ms Grover confirmed that she would not view that person as a woman, and did not agree that in Australian society the natural and ordinary contemporary meaning of the word woman encompasses women who were assigned male at birth and have since transitioned legally to be women. Ms Grover made clear in cross-examination that she does not differentiate between people who were assigned male at birth, even if they have since transitioned to become transgender women, stating "*they're male people*".

94 Ms Grover estimated that, in 2020, she would have had approximately 45,000 Twitter followers. On that platform, since the commencement of these proceedings, she has frequently described Ms Tickle as a man. She has also made posts stating that a man wants access to a female space, and given interviews to various news outlets that Ms Tickle is a man who wants

access to the Giggle App which is a female space. This evidence was given in a matter-of-fact manner, and I am satisfied reflected a genuinely held position, rather than a view expressed only to offend Ms Tickle. That is important in light of authority on the absence of bona fides being relevant to the question of aggravated damages.

(c) Giggle and the Giggle App

95 Giggle was incorporated on 8 March 2019. As noted above, Ms Grover's evidence is that the Giggle App was developed in 2019 with the help of her father. She further deposed to it being unofficially launched as a beta version in February 2020. Her evidence is that the Giggle App was originally conceived to be what she described as a women-only safe space on the internet, where women could search for roommates and employment opportunities, network, commune and engage in discussion. Its ambit was broadened during its initial development, with additional features added, which she described as allowing women to connect for emotional support, freelance work, general friendship and much more. In her affidavit evidence, Ms Grover described her vision for the Giggle App:

> The vision was to create a little corner of the Internet where women from all over the world could have a refuge away from men. It could be for serious reasons, very superficial reasons, or very practical reasons. It would be a place without harassment, "mansplaining", "dick pics", stalking, and aggression, and other male patterned online behaviour. A place to vent and get advice from other women and find out what was happening in the real world in a female-only environment.
>
> During development, I would often say, "I want to ensure that women can have access to a female support network in the palm of their hand whenever they need it" and that is essentially what we were creating. The vision was an online women's refuge, so to speak. The vision was to have a positive impact on women's daily online and social media experience.

96 The Giggle App could only be used on smartphones, not computers. Ms Grover describes it as effectively a number of apps on one platform. The Giggle App allowed users to directly message each other, and also featured a lesbian dating platform which allowed users to create a profile and then swipe to match with other users before beginning a private conversation. It also included a feature called "*Giggle Talk*", which Ms Grover describes as a female-only Twitter, which was added to the beta app in 2021. Giggle Talk did not allow non-Giggle App users to view or create posts. Ms Tickle describes there also being a section of small groups which were called "*Giggles*". Users could join a Giggle to discuss topics of interest, such as cooking, travel or health. While it is not expressly explained what this feature entailed, in context it seems to be some kind of group texting facility, but nothing turns on this additional detail.

97 The Giggle App was free for users, with premium upgrades available for purchase which were described as allowing them to have greater control over their experience on the App. Ms Grover says that upgrades to use premium features cost $2-3 per month, though at some point in 2020 Giggle made those features available to users for free. These included a feature called Giggle Slide, which allowed users to message each other without matching with each other, and a feature called Giggle Invisible which allowed users to use the App anonymously (presumably to each other, and not to the App itself). Ms Grover's affidavit evidence states that the fees payable for premium features were charged "*by reason of the software upgrades that were required to produce them*" and that Giggle "*turned off*" payments for those features in 2020 onwards to allow users access to those features.

98 The beta version of the Giggle App was taken live on the Google Play and Apple App stores in February 2020, in order for testing to be undertaken. Its promotional materials described it as a female social media and networking platform. Ms Grover's evidence was that, at that stage, only a small number of women were aware of its existence. However, soon after its release on 7 February 2020, the Giggle App received over 5,000 unwelcome user applications from people that Ms Grover determined to be male by inspection of their onboarding selfie photographs. She referred to what she called "*onslaught[s]*" like this occurring roughly every three weeks. The Giggle App also received numerous one-star reviews on the Google Play and Apple App stores. Ms Grover says that, at that early stage, multiple men had successfully created profiles on the Giggle App, as the Kairos AI software was not yet in place on the Giggle App. It is unclear whether the account creators Ms Grover describes as men or male included transgender women. The latter is certainly possible as she describes many of the users admitted would post messages to the effect of "*Kill TERFs*" and many of the one-star reviews object to the exclusion of transgender women, but this was not clarified in cross-examination. Ms Grover says that, on 8 February 2020, the decision was made to make the Giggle App available more broadly. By September 2021, the Giggle App had approximately 20,000 users.

99 The Giggle App's terms of use stated that "*[o]ur Platform allows females to connect with one another on the giggle app either in public or private spaces*"; that an account creator must be 16 years or older; and that "*[y]ou must be female*" to use it. The section called "*Acceptable use of our platform*" states that "*Giggle for Girls is a place where female users feel comfortable expressing themselves, sharing information, and communicating with one another.*" The Termination section allows Giggle to suspend a user's account without notice if they are in breach of the terms.

100 It appears that the respondents had adopted early on an explicit policy of excluding transgender women from access to the Giggle App, as evidenced by Ms Grover's blog post dated 19 July 2020 titled "*I Guess I'm a Terf Then – part II*" (described at [92] above). The post states that, from around June 2020, Giggle had adopted a view that no transgender women should be given access to the Giggle App. There was no cross-examination to endeavour to adduce evidence that this was in fact a policy and that it was actually given effect to. The Court is left to speculate whether or not such a policy was implemented, including whether this was reflected in the exclusions from use that Ms Grover deposed to.

101 Registration for a Giggle App account required a potential user to provide a phone number and to then upload a selfie. Users did not have to provide any additional information, such as their date of birth or name, to create a profile, but could choose their own username. The uploaded selfie would then be reviewed by an AI system provided by a third-party, Kairos, which was designed and used to determine if the person in the selfie appeared to be female or male. The AI system performed what was described as gender detection on user-submitted selfies, purportedly detecting the gender of each face with 94% accuracy. Ms Grover says that she selected that accuracy level as it reduced the chance of women being denied access to the App due to a poor-quality onboarding selfie, but still ensured most men attempting to join were rejected.

102 If the AI system determined that the person appeared female, it would grant them access to the Giggle App. If the potential user was rejected, a pop up would tell the potential user "*oops you have not been verified please try again*" and they would not receive access to the App or any of its functionality. Giggle would not receive a notification when a potential user was rejected by the AI system, but if their phone number was provided, the potential users' profile could be accessed by those at Giggle through a backend server called **Athena**. Ms Grover in cross-examination disagreed that the purpose of the Kairos AI was to determine if a person seeking to join the Giggle App was male or female, stating that the purpose of the AI was to "*aid us in gatekeeping and creating a female-only space*".

103 In addition to the AI screening, Ms Grover, and others running the Giggle App, reviewed the selfies uploaded by users who had been granted access to the app, receiving some kind of daily summary of these users' photographs. She says that this review process was undertaken on a shift basis by herself, her mother and a friend. Ms Grover described the purpose of this additional check as ensuring that men attempting to join the Giggle App had not bypassed the AI screening. Where, in these reviews, a man was identified, he would be blocked from using

the Giggle App. On the available evidence, and given Ms Grover's pivotal role, it is more probable than not that, as a practical matter, Ms Grover herself was the one reviewing these images most of the time that the Giggle App was operational, notwithstanding the shift arrangement that she referred to. Again, this could have been clarified by cross-examination, but was not.

104 In her affidavit evidence, Ms Grover says that users who were not granted access by the AI would often email Giggle and Ms Grover could, by using their number, review their profile on Athena. She says Giggle's practice was, on reviewing the applicant's photo, to accept them if they appeared female, reject them if they appeared male, and ask them to submit another photo if their sex was ambiguous. In cross-examination, however, she said that emails received at a particular Giggle email address were "*primarily from a flood of male abuse*", and they would at times receive hundreds or even thousands of emails from "*males*" which they routinely deleted or did not read as they could not have done so, presumably due to the sheer volume. The apparent inconsistency, or at least ambiguity in that evidence was not explored in cross-examination.

105 Ms Grover gave evidence that female users' issues would be dealt with through an in-App messaging system. Once a user had been blocked, however, any in-App communications made by them would not be received. As she put it, if an in-App communication were made by Ms Tickle after being blocked, the communication would not have been received by the Giggle team "*because the front end of the App was no longer connected to the backend of the App*".

106 The Giggle App was taken offline in August 2022. It was not operational or available for purchase on the Google Play or the Apple App stores at the time of the trial. Ms Grover gives a number of reasons for shutting down the Giggle App. Those reasons are relevant for the purpose of assessing the likelihood of that stance changing. The gist of Ms Grover's reasons was that, in July 2022, the App had received an inundation of users she describes as male, who had left one-star app reviews, and while she hoped that this manifestation of what she described as the "*culture wars*" would blow over, it did not.

107 Ms Grover's affidavit evidence states that until Giggle can be certain it is legal for the Giggle App to operate to the exclusion of all males which, she evidently considers to include Ms Tickle, the Giggle App will not be reopened. Ms Grover agreed in evidence that the Giggle App was, at the time of trial, being rebuilt, but did not recant from, nor was she challenged about, the intention not to resume the Giggle App unless a continuation of what had taken place before was found to be lawful. The practical effect of this is that if Ms Tickle succeeded in

either of her claims of gender identity discrimination, then the Giggle App, Ms Grover and therefore Giggle were determined not to reinstate the Giggle App. This is relevant to the relief of restoration to the Giggle App sought by Ms Tickle.

(d) The removal of Ms Tickle from the Giggle App

(i) Background

108 On 14 and 15 January 2021, Ms Tickle interacted with Ms Grover for the first time on Twitter (the social media platform now known as X). The two expressed disagreement over female-only spaces, specifically in relation to the McIver's Ladies Baths, a women and children-only baths in Coogee, Sydney. The interaction was on reasonably civil terms, the extract below being indicative of the tone of the entire exchange:

> **Sall Grover ([redacted Twitter handle]), 14 January 2021:** The McIver Ladies Baths "female children only" status should not be changed because of an onslaught of abuse. Please sign this petition so that women's hard won rights of female spaces continue in this beautiful space. [The post linked to a webpage on ipetitions.com titled "Petition Keep McIver's Ladies Baths Women & Children Only"]
>
> **Roxy Tickle ([redacted Twitter handle]), 14 January 2021:** Your tweet is a little misleading. Trans women, who are morally and legally women, have been going to the baths, without problem, for years. As trans women are legally women, should you wish to have trans women excluded from women's spaces you need to talk to the government.
>
> **Sall Grover ([redacted Twitter handle]), 15 January 2021:** They have been – because, as management said, transitioned trans women were welcome. But that wasn't good enough for the "activists". They want it to be self ID. That's what started this whole thing.
>
> **Roxy Tickle ([redacted Twitter handle]), 15 January 2021:** How do you define "transitioned" though? The law defines it as somebody that has commenced transitioning, not completed transitioning. I don't know if you have thought about it from our side, but it is actually terrifying to go swimming as a trans woman.
>
> **Sall Grover ([redacted Twitter handle]), 15 January 2021:** I have a lot of empathy for that, I really do. But changing the rules of female spaces isn't the answer. It's not right or fair. A lot of women enjoy female spaces because of the camaraderie & safety. I feel like trans women should have that with trans women, in these situations.

109 It was during or after the above interaction that Ms Tickle first heard that Ms Grover operated the Giggle App. Ms Grover's evidence is that she did not know Ms Tickle was the person that she interacted with on Twitter until she revisited her Twitter history after the AHRC complaint was made.

(ii) Ms Tickle's account creation and removal

110 Ms Tickle's evidence is that, in February 2021, she downloaded the Giggle App from the Apple App Store and completed the in-app registration process by providing her mobile phone

080/426

1079

number, selecting a username and taking a selfie. Ms Grover neither confirms nor challenges that evidence. It stands uncontradicted and accordingly I accept that this is what took place.

111 Ms Tickle's evidence is that the Giggle App notified her that her selfie would be assessed by Kairos AI and by a person from Giggle to determine if she was female. It is not clear what constituted this notification, but nothing turns on this, noting that of itself this is no more than the expression of an intention and is not evidence as to what actually happened, especially in relation to any assessment by a person. Ms Tickle's evidence is that the Kairos AI determined that she was a woman and she was granted access to the Giggle App. I take this to be a statement of the fact that Ms Tickle was able to pass the AI filter, and an assertion or conclusion as to what this meant to her, namely being treated as a woman by the AI algorithm. Ms Grover's evidence is that she reviewed Ms Tickle's account at the time the AHRC complaint was made, when the Giggle App was still live, and saw that none of her profiles used the words "*trans woman*", "*trans*", "*gender identity*" or "*gender*".

112 There is no direct evidence that a review of Ms Tickle's selfie by a human ever in fact took place at the registration stage. Affidavit evidence of Ms Tickle stating that this took place was objected to and not admitted. Ms Tickle could not give this evidence as it was no more than a conclusion she drew, rather than a reflection of any actual knowledge that this indeed occurred. However, there is undisputed evidence that the AI aspect of the review was actually deployed. I accept that Ms Tickle's enrolment was successful by reason of the AI procedure that was applied, but I am unable to accept that the evidence establishes that it is more probable than not that there was any human intervention at that stage. Nothing turns on this qualification that has a bearing on the determination of any of the facts in issue.

113 Ms Tickle's evidence is that, in the months after setting up her account, she had periodically opened the Giggle App and read posts in the Giggle Talk section. She set up a profile in the Giggles section of the App, and joined a few different Giggles. However, she found that there were not many users to connect with and lost interest. This is important contemporaneous evidence, because of its inherently greater reliability as to Ms Tickle's true attitude towards being able to use the Giggle App, when it comes to any damages assessment, and because it is relevant to the real measure of detriment suffered by being deprived of access to the App.

114 Ms Grover's evidence is that she reviewed Ms Tickle's profile after the AHRC complaint was made and found that Ms Tickle had no interactions or connections with other Giggle App users, and had made no connections, posts or other contributions. There was no cross-examination

challenging this evidence, and no evidence from Ms Tickle to the contrary, so I accept that this is what in fact occurred.

115 Ms Tickle's evidence is that, at some point between July and September 2021 (her AHRC complaint referring to September), she noticed that her access to the Giggle App had been restricted. She was able to read content that had been posted by others, but was not able to post content, comment on posts, nor read comments made by other users on posts, noting the unchallenged evidence in the preceding paragraph. It is Ms Tickle's belief, which is foundational to her claim, that the respondents excluded her from the Giggle App because she is a transgender woman.

116 How the Giggle App blocking mechanism actually worked was not explored in cross-examination. I am left to conclude on the available evidence that when Ms Tickle's account was restricted, it was because her account had been blocked from the Giggle App. That is, I infer that the limited features Ms Tickle was able to access at this point were a consequence of that form of blocking.

117 Ms Grover gave evidence in cross-examination that she did not remember removing Ms Tickle from the Giggle App, and so was not sure of the exact date the removal occurred. There is some lack of clarity about this, because annexed to one of Ms Grover's affidavits is a tweet by Ms Tickle on 24 January (presumably in 2022) saying that she had only then been removed from the Giggle App, and then re-admitted to the App. Ms Grover denies that Ms Tickle still had access to the Giggle App at that time. I am unable to determine what in fact took place in relation to later access, but it does not have any material bearing on the conclusions I reach.

118 After noticing her account restriction, Ms Tickle tried to contact Giggle through its in-App contact form. Ms Tickle relied upon evidence of her in-App messages having been sent as evidence of them having been received, but evidence of sending does not necessarily equate to evidence of receiving. While there is a rebuttable presumption that this is so for electronic communications in s 161(1)(d) of the *Evidence Act 1995* (Cth), sufficient doubt has been raised by Ms Grover's evidence on this topic for the presumption not to apply: see the chapeau to s 161(1). Her evidence was that, after a user had been blocked, no in-App messages would be received by Giggle from that user: see [105] above. I am not otherwise satisfied that the in-App messages that Ms Tickle sent were in fact received, let alone that they were received by Ms Grover.

119 On 4 October 2021, Ms Tickle sent an email to Ms Grover's email address and an email address from Giggle that had sent her the initial welcome email after setting up an account. The following exchange occurred:

(a) **Ms Tickle (4 October 2021 at 1:11 pm)**

> Subject: Help Desk Request
>
> Hi Sall,
>
> I sent this message through your app a week ago and haven't received a response as yet. Sorry to disturb you, but would you mind passing it on to the appropriate person please? I couldn't find any other way of contacting tech support.
>
> Thanks in advance!
>
> Cheers,
>
> Roxy

(b) **Ms Grover (8 October 2021 at 10:32 pm):**

> Hi Roxy,
>
> I am so sorry for this!
>
> Can you send me your phone number and I will personally look into it right now.
>
> All the best,
>
> *sall*
>
> founder & CEO
>
> www.joinagiggle.com
>
> [Ms Grover's mobile phone number]
>
> [Ms Grover's Twitter handle]

(c) **Ms Tickle (11 October 2021 at 10:58pm):**

> Hi Sall,
>
> Sorry for the delay!
>
> I try and put my email away for the weekend and then I had a massive day at work today.
>
> My phone number is [Ms Tickle's mobile phone number].
>
> Thanks for your help.
>
> Cheers,
>
> Roxy.

120 Ms Tickle received no further response by email from Ms Grover. She sent six follow up emails to the same addresses. They are all polite in tone, and all to the effect that she is

following up on her initial email and hopes that she was not blocked. She mentions that she can see other people's posts, but not the comments on such posts, and that she cannot pay for premium features. Ms Tickle also attempted to contact Ms Grover by telephone. In her email to Ms Grover on 29 October 2021, she mentions that she had called Ms Grover and did not get through. In her affidavit, Ms Tickle says that she missed a return call from Ms Grover's number on the morning of 30 October 2021. She sent the following text in reply:

> Hi Sall. Thanks for calling. Sorry I missed your call but Saturday is my proper-sleep-in and rest-all-day day! I actually didn't think you would be available on the weekend but I could make time to talk tomorrow if that suited you better than waiting til Tuesday? Cheers Roxy.

I accept, from that contemporaneous text message and Ms Tickle's evidence, that Ms Grover did attempt to call Ms Tickle at this time, but the call was not answered.

121 Ms Grover confirms that she received calls and texts from Ms Tickle in October 2021, which she did not keep. She recalls entering the phone number which Ms Tickle used to make those calls into Athena and viewing Ms Tickle's onboarding selfie. Ms Grover then called her father and told him that a man, who said that he was a Giggle App user and had been removed from the App, had called her. Ms Grover's father told her to block the phone number and ignore the telephone call and text she had received, which she did.

122 Ms Grover states in her affidavit evidence that she felt scared, threatened and harassed by the call and text, and feared that Ms Tickle might confront her in person. Ms Grover further states that she had no idea how Ms Tickle had obtained her personal mobile phone number, because as far as she was aware her mobile phone number was not publicly available. That is at best disingenuous. I find that Ms Tickle almost certainly obtained Ms Grover's phone number as a result of Ms Grover communicating it to her. That inference is inescapable because it was included in Ms Grover's email signature, which was included in the reply email Ms Grover sent to Ms Tickle on 8 October 2021.

123 While Ms Grover's affidavit evidence states that Ms Tickle had been removed from the Giggle App in October 2021, and had not regained access thereafter, Ms Grover acknowledged that it was possible Ms Tickle was removed earlier, but no later, and that she would not dispute a date of September 2021. Ms Grover, when informed in cross-examination that Ms Tickle had attempted to make contact with Giggle through the in-App contact form due to her lack of access to the App in September 2021, stated that this indicated she was likely blocked before that point as the block would have meant the in-App form was not operational. This accords with the finding to that effect made above.

124 The emails, phone calls and text message from Ms Tickle to Ms Grover occurred subsequent to Ms Tickle's account restriction, being the reason that she was making contact with Ms Grover. I therefore conclude that the removal must have occurred before the first email was sent on 4 October 2021, likely in September 2021 or alternatively in early October 2021.

125 In cross-examination, Ms Grover agreed that Ms Tickle would have been removed from the Giggle App when Ms Grover examined her photograph, with Ms Grover deciding from viewing of that photograph that Ms Tickle was not a woman and hence removing Ms Tickle. Ms Grover could not recall removing Ms Tickle specifically, but stated that it was her practice to review users' onboarding selfies and block anyone who appeared male to her. As I have found, at the time that Ms Tickle was removed from the Giggle App, Ms Grover was most likely responsible for the majority of the human reviews of user photos. It is most likely that it was not just that Ms Grover did the majority of those reviews, but the overwhelming majority, to the likely exclusion of any significant volume being done by anyone else. That probably accounts in part for Ms Grover's lack of any specific recollection of having done so in relation to Ms Tickle.

126 When asked about the reason for removing Ms Tickle on viewing her application photograph Ms Grover said "*the same as removing all males, yes*". As Ms Grover has otherwise in her evidence stated that she does not specifically remember removing Ms Tickle from the Giggle App, I take this answer to mean that Ms Grover believes she would have removed Ms Tickle with the intention of effecting the Giggle App's rule that it be female only. In other words, I accept Ms Grover's evidence that the likely reason for the applicant's removal from the Giggle App based upon her application selfie was not for the reason that Ms Tickle is a transgender woman, but rather because Ms Grover perceived the selfie to be a photograph of a male and would have removed Ms Tickle for that reason. This accords with the respondents' statement in their written submissions that Ms Tickle was excluded from the Giggle App by Ms Grover upon her visual perception of Ms Tickle's male sex. Ms Grover's evidence is that she did not look again at Ms Tickle's Giggle App selfie when she was contacted by Ms Tickle at a later date about her removal from the Giggle App. There is no reason to doubt that evidence.

127 There is an apparent inconsistency between Ms Tickle being allowed to use the Giggle App for some months before being blocked and the user review processes Ms Grover described, which was not addressed by either party. While nothing turns on this, it appears to me most likely that while the Kairos AI granted access to Ms Tickle on its review of her onboarding selfie in February 2021, Ms Grover did not herself review that selfie until much later in the year. While

Ms Grover has explained that Giggle staff received a daily users report that showed them the onboarding selfies of those who had recently joined the Giggle App, Ms Grover has also stated that a large number of people, between 50 and 5,000 per day, were attempting to join the App. It is therefore possible, and even quite likely, that, even if Giggle staff were being sent these reports daily, there was a backlog of these reports and that Giggle staff were not reviewing the reports as they came in. If Ms Grover was reviewing selfies from February 2021 in September 2021, and hence first saw Ms Tickle's onboarding selfie and subsequently blocked Ms Tickle at that time, this would explain why she was able to use the Giggle App for the intervening months before being blocked from the App.

128 In summary, I have made the following factual findings:

(a) Ms Tickle's inability to access certain features on the Giggle App was a consequence of her being blocked from that App;

(b) that block occurred when Ms Grover made a decision to remove Ms Tickle from the App after reviewing her onboarding selfie and concluding that she was male;

(c) that review and block occurred at some point before 4 October 2021, most likely in September 2021;

(d) Ms Tickle subsequently contacted Ms Grover about being denied access and provided her mobile phone number to Ms Grover; and

(e) Ms Grover also provided her mobile phone number to Ms Tickle by way of the signature block in her reply email to Ms Tickle.

(ii) Conclusions on gender identity discrimination

129 In light of the foregoing, I am unable to accept that any direct discrimination has been established, repeating the observations above that this was not really, in substance, the case that Ms Tickle advanced. The evidence did not establish that Ms Tickle was excluded from the Giggle App by reason of her gender identity, although it remains possible that this was the real but unproven reason. Rather, the evidence goes no further than establishing that her exclusion was likely to have been a byproduct of excluding those who were perceived as being men, by the use of visual criteria that failed to distinguish between cisgender men and transgender women.

130 Ms Grover embraced the fact that Giggle had a policy of excluding all people who were male sex at birth at the time Ms Tickle was removed, and this included, as Ms Grover made clear in oral evidence and her blog post quoted at [92] above, transgender women. A difficulty for Ms

Tickle's direct discrimination case remains, however, the lack of clarity surrounding Ms Grover's specific decision to remove her from the Giggle App, including because of the failure to delve into this by effective cross-examination.

131 Ms Grover's evidence is that she cannot remember blocking Ms Tickle, but the decision would have been based only on Ms Tickle's selfie, and that she was reviewing large numbers of selfies quickly. Further, she gave evidence that she did not recall Ms Tickle from their earlier Twitter exchange, and that nothing on Ms Tickle's Giggle App profile pointed to her being a transgender woman. I am left to conclude that it is most likely she did not know that Ms Tickle was a transgender woman when she reviewed her selfie, and instead excluded her on the quick or reflexive decision that she appeared to Ms Grover to be a male. Of course, given Ms Grover's views, her decision almost certainly would have been the same had she been aware of Ms Tickle's gender identity. For Ms Grover, there is no legitimate distinction between transgender women and cisgender men. Denial in the legitimacy of that distinction would be no answer to a case of direct discrimination, if awareness of Ms Tickle's gender identity had been established. Nonetheless, the direct discrimination case must fail on the more basic evidential basis that it has not been established that Ms Grover was aware of Ms Tickle's gender identity at the time she blocked her from the Giggle App. The exclusion, therefore, was not proven to be by reason of Ms Tickle's gender identity.

132 It is conceptually possible for Ms Tickle to have been excluded from the Giggle App not due to direct gender identity discrimination, yet later be refused readmission to that App by reason of such direct discrimination. This could be the case if, after the initial exclusion, there was an intervening realisation of her gender identity by the respondents, and that new knowledge of her gender identity was the reason for denial of readmission. However, that claim of direct discrimination by reason of not being readmitted to use the Giggle App suffers from a shortfall of evidence establishing Ms Tickle's messages made the respondents aware of her gender identity, and that there was no response to Ms Tickle's inquiries *by reason of* her gender identity. There was also no evidence as to any actual decision not to readmit, nor any reason for non-readmission beyond the reason for exclusion in the first place, namely that Ms Grover considered Ms Tickle had the appearance of a cisgender man.

133 There is some evidence that might, with a measure of exploration in cross-examination, have supported an inference that Ms Grover had been made aware that Ms Tickle identified as a woman but, on review of her selfie, declined to readmit her. In her affidavit evidence, Ms Grover she said that users who had been refused access from the Giggle App would often email

Giggle, and her practice had been to use the users' phone numbers to look up and review their selfies on Athena. She states that if the user appeared to be female they would be admitted, if they appeared male they would remain blocked, and if their sex was ambiguous they would be asked to submit another photo. That is certainly what Ms Grover seemed to be suggesting would occur when she responded to Ms Tickle's initial email, asking for Ms Tickle's phone number so that she could personally look into it. It is certainly possible that Ms Grover had been put on notice that Ms Tickle identified as a woman by that email, and that she proceeded to review Ms Tickle's photo, choosing not to readmit her because she regarded Ms Tickle as male. However, the evidence before me is that she only reviewed the photo at a later stage, after Ms Tickle called her. There is no firm basis for me to infer that, at that stage, Ms Grover was aware of who Ms Tickle was or her gender identity. All of this might have been explored in a more effective cross-examination of Ms Grover, but it was not, and I am left with the facts established by the evidence that was adduced.

134 The situation and conclusion for indirect discrimination is the polar opposite, for much of the same reasons that the claim of direct discrimination fails. Ignorance of Ms Tickle's gender identity is no defence to the indirect discrimination claim; indeed, it is a significant part of the reason why her case succeeds. The imposed condition of needing to appear to be a cisgendered female in photos submitted to the Giggle App had the effect of disadvantaging transgender women who did not meet that condition, and in particular Ms Tickle. But this finding applies only to the act of excluding Ms Tickle from the Giggle App. It does not apply to her not being readmitted due to the paucity of evidence to explain this, or even to establish that any positive decision was made not to allow this to take place.

135 As to exclusion, ordinarily there is a need for a careful comparator exercise to be carried out, in order to identify how and why a condition, requirement or practice imposed or proposed to be imposed has or is likely to have the effect of disadvantaging the person indirectly discriminated against, or persons who have the same characteristics of the aggrieved person, here having the same gender identity as Ms Tickle, namely that of a transgender woman. This requirement must still be addressed, but on the way in which the evidence has unfolded and the competing arguments advanced, it is straightforward. That is because, in substance, as opposed to any pleading or argumentative form to the contrary, the existence of the condition and its effect is not disputed or otherwise in issue. It is not denied or otherwise in doubt that the basis for the exclusion of Ms Tickle was that she was perceived to have a male appearance, that is, she was perceived to have been male at birth. Indeed, this was the very essence of the respondents' case.

136 Nor do the respondents deny in this proceeding that the effect of this condition was that it would not just exclude men who were male sex at birth, but also transgender women too, including transgender women who are legally regarded as female. Indeed, it was not direct discrimination only because, on the evidence before me, it was not established that the respondents were aware that Ms Tickle was a woman, so that her gender identity was not established to be any part of the reason for her exclusion. The respondents not only did not deny this as a possible or likely outcome of the condition, but embraced it as being a legitimate and desirable thing to happen. They saw, and continue to see, nothing wrong in not drawing or attempting to draw this distinction.

(e) Other evidence relied upon by the respondents

137 The respondents relied upon expert evidence to support their arguments as to the meaning of the word "*woman*" in CEDAW and the SDA. They also read 14 affidavits from users of the Giggle App that they relied upon in relation to their submissions as to the application of the s 7D exemption. For the reasons below, none of this evidence was of any assistance to the respondents' case.

(i) Expert evidence

138 The respondents included three purported expert reports in the Court Book. Those reports are from Colin Wright, Helen Joyce and Kathleen Stock. Dr Wright and Dr Stock's reports were accepted as expert evidence without objection. None of Dr Wright, Dr Joyce or Dr Stock gave oral evidence at the hearing.

139 I did not accept Dr Joyce's report as expert evidence in this case, with both Ms Tickle and the respondents accepting that she lacked sufficient expertise for the exception to the opinion rule to apply: see *Evidence Act*, ss 76, 79. The respondents put forward a rather peculiar argument that this report went to a finding of legislative fact, which they contended to be whether the Giggle App could be regarded as a special measure under s 7D of the SDA, and they therefore sought to tender it not as evidence or submissions but some mysterious third category of document to which the Court could have regard. Such a finding as to whether the Giggle App is a special measure would clearly be one of fact. In any case, my earlier finding as to the construction of s 7D, and its inapplicability to the respondents' case, would render this asserted evidence of no moment. The report was ultimately relied upon by the respondents as their own submissions. As such, it went nowhere.

140 Dr Wright has a bachelor's degree in science, focussing on evolution, ecology and biodiversity from the University of California, Davis. Dr Wright also has a PhD in evolution, ecology and

marine biology from the University of California, Santa Barbara and has served as a Postdoctoral Fellow at The Pennsylvania State University. At the time of making his report, Dr Wright had published 28 peer-reviewed scientific articles on animal behaviour and the biology of sex. A number of questions were addressed by Dr Wright in his expert report. Those included "*what is biological sex?*"; "*how many biological sexes are there?*"; "*what is a biological male?*"; and "*what is a biological female?*". Dr Wright also addressed questions regarding biological sex characteristics and their relationship to biological sex, whether humans can change biological sex, and how humans recognise biological sex in other humans. The final question Dr Wright addressed in his expert report was:

> based on your specialised knowledge, in your opinion is there a scientific explanation as to why Sally Grover determined that the image ... the Applicant uploaded at onboarding to the App was an image depicting a male person.

141 While I have read Dr Wright's report, it does not assist me in deciding this case. It is not my role in forming a judgement about the issues in dispute, and the relevant law, to have regard to the evolutionary or biological definitions or features of human sex. That is because, as I have already found, the legal definition of a woman (or man) is not so confined. It is therefore outside my purview to consider, far less determine, the general nature of biological sex. The science behind that evidence is not, as far as it goes, in dispute. It is just that the issues in this case involve wider issues than biology.

142 Ms Tickle is a legal female, as reflected in her updated birth certificate issued under Queensland law. The discrimination complained of by Ms Tickle is on the basis of gender identity and not sex. Dr Wright's report does not address, or attempt to address, the concept of human gender identity. Yet that is what this case is all about, having regard to the proscription on gender identity discrimination in the SDA, legislated by the Commonwealth parliament.

143 Dr Stock's report in large part answers the question posed by the respondents to her, namely:

> from an ontological perspective, based on your specialised knowledge, in your opinion, is a woman a socially constitutive fact or convention into which any human can self-identify at their discretion?

144 I have read the report of Dr Stock, but again find it of no assistance in deciding this case, for much the same reasons as for Dr Wright's report. Ms Tickle has not only self-identified as a woman, or a female, but has successfully undertaken steps to become entitled to refer to herself, legally, as female. Much of the report from Dr Stock deals with whether or not womanhood is a social or natural construct, falling clearly on the side of it being a natural construct, or natural

fact, and not a social convention which a person can self-identify into. Any debate around the concept of woman, of womanhood, or gender more broadly as a natural, biological, or social construct falls well outside what I must, legally, determine in this case.

145 Turning now to the report of Dr Joyce, advanced by the respondents as a submission. Dr Joyce is the director of advocacy of an organisation called "*Sex Matters*", which she describes as a human-rights organisation concerned with clarity about sex in law and policy, based in the United Kingdom. Dr Joyce is also a journalist and author who has written on the topic of transgender identities and women's rights. She has a PhD in mathematics, but does not have any formal education or qualifications even in biology, let alone in gender, sex or law, being the topics which her report addresses. For the purposes of this proceeding, she is not an expert at all. She has no recognised expertise in any of the areas in which she expresses an opinion (or more relevantly, provides a submission). Thus, while Dr Joyce's submissions are in the form of an expert report, they have not been received as anything more than submissions. Dr Joyce was asked by the respondents to provide her opinion on:

> The importance of a biology-based definition of sex to human rights, especially women's rights;
>
> The importance to women's rights of being free to use sex-based language;
>
> The importance of single-sex spaces, including virtual and digital spaces, for women's participation in public life;
>
> Why allowing men (natal males) who identify as women into spaces (physical and digital) designated female-only is incompatible with women's human rights and women's ability to fully participation in public life.

146 The thrust of Dr Joyce's report, ultimately advanced as a submission, is that the concepts of male and female derive from reproductive anatomy, and the ordinary meaning of man is a male adult, and of female a female adult, and that it is not possible for a person to change sex. Dr Joyce refers to laws in other jurisdictions which allow a person to change their legal sex without having undergone any genital reconfiguration surgery. Those laws are not relevant to the case before me.

147 Dr Joyce also discusses why it is that women need women-only spaces, referring to the importance of single-sex spaces such as bathrooms for the protection of women and girls from sexual assault and harassment, as well as for women's privacy and dignity, mutual organisation, aid and comfort. Dr Joyce argues that female-only spaces which are open to men, which on her definition includes transgender women, are no longer female-only. Joyce is strongly ideologically committed to the idea that transgender women do not exist, and that

language should not be used, a stance that permeates her report. She is entitled to her opinion, but it is of no assistance to the respondents' case, or to this Court.

(ii) Lay evidence

148 Relying on the exception to the opinion rule for lay opinions, the respondents tendered 14 affidavits in support of their argument that the Giggle App was a special measure to promote equality within the meaning of s 7D. While the legitimacy of the application of this exception to the opinion rule may be doubted, I allowed these affidavits to be read in their entirety. None of the witnesses who made those affidavits provided oral evidence at the hearing. The affidavits broadly pertained to the importance of female-only spaces. Most of these witnesses made clear that, by "*female-only spaces*" they meant female-sex-from-birth-only spaces. Most, but not all, of the witnesses had been users of the Giggle App. Many of the affidavits related to different kinds of women's spaces that were not strictly relevant to the Giggle App. Given my rejection of the respondents' attempt to rely on s 5 and s 7D, turning on the construction of both provisions, it was not necessary to consider further any of these affidavits.

PART 5: CONSTITUTIONAL ISSUES

149 Having found that Ms Tickle's claim of indirect discrimination is made out, I turn to the respondents' two challenges to the constitutional validity of the provisions relied upon for Ms Tickle's case.

(a) Is s 22 beyond the scope of Commonwealth legislative power to the extent it prohibits discrimination on the ground of gender identity?

150 By their amended s 78B notice, the respondents raise two constitutional questions, the first being whether:

> s 5B of the Sex Discrimination Act 1984 (Cth) (SDA) is beyond the legislative power of the Commonwealth and ultra vires

The respondents submit the answer is "*yes*". The Commissioner defends the validity of s 5B and thereby the references to gender identity discrimination in s 22. Ms Tickle adopts the Commissioner's submissions without adding anything of substance to the argument.

151 Section 5B is a provision that defines what constitutes discrimination on the ground of gender identity. It is not itself a provision to which any constitutional head of power is directed. The concept of gender identity discrimination, so defined, is then used throughout the SDA, including in provisions proscribing this and other forms of discrimination. Section 5B therefore gives content to other parts of the Act which entail the exercise of legislative power

to proscribe such discriminatory conduct. Sections 5 to 7A similarly define other forms of discrimination on the ground of sex, sexuality or intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, and family responsibilities. Various provisions in Pt II of the SDA then prohibit discrimination on these grounds, including in work, education, the provision of goods, services and facilities, and so on. Ms Tickle relies on s 22, which prohibits several kinds of discrimination, including on the ground of gender identity, in the provision of goods, services and facilities.

152 The respondents mistakenly challenge the constitutional validity of s 5B, rather than s 22 to the extent that it prohibits discrimination on the ground of gender identity. The challenge therefore purports to have an impact on this aspect of the SDA as a whole. However, the specific question that properly arises on the facts in this case is whether s 22, read with s 5B, goes beyond Commonwealth legislative power to the extent that it prohibits discrimination on the ground of gender identity in the provision of services. It is appropriate to deal with the respondents' constitutional challenge on this basis, rather than take the available easy option of dismissing it as misconceived. The conclusion reached on that question necessarily has a parallel impact on other provisions that proscribe gender identity discrimination in other areas, which also apply the terms of s 5B to give content to those proscriptions.

153 Section 9 of the SDA, dealing with the application of that Act, is drafted with a view to the scope of, and limitations upon, Commonwealth legislative power: see, *AB v Registrar of BDM* at [7] (Black CJ, dissenting, although not on this point). Section 9(4) relevantly provides that "*the prescribed provisions of Part II ... have effect as provided by ... the following provisions of this section and not otherwise*". Section 22 is a "*prescribed provision*" of Pt II: s 9(1). Section 5B is in Pt I of the Act, so is not itself a prescribed provision to which s 9 is directed.

154 The "*following provisions*" in s 9 refer to various heads of constitutional power in the Constitution. Relevantly:

(a) section 9(10) provides that the prescribed provisions, which include s 22, are to be given effect to the extent that they give effect to a "*relevant international instrument*", referencing the scope of the external affairs power in s 51(xxix) of the Constitution; and

(b) section 9(11) provides that the prescribed provision in Part II have effect "*in relation to discrimination by ... a trading corporation formed within the limits of the Commonwealth, or by or in relation to a person in the course of the person's duties or purported duties as an officer or employee of such a corporation*", referencing the

trading corporations aspect of the corporations power in s 51(xx) of the Constitution; and s 9(13) confirms that the provisions have effect to the extent such discrimination took place "*in the course of*" such a corporation's "*trading activities*".

155 The effect of s 9 is that the limits of Commonwealth legislative power affect the statutory construction of s 22, rather than the provision's validity: *AB v Registrar of BDM* at [96]-[97] (Kenny J, Gyles J agreeing). This requires some further explanation. The construction issue in relation to s 9 is that, if the meaning of the text to which it purports to apply a head of Commonwealth power, relevantly s 22 when read with s 5B, goes beyond the scope of that power, it will be taken to operate only to the extent that it falls within a head of power, not invalidating the provision entirely. The real issue is therefore not the meaning of s 9 per se, but the meaning of s 22 as affected by s 9.

156 The Commissioner contends that s 22 is supported by s 51(xx) and (xxix) of the Constitution, that is, the corporations and external affairs powers. Those submissions are adopted by Ms Tickle and only expanded upon further in relation to the assessment of whether Giggle is proven to be a trading corporation. In short, the respondents contend that CEDAW does not extend to gender, the ICCPR is too vague, and Giggle was not, on the evidence, a trading corporation. I consider each in turn.

(i) The external affairs power

157 The external affairs power supports legislation that is reasonably capable of being considered appropriate and adapted to implementing Australia's obligations under international instruments: *Commonwealth v Tasmania* [1983] HCA 21; 158 CLR 1 (***Tasmanian Dam Case***) at 259 (Deane J), see also at 130 (Mason J), 172 (Murphy J), 231 (Brennan J); *Victoria v Commonwealth* [1996] HCA 56; 187 CLR 416 (***Industrial Relations Act Case***) at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). That, in turn, requires the Court to identify the nature of Australia's obligations under relevant international instruments, being a task of construing their terms.

158 The task of interpreting international instruments is one of identifying the construction the international community would accord them: ***CRI026*** *v Republic of Nauru* [2018] HCA 19; 92 ALJR 529 at [22]; citing *Queensland v Commonwealth* [1989] HCA 36; 167 CLR 232 at 240. The applicable principles include Arts 31 and 32 of the ***Vienna Convention*** *on the Law of Treaties* (1969), which codify relevant rules of customary international law: *CRI026* at [22]; see also *Riley v Commonwealth* [1985] HCA 82; 159 CLR 1 at 15 (Deane J). A treaty is to be interpreted in good faith, by giving its terms their ordinary meaning in their context, in light of

its object and purpose: Art 31(1). Treaty terms are to be construed in light of the parties' common intention at the time of the treaty's conclusion: *Dispute regarding Navigational and Related Rights (**Costa Rica v. Nicaragua**)*, Judgment, ICJ Reports 2009, p. 213, 242 at [63]-[64].

159 Under Art 32 of the *Vienna Convention*, recourse can also be had to supplementary means of interpretation, including the treaty's preparatory works (called *travaux préparatoires*) to confirm the meaning identified in applying Art 31, or to determine the meaning where application of Art 31 leaves the meaning ambiguous or leads to a manifestly absurd or unreasonable result. Considerable weight must be given to convention committees' interpretative statements: *CRI026* at [22], citing the International Court of Justice's statement to the same effect in ***Ahmadou Sadio Diallo*** *(Republic of Guinea v. Democratic Republic of the Congo)* [2010] ICJ Rep 639 at 664 [66]. However, as a cautionary note, it is unclear as to how this approach fits in with Arts 31 and 32 of the *Vienna Convention*: see, Danae Azaria, "The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of Interpretation of Treaties", *International Community Law Review* 22 (2020) 33-60, see especially discussion of *Ahmadou Sadio Diallo* at 40-41.

160 As noted above at [70], s 9(10) of the SDA provides that the prescribed provisions, which include s 22, have effect to the extent that they "*give effect to a relevant international instrument*"; and s 4 defines "*relevant international instruments*" to include CEDAW and the ICCPR. The combined effect of s 9(4) and (10) is that s 22 will be given effect to the extent that it implements Australia's obligations under relevant international instruments: *AB v Registrar of BDM* at [96] (Kenny J, Gyles J agreeing).

161 The Commissioner contends that s 22, read with s 5B, is supported by s 51(xxix) of the Constitution, as an enactment of Australia's obligations under CEDAW and, in the alternative, under Art 26 of the ICCPR. Ms Tickle adopts that submission; the respondents dispute it.

CEDAW

162 The Commissioner contends the word women in CEDAW includes transgender women. She argues, therefore, that s 22, read with s 5B, gives effect to Australia's obligations under CEDAW, and is therefore supported by the external affairs power. That submission is adopted by Ms Tickle. The respondents contend that s 5B (which, again, I beneficially take to be a reference to s 22 read with s 5B) is not an enactment of Australia's obligations under CEDAW to the extent that it protects persons who were not born of the female sex. On the construction

they advance, CEDAW grants protections only to women, and the word women in CEDAW only means adults born of the female sex.

163 There is in fact an anterior question – not addressed by the respondents – as to whether CEDAW is exclusively concerned with discrimination that places women in a less favourable position than men, or whether it is also capable of addressing discrimination against a group of women that places them in a less favourable position than other women, here discrimination against transgender women, which places them in a less favourable position than cisgender women. For the reasons that follow, and without any assistance from the submissions by the respondents, I do not accept that CEDAW supports the prohibition on gender identity discrimination in s 22 in the way it is relied upon by the Ms Tickle here, namely, discrimination that placed her in the same position as men, not a less favourable one. I start by making several observations about the text of CEDAW.

164 As is evident from its name, the CEDAW is concerned with the elimination of discrimination against women. Article 1 defines discrimination against women, a concept deployed throughout the Convention, as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

165 Notably, that definition is concerned with sex discrimination *against women*, not sex discrimination in general: *AB v Registrar of BDM* at [81] (Kenny J, Gyles J agreeing); Patricia Schulz, Ruth Halperin-Kaddari and Beate Rudolf, 'Introduction' in Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf and Marsha A. Freeman (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol: A Commentary* (Oxford University Press, 2022, 2nd ed) 1, 13.

166 The words "*women*", "*men*" and "*sex*" are not defined within CEDAW. Neither of the words "*gender*" or "*gender identity*" appear within its text.

167 Article 4 of CEDAW makes clear and express that temporary special measures aimed at accelerating de facto equality between men and women are not considered to be discrimination. The most obvious manifestation of this is affirmative action. This exception is reflected in the carve out in s 7D of the SDA to the various prohibitions on sex discrimination in that Act.

168 Article 2 of CEDAW contains the substantive obligations of signatories to eliminate discrimination against women, as defined in Art 1, and to achieve equality of men and women at law. It reads:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
>
> (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
>
> (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
>
> (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
>
> (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
>
> (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
>
> (g) To repeal all national penal provisions which constitute discrimination against women.

169 CEDAW then:

(a) provides in Art 3 that, in all fields signatories shall take:

> all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

(b) provides in Art 5 further obligations for signatories to take all appropriate measures to:

> modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women

and to ensure

> the recognition of the common responsibility of men and women in the upbringing and development of their children.

(c) refers in Articles 6-16 to specific areas where States are to take all appropriate measures to address discrimination against women and/or ensure equality between men and women, including in political and public life (Arts 7 and 8), education (Art 10), work (Art 11), healthcare (Arts 12 and 14(2)(a)), economic and social life (Art 13), law (Art 15) and in marriage (Art 16);

(d) creates in Art 11(2)(a) a specific obligation to prohibit

> dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status

being an obligation which is notable for the fact that it is addressed to a certain kind of sex-based discrimination rather deploying the general concept of discrimination against women.

170 Articles 17-22 of CEDAW establish an independent committee for the purpose of considering the progress made in the implementation of the Convention (the **CEDAW Committee**). Under the *Optional Protocol to CEDAW* (1999), which Australia acceded to in 2008, the Committee may receive communications from individuals or groups who claim their rights under the CEDAW have been violated. Where certain conditions are met, the Committee may consider the claim and communicate its views and recommendations to the affected state signatory. For completeness, Arts 23-30 of CEDAW are mechanical provisions related to its signing and operation.

171 The question of whether CEDAW creates obligations for signatories that go further than addressing discrimination against women as compared to men, and achieving formal equality between men and women, was considered by the Full Court of this Court in *AB v Registrar of BDM*. The Court was required to consider whether implementation of CEDAW could support a legislative prohibition of discrimination on the basis of marital status, where that discrimination affected men and women equally. The appellant in *AB v Registrar of BDM* had challenged a decision by the Victorian Registrar of Births, Deaths and Marriages to refuse to change the sex marker on her birth certificate on the basis that only unmarried persons were allowed to make such applications, pursuant to s 30A of the *Births, Deaths and Marriages Registration Act 1996* (Vic) (**Registration Act**). She argued that the decision was a contravention of the prohibition of discrimination on the ground of marital status under s 22 of the SDA.

172 Kenny J, with whom Gyles J agreed, found that neither the text of CEDAW, nor its preparatory works, supported the view that it created an obligation to prohibit discrimination on the basis of marital status per se, "*or even as regards women where such discrimination does not involve*

less favourable treatment than men": at [90]. Relevant to that finding were observations that the consequence was that, by operation of s 9(4) and (10), s 22 was to be construed as only prohibiting discrimination on the basis of marital status that resulted in less favourable treatment of women than men: *AB v Registrar of BDM* at [95]-[96]. So construed, the Registrar's decision was not a contravention of s 22, as s 30A of the Registration Act discriminated against married men and married women equally. Whether the reference to "*women*" in the CEDAW included transgender women does not appear to have been a direct issue in *AB v Registrar of BDM*, despite the appellant, born male, having transitioned by surgery to female.

173 Some care must be taken in relying on *AB v Registrar of BDM*, which emphasises specific language in the Convention and preparatory work related to discrimination on the ground of marital status: see in particular [14], [89], [91]. Nonetheless, Kenny J's conclusions as to the meaning of "*discrimination against women*" in CEDAW, which are the result of careful analysis of the Convention's text and preparatory work (see [81]-[90]), are equally applicable to determining the general nature of the obligation to prohibit such discrimination against women created by the Convention. At [88], her Honour records the burden of particular debates between States Parties as to whether the CEDAW should be directed to sex discrimination in general, or specifically to discrimination against women. The latter view prevailed upon the basis of the argument by the United Kingdom that this might result in CEDAW covering discrimination against men, making it clear that the focus was to remain on eliminating discrimination against women in favour of men.

174 The Commissioner submits that *AB v Registrar of BDM* is not binding on this Court due to subsequent amendment to s 9(10). At the time it was decided, s 9(10) provided that the prescribed provisions had "*effect in relation to discrimination against women, to the extent that the provisions give effect to the Convention*" (meaning CEDAW). An amendment to s 9(10) in 2011 removed the reference to discrimination against women and included reference to a number of additional international instruments (as noted above at [70]): *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) Sch Pt 1, items 10 and 24. This was done with the specific intention of broadening the reach of the constitutional support of the SDA so that it might effectively prohibit forms of discrimination affecting men, avoiding the limitation observed in *AB v Registrar of BDM*: Explanatory Memorandum, Sex Discrimination Amendment Bill 2010 [41] citing Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discriminating and promoting gender equality* (Report, December 2008), recommendation 7, see also [11.19]-

[11.23]. While this renders the specific construction of s 9(10) adopted by the majority of the Full Court in *AB v Registrar of BDM* non-binding, or at least no longer relevant, it does not affect the authority of its statements on the proper construction of CEDAW, which remain binding, or at least, in light of the amendment, highly influential and capable of being applied.

175 Alternatively, the Commissioner submits that Kenny J's construction of CEDAW is not binding due to the contradictory, and (the suggestion is) more authoritative commentaries subsequently published by the CEDAW Committee. In these commentaries, the CEDAW Committee expresses support for "*intersectionality*" as a framework to understanding the scope of the obligations under Art 2, and encourages States Parties to take steps to address intersecting forms of discrimination experienced by women: see CEDAW Committee, **General Recommendation 28** on the core obligations of States Parties under article 2 of the CEDAW, UN Doc CEDAW/C/GC/28 (16 December 2010) at [18]; CEDAW Committee, General Recommendation No. 33 on women's access to justice, UN Doc CEDAW/C/GC/33 (3 August 2015) at [8]; CEDAW Committee, General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc CEDAW/C/GC/35 (26 July 2017) at [12]; CEDAW Committee, General recommendation No. 39 on the rights of Indigenous women and girls, UN Doc CEDAW/C/GC/39 (31 October 2022) at [22].

176 Even if I were to regard any such commentaries as permitting a departure from the reasoning of the Full Court in *AB v Registrar of BDM* that remains on point, I am not convinced that any of these commentaries go so far as to suggest, let alone support, a departure from the meaning of discrimination against women in CEDAW identified in that case. In General Recommendation 28 (at [18]), for example, the CEDAW Committee notes that "*discrimination of women based on sex and gender is inextricably linked with other factors that affect women*" such as race, age and gender identity. It proceeds to explain that women may experience discrimination on the basis of these other factors "*to a different degree or in different ways to men*". States Parties must recognise and prohibit these "*intersecting forms of discrimination and their compounded negative impact on the women concerned*". This is properly read as an acknowledgement that women experience heightened forms of various kinds of discrimination as compared to men, and encouragement that States Parties address these compounded forms of discrimination. It does not go so far as suggesting that the CEDAW obliges States Parties to address discrimination as between different groups of women. General Recommendation 28 at [19] reinforces the signature importance of achieving equality with men, by reference to the topic of violence and its disproportionate effect on women.

177 The Commissioner also pointed to several country-specific guidances by the CEDAW Committee that variously celebrated as progress steps taken to address discrimination against transgender women, and condemned countries for failing to take steps to address violence and discrimination directed to this group: CEDAW Committee, Concluding observations on Russian Federation, UN Doc CEDAW/C/USR/CO/7 (16 August 2010) at [41] and UN Doc CEDAW/C/RUS/CO/9 (30 November 2021) at [46]-[47]. This included a statement directed to Australia that the CEDAW Committee welcomed the progress achieved by the 2013 SDA Amendment, specifically citing the introduction of the gender identity discrimination provisions: CEDAW Committee, Concluding Observations on the eighth periodic report of Australia, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018) at [49(e)]. None of these statements made clear how an obligation to address gender identity discrimination that did not result in less favourable treatment than men could fit with the definition of discrimination against women in Article 1. The assistance of the guidances on this question was minimal, providing broad assertions that certain action related to transgender women aligned or did not align with CEDAW, without explaining why.

178 I consider the reasoning of the Full Court in *AB v Registrar of BDM* (per Kenny J, Gyles J agreeing), to be binding authority on the interpretation of this aspect of CEDAW, and correct in any event. 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 go only as 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, which is plainly not the case relied upon by Ms Tickle. To the contrary, her objection is to being treated the same as men, not less favourably than them. Except for specific protections for pregnant women, 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, which is precisely what Ms Tickle's case relies upon.

179 The obligation to prohibit discrimination against women created by CEDAW and defined in Art 1 is specifically a reference to discrimination that places women in a less favourable position than men. Section 22, read with s 5B, is therefore incapable of being an implementation of this obligation to the extent that it could be relied upon by persons alleging (as Ms Tickle does) that they have been discriminated by being treated in the same way as men.

180 The consequence is that it is not necessary to consider whether the argument made by the Commissioner, and adopted by Ms Tickle, that references to women in CEDAW includes transgender women is correct. I note that questions of constitutional validity should ordinarily only be determined if they properly arise on the case that has been brought: *LibertyWorks Inc v Commonwealth* [2021] HCA 90; 274 CLR 1 at [90]. It follows that the question of whether references to women in CEDAW include transgender women must be left for a case in which this squarely arises for determination. What matters is that CEDAW, by its text, does not in any event support the case that Ms Tickle brings against the respondents.

Art 26 of the ICCPR

181 I now turn to the question of whether the gender identity prohibition in s 22 is instead supported by Art 26 of the ICCPR. The ICCPR comprises 53 Articles in six parts. A wide range of fundamental rights sought to be protected are set out in 22 articles in Pt III, which includes, in Art 26, equal protection under the law without discrimination. A general observation may be made that the terms of many of the rights referred to are expressed in terms that are far from precise, the detail being left to the implementing State.

182 The Commissioner contends the gender identity prohibition is supported by Art 26 specifically, which provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

183 Two preliminary observations can be made of the text of Art 26. The first observation is that Art 26 creates twin obligations for States Parties to ensure formal equality of persons under the law (the **equality obligation**), and to prohibit discrimination by operation of law (the **non-discrimination obligation**). No issue or dispute was raised in this proceeding that the non-discrimination obligation encompasses an obligation to address discrimination by private actors in the public sphere, as supported by commentaries of the Human Rights Committee, established under the ICCPR to supervise its progress, and the Convention's preparatory works: Human Rights Committee, *General Comment 18: Non-discrimination*, 37th sess (10 November 1989) at [12]; Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) at [8]; Lord Lester and Sarah Joseph, "Obligations of Non-Discrimination", in *The International Covenant on Civil and Political Rights and United Kingdom Law*, David Harris and Sarah Joseph (eds) (Clarendon Press, 1995) 563, at 583 and fn 148, referring to views

expressed by States Parties in the Third Committee of the UN General Assembly, 16th sess, 1098th meeting, UN Doc A/C.3/SR.1098 (9 November 1961) at [6] and [25]; Third Committee of the UN General Assembly, 16th sess, 1099th meeting, UN Doc A/C.3/SR.1099 (10 November 1961) at [2]; Third Committee of the UN General Assembly, 16th sess, 1101st meeting, UN Doc A/C.3/SR.1101 (13 November 1961) at [18] and [52].

184 The second observation is that Art 26 includes a non-exhaustive list of the sorts of personal characteristics protected by the dual equality and non-discrimination obligations. The non-exhaustive nature of that list is indicated by the words "*any ground such as*" preceding the listed characteristics, and the broad category of "*or other status*" at the end. That wording strongly indicates that Art 26 was intended to create an open-ended obligation to address kinds of discrimination that may change over time and or vary depending on the situations of States Parties: see, Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) at [6.9]. Whether or not gender identity is a characteristic subject to the non-discrimination obligation under Art 26 is the subject of a dispute by Ms Tickle and the respondents, with the Commissioner's argument supporting Ms Tickle's position as a matter of construction.

185 It is convenient next to reproduce again the definition of gender identity in s 4 of the SDA, in order to understand the competing arguments that follow:

> ***gender identity*** means 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.

186 The substance and crux of the respondents' argument is that gender identity, on this definition, is only a series of outward manifestations, not located in any status or notion of status. They submit it is therefore too nebulous a concept to pick out a "*political class*" which, they assert, is necessary to be covered by Art 26. In substance, this is a rather weak submission that this definition is too vague or malleable to be a status contemplated by Art 26. As the Commissioner contends in response, the above s 4 definition of gender identity is clear enough to be a workable definition, correctly noting that gender identity is not exclusively defined by outward manifestations in any event. Moreover, many of the other grounds of discrimination referred to in Art 26 are similarly malleable or vague. For example, the phrase "*political or other opinion*" is not a reference to some kind of immutable or biologically founded characteristic, but one that is capable of profound change across an individual's life. The scope of what is political and what is an opinion as opposed to an objective fact is not necessarily

fixed either, but can evolve over time. Status is a concept within which categories may be difficult to define with precision, especially in the abstract.

187 That gender identity is an "*other status*" that is subject to the non-discrimination obligation in Art 26 is affirmed by several communications from the Human Rights Committee, which is empowered under the Convention's Optional Protocol to hear and provide views on allegations that States Parties have violated individuals' rights under the ICCPR: see Human Rights Committee, *G v Australia*, Communication No. 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) at [7.2]; Human Rights Committee, *MZBM v Denmark*, Communication No. 2593/2015, UN Doc CCPR/C/119/D/2593/2015 (12 May 2017) at [6.6]; Human Rights Committee, *Nepomnyashchiy v Russian Federation*, Communication No. 2318/2013, UN Doc CCPR/C/123/D/2318/2013 (23 August 2018) at [7.3]; Human Rights Committee, *Ivanov v Russian Federation*, Communication No. 2635/2015, UN Doc CCPR/C/131/D/2635/2015 (14 May 2021) at [7.12]; Human Rights Committee, *Alekseev v Russian Federation*, Communication No. 2757/2016, UN Doc CCPR/C/130/D/2757/2016 (9 June 2021) at [9.14]; Human Rights Committee, *Mikhailova et al v Russian Federation*, Communications No. 2943/2017, UN Doc CCPR/C/134/D/2943/2017 (29 August 2022) at [9.12]; Human Rights Committee, *Savolaynen v Russian Federation*, Communication No. 2830/2016, UN Doc CCPR/C/135/D/2830/2016 (23 January 2023) at [7.15].

188 Article 26 creates an obligation for States Parties to prohibit discrimination on a number of grounds, which may readily extend to gender identity as being another status as substantial, yet potentially changeable, among those expressly and non-exhaustively listed of language, religion, political or other opinion, or property. The prohibition on gender identity discrimination contained in s 22 of the SDA, read with s 5B, constitutes an implementation of that obligation. By operation s 9(4) and (10) of the SDA, this component of s 22 is to be read with that effect. The respondents' argument that s 22, read with s 5B, is not supported by a head of Commonwealth legislative power must therefore fail, because it is supported by the external affairs power in s 51(xxix) of the Constitution, implementing Art 26 of the ICCPR.

(ii) The trading corporations power

189 Additionally, I find for the reasons that follow that s 22 of the SDA, to the extent it prohibits discrimination on the ground of gender identity by trading corporations and their agents and employees, is an exercise of the Commonwealth's legislative power in relation to trading corporations contained in s 51(xx) of the Constitution. Section 22, read with s 5B is therefore valid upon that head of power as well. Pursuant to s 9(11) and (13), I read s 22 to have that

effect. Section 22, read with s 5B, is capable of applying to the actions of Giggle and also to the actions of Ms Grover in her capacity as its director and CEO, if the Court is satisfied that Giggle was, at the relevant time, a trading corporation within the meaning of s 51(xx).

190 Whether Giggle was a trading corporation is a question of characterisation on the evidence before the Court. The question is whether Giggle's activities formed a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation: ***United Firefighters*** *Union of Australia v Country Fire Authority* [2015] FCAFC 1; 228 FCR 497 at [135] citing *R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* [1979] HCA 6; 143 CLR 190 at 233 (Mason J). That it could be characterised in another way, carries on more extensive non-trading activities, or was incorporated for a primary purpose other than trading are not barriers to finding it was a trading corporation: *United Firefighters* at [136]-[137].

191 Several features of Giggle and its business during the relevant period are established on the evidence, especially of Ms Grover:

(a) the primary purpose of the Giggle App was to create a female-only online space;

(b) the Giggle App had offered users in-App purchases for premium upgrades for a fee of $2 – $3 per month;

(c) on Ms Grover's evidence, these fees covered just the cost of providing such services, however payments for these features were turned off from 2020 onwards;

(d) the Giggle App, at least in its beta stage, showed advertisements through Google Admob, which I infer to be a mobile telephone advertisement service. Ms Grover's evidence was that this was only done until Giggle could place its own content in those spaces as otherwise there would be blank space for advertisements on the Giggle App, which would "*distort the aesthetic of the App*";

(e) due to the Giggle App's low rankings on Google Play and the Apple App Store, those advertisements produced little to no income;

(f) in Giggle's balance sheet for the financial year ending 30 June 2021, which also includes details from the financial year ending 30 June 2020, the total assets as at 30 June 2020 were $223,721 and at 30 June 2021 $380,450; and the net liabilities for each year were much higher, being $505,273 for the 2020 financial year and $676,337 for the 2021 financial year, with almost $300,000 negative equity in both financial years, which, in the context of the other features listed, is some indication of trading activity or activity in support of trading;

(g) the development costs for the Giggle App recorded in the balance sheet referenced above were $187,499 as at 30 June 2020 and $300,886 as at 30 June 2021, those amounts being recorded as a component of the company's fixed assets, being cumulative amounts, meaning that the development costs of the Giggle App over those two financial years was just shy of half a million dollars;

(h) profit and loss statements prepared by accountants for Giggle show that the company had the following trading profits in the following years:

(i) financial year ending 30 June 2020: $14 from sales;

(ii) financial year ending 30 June 2021: $637 from sales;

(iii) financial year ending 30 June 2022: $12,673 from the sale of goods;

(iv) financial year ending 30 June 2023: $449 from the sale of goods;

(i) the same profit and loss statements show that Giggle had a net loss in each of those financial years, noting that while this is after the key events, it reflects ongoing trading activity and thus continuity;

(j) Giggle had received loans from a company called WADD Holdings Pty Ltd, a company of which Ms Grover is a director, of $60,000 in the financial year ending 30 June 2019, and $479,477 in the financial year ending 30 June 2020, with Ms Grover's evidence being that this money was an investment from family and friends, and was directed to the Giggle App's development;

(k) Ms Grover's description of the Giggle App, in her affidavit evidence, as delivering a service to the market that had not been provided to date points to a characterisation of Giggle as intending to be engaged in trade, in the context of other indicia indicating that this is what in fact took place, albeit to a modest degree;

(l) as Ms Grover accepted, one of Giggle's intentions was to provide those investors with a return, to the extent that was possible, while still pursuing the Giggle App's primary purpose of creating a female-only online space.

192 Ms Grover's evidence was that the trading profits for the years 2020 and 2021 were derived from in-App purchases, but was unable to explain the source of such profits in the 2022 and 2023 financial years. As the Giggle App was operational in the latter half of the 2022 calendar year, and therefore the 2023 financial year, the in-App purchases appear the obvious source of those profits. In any case, I readily infer from the trading profits arising from the sale of goods as expressly referred to in the profit and loss statements for the 2022 and 2023 financial years, that Giggle was engaged in the sale of some kind of goods in those periods, again evidence of

trading continuity. Importantly, Ms Grover's evidence was not that the profit and loss statements, which were tendered as annexures to one of her affidavits, were incorrect, but that she was not across that level of detail of the Giggle's finances. What matters is that this income was received and there was no evidence to contradict its status as recorded in the financial records of the company of being income. On the basis of the profit and loss statements alone, I find that Giggle can properly be characterised as a trading corporation.

193 While I accept Ms Grover's evidence that the primary purpose of Giggle was to create a female-only online space through the Giggle App, that goal was not inconsistent with characterisation of Giggle as a trading corporation. I am unpersuaded by the respondents' emphasis on the fact that Giggle was not profitable, which would not necessarily be inconsistent with a characterisation as a trading corporation either. Even if profitability were such a requirement, however, I am satisfied on the evidence that *a purpose* of Giggle *was* to turn a profit through trading activities, if only to support the continued existence of the Giggle App to advance its stated primary purpose. That much was admitted by Ms Grover, who stated that a purpose of the Giggle App (even if a subordinate one) was to achieve a return on investment for its investors.

194 I also infer that Giggle was a trading corporation from the sheer amount of money that had been invested into the Giggle App's development, being around half a million dollars, given Ms Grover had intended to offer a return on investment.

195 The conclusion that Giggle was a trading corporation is one of applied commonsense, supported by logic and some awareness of how social media has worked since the emergence of platforms such as Facebook. Twin goals of profitability and creating spaces for human connection notoriously can be seen as a common feature of social media businesses, with long lead times before, sometimes, profits are actually made.

196 It follows that I find that Giggle was at all relevant times a trading corporation, such that the corporations power supports the application of the gender identity provisions for the purposes of the allegations that they were contravened by the respondents.

(b) Is s 24 of the *Births, Deaths and Marriages Registration Act 2003* (Qld) (Qld BDM Registration Act) invalid by reason of inconsistency with the SDA?

197 The respondents contend that that s 24 of the Qld BDM Registration Act is invalid by the operation of s 109 of the Constitution by reason of inconsistency with the SDA, a challenge that in substance is really directed to s 24(4). By their amended s 78B notice, the respondents contend that the legal construct of "*female*" that emerges from s 24 of the Qld BDM

Registration Act directly clashes with the operation and or applies to a matter that is comprehensively regulated by and or applies, in this particular case, inconsistently with ss 5, 5B, 7B, 7D and 22 of SDA or their application.

198 The respondent's amended s 78B notice describes more fully the description of the nature of the Constitutional matter as being:

> Part 4 of the Births, Deaths and Marriages Registration Act 2003 (Qld) [Qld BDMR Registration Act] and in particular s 24(1) of the [Qld BDMR Registration Act], alters, impairs or detracts from the operation of ss 5, 5B, 7B, 7D and 22 of the SDA in a manner impermissibly inconsistent with the SDA, and is thereby inoperative, by reason of s 109 the Constitution.

199 Part 4 (ss 22 to 24) of the Qld BDM Registration Act, deals with changes to registered sex. The change to a person's sex after sexual reassignment surgery may be noted on the person's entry in the register of births: s 22. Equivalent recognition is given to a reassignment of sex entered into a register maintained under a corresponding law, defined to be the law of another State, provided the terms of s 23 have been complied with in relation to an application to note a reassignment of sex: s 24(1)-(3). A person who has had such a reassignment under the Qld BDM Registration Act is, expressly, a person of the sex as reassigned: s 24(4).

200 For completeness, it should be noted that the Qld BDMR Registration Act was repealed after the hearing of this proceeding, though the substance of s 24(4) is preserved by the replacement Act: see *Births, Deaths and Marriages Registration Act 2023* (Qld) s 142. Though not relevant to the present case, the replacement Act has removed the requirement that a person undergo sexual reassignment surgery in order to have their sex changed on the births register: see ss 39-41, 47.

201 The contention of direct inconsistency has been found ordinarily to require a conclusion that the impugned provision – here, s 24(4) of the Qld BDM Registration Act – "*alters, impairs or detracts*" from the operation of a Commonwealth statute or part of such a statute, here the gender identity discrimination provisions of the SDA, by reason of there being a real conflict between the two: *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2; 266 CLR 428 at [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); albeit subject to a different view that the distinct classification between direct and indirect is inherent or always possible, at [67], [70] (Gageler J), see also [105] (Edelman J). What ultimately matters is whether there is a *real conflict* between the Commonwealth law and the State law, with the latter being inoperative rather than invalid to the extent of the inconsistency.

202 The Commissioner advances the following contrary submissions and consequent propositions, which are adopted by Ms Tickle. I agree with and accept, and to an extent embellish, those submissions:

(a) The Qld BDM Registration Act and relevantly similar State and Territory legislation, which permit a person to change the record of their registered sex in this way, informs the ordinary meaning of the word sex as it appears in the SDA. Section 24 of the Qld BDM Registration Act does not detract from the operation of the SDA but rather informs the ordinary meaning of the words "*sex*", "*man*" and "*woman*".

(b) There is no direct inconsistency, because the SDA does not define the word sex, and also the prior definitions of "*man*" and "*woman*" in the SDA were repealed so that they could carry their ordinary meaning. I see no reason why State and Territory statute should not form part of the understanding of ordinary meaning. This does not render the SDA impotent in any way.

(c) There is also no indirect inconsistency. Even if the SDA does somehow create its own unique meaning of "*sex*" and "*woman*" which is independent from the operation of State and Territory laws, there is no indication that it was intended to define those concepts for all purposes beyond discrimination law, including as to how those concepts are used for the purposes of birth registers. The respondents do not identify how the SDA can be read in that way, nor how the Commonwealth Parliament would have power to impose its meaning outside its own fields of legislative competence in any event. Rather, the relevant subject matter of the SDA is discrimination on the grounds expressly specified – here gender identity – and no more. The Qld BDM Registration Act only addresses the register and the making of entries upon it; it does not in terms address the matters with which the gender identity discrimination provisions of the SDA are concerned and address, even if it may have an incidental impact upon them.

(d) The SDA is plainly not intended to be an exhaustive statement of the law of discrimination on the grounds it deals with, because ss 10 and 11, dealing respectively with the operation of State and Territory laws generally and the those which further the objects of relevant international instruments, expressly preserve the operation of certain State and Territory discrimination laws and work health and safety laws, provided they are capable of operating concurrently with the SDA: see in particular s 10(3) and s 11(3). While such provisions cannot cure direct inconsistency, they are relevant to the question of whether the SDA was intended to be an exhaustive statement of law on its subject matter.

(e) The respondents' challenge to the operation of s 24 – in particular s 24(4) – of the Qld BDM Registration Act entails a contention that the Ms Tickle's status as female on the Queensland births register should have no effect on whether she is of the female sex or a woman for the purposes of the SDA. That contention must be rejected. Provided that there is no inconsistency, and I have found there is none, I see no reason why State or Territory legislation should not inform the ordinary meaning of language.

203 The respondents' further submission that, in allowing legal recognition of sexual reassignment, the Qld BDM Registration Act altered, impaired or detracted from the SDA's asserted general purpose of protecting women's "*sex-based rights*" was of no assistance. If there was any such impairment or detraction, which has not been demonstrated, that was occasioned by the expansion of the SDA by the Commonwealth parliament to encompass gender identity discrimination.

204 By reason of the foregoing, I readily conclude that the two statutes can and do operate harmoniously. Section 24 of the Qld BDM Registration Act complements the gender identity discrimination provisions of the SDA, rather than conflicting with them. It follows that the respondents' challenge to the validity or application of s 24(4) of the Qld BDM Registration Act must fail.

PART 6: REMEDIES

205 Ms Tickle seeks the following relief:

(a) declarations that the respondents contravened s 22 of the SDA;

(b) $100,000 in general damages;

(c) $100,000 in aggravated damages;

(d) a published written apology from the respondents; and

(e) an order that Giggle reinstate Ms Tickle's access to the Giggle App on equal terms to other female users per its usual terms of trade.

206 Before I turn to address each remedy sought, it is necessary to consider the limits on this Court's jurisdiction to award that relief.

207 Ms Tickle's standing to make the present application in this Court arises from the AHRC's termination of her earlier complaint, and the notification of Ms Tickle of that termination: s 46PO(1) of the AHRC Act. As I decided in *Hanson v Burston* [2022] FCA 1234 at [44],

however, that provision does not grant applicants an unfettered right to litigate. Rather, the unlawful discrimination alleged must meet the requirements of s 46PO(3), namely:

> The unlawful discrimination alleged in the application:
>
> (a) must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint; or
>
> (b) must arise out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint.

208 If this Court is satisfied that unlawful discrimination within the bounds of s 46PO(3) has taken place, it may make a variety of orders under s 46PO(4) of the AHRC Act, including the following:

> (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
>
> (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
>
> (c) an order requiring a respondent to employ or re-employ an applicant;
>
> (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
>
> (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;
>
> (f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

209 The readily apparent purpose of s 46PO(3) is to limit applications alleging unlawful discrimination to those that have been screened through the AHRC (*Grigor-Scott v Jones* [2008] FCAFC 14; 168 FCR 450 at [19], Emmett, Lander and Tracey JJ), as opposed to complaining to the AHRC being a mere technical requirement or stop off point for the initiation of proceedings. The significance of this jurisdictional limitation for this proceeding is that Ms Tickle's claim of aggravated damages relies in part on conduct of the respondents that occurred after she filed her complaint, namely that they refused to reinstate her access to the Giggle App in the face of her complaint to the Commissioner. It is difficult, if not impossible, to fit any of the remedies listed above for such conduct within the terms of s 46PO(3), as to do so would be inherently illogical, or even conceptually incoherent. Despite this, in considering a number of the remedies below, I have assumed that this problem does not arise.

210 Ms Tickle also relies on adverse public comments made by Ms Grover about her and, on their face, transgender women more generally, after her AHRC complaint and during the course of

these proceedings before trial to ground a claim for aggravated damages. That claim is dealt with separately at Part 6(c)(iv) below. In that sense, her case had the flavour of a victimisation claim brought under s 94 of the SDA, which may be founded on a person subjecting another person to detriment for making a complaint or initiating a proceeding under the SDA or the AHRC Act: SDA s 94(2)(a) and (b). Section 94 constitutes a deliberate legislative step to address post-complaint conduct so as to dispense with the jurisdictional problem otherwise presented by the terms of s 46PO(3). In fact, Ms Tickle's originating application made reference to seeking a declaration that the respondents had contravened, among other things, s 94 of the SDA and therefore at least implicitly included a claim of victimisation. However, this was not reflected in either her original statement of claim, nor her amended statement of claim, as one of the remedies she was seeking. Nor did she make any submissions referring to s 94. Accordingly, this is, deliberately, not a victimisation case, a characterisation that is of some importance to the basis for Ms Tickle's claim for aggravated damages, considered below.

211 Whether an application in this Court can rest on conduct that occurred after a complaint to the AHRC was made was considered by Katz J in *Charles v Fuji Xerox Australia Pty Ltd* [2000] FCA 1531; 105 FCR 573 (the AHRC and AHRC Act then being named as the Human Rights and Equal Opportunity Commission (**HREOC**) and the Human Rights and Equal Opportunity Commission Act (**HREOC Act**), respectively). Katz J considered whether conduct that occurred after a complaint had been made to the HREOC could found proceedings in this Court alleging unlawful discrimination under the *Disability Discrimination Act 1992* (Cth). His Honour concluded that such unlawful discrimination was beyond the scope of s 46PO(3): at [36]. I agree with that conclusion for the detailed and comprehensive reasons given by his Honour, which are therefore worth setting out in some detail in order to adopt them in full:

> [37] It appears to me that s 46PO(3) of the HREOCA [HREOC Act] is only incidentally concerned with those allegations of fact which can be made in an application under s 46PO(1) of the HREOCA; it is primarily concerned, not with such allegations, but rather with the legal character which those allegations of fact can be claimed to bear. In the two situations with which it deals, it permits an applicant in a proceeding before the Court to claim that the facts alleged against the respondent constitute unlawful discrimination of a different legal character than the unlawful discrimination which was claimed in the relevant terminated complaint.
>
> [38] Paragraph (a) of s 46PO(3) of the HREOCA proceeds on the basis that the allegations of fact being made in the proceeding before the Court are the same as those which were made in the relevant terminated complaint. The provision naturally permits the applicant to claim in the proceeding that those facts bear the same legal character as they were claimed in the complaint to bear. However, it goes further, permitting the applicant to claim in the proceeding as well that those facts bear a different legal character from that they were claimed in the complaint to bear, provided, however, that the legal character now being claimed is not different in substance from the legal character formerly being claimed.

[39] Paragraph (b) of s 46PO(3) of the HREOCA, on the other hand, permits the applicant to allege in the proceeding before the Court different facts from those which were alleged in the relevant terminated complaint, provided, however, that the facts now being alleged are not different in substance from the facts formerly being alleged. It further permits the applicant to claim that the facts which are now being alleged bear a different legal character than the facts which were alleged in the complaint were claimed to bear, even if that legal character is different in substance from the legal character formerly being claimed, provided that that legal character "arise[s] out of" the facts which are now being alleged.

[40] It is worth recording here that, although the Senate explanatory memorandum for the Bill which became the amending Act did not elaborate on the intended operation of the proposed s 46PO(3)(a) of the HREOCA, it did elaborate on the intended operation of the proposed s 46PO(3)(b) of the HREOCA, saying,

> "This second limb is intended to cover situations in which different instances of unlawful discrimination arise out of essentially the same factual circumstances. For example, an Asian woman may make a complaint to HREOC alleging that her dismissal from employment amounted to discrimination on the ground of her sex. On the basis of things said or done during the inquiry or conciliation process, the woman may form the view that her dismissal also amounted to discrimination on the ground of her race. If the complaint cannot be conciliated and is terminated, and the woman makes an application to the Federal Court in respect of the terminated complaint, this paragraph may permit her to allege racial discrimination in that application."
>
> It appears to me that the first limb of s 46PO(3) of the HREOCA was likely to have been intended to cover situations in which, for instance, a person makes a complaint to the Commission of the doing of an act constituting unlawful disability discrimination in employment, which complaint cannot be conciliated and is terminated, and the person then makes an application to this Court in respect of the terminated complaint, claiming instead, but on the basis of the same allegations of fact, unlawful disability discrimination in contract work: see s 17 of the DDA.

[41] On the construction which I give to s 46PO(3) of the HREOCA, it is apparent that par (a) thereof provides no warrant for an applicant in a proceeding in this Court to make any allegation of fact in the proceeding different from those which were made in the applicant's earlier complaint to the Commission. On the other hand, par (b) thereof does permit an applicant in a proceeding in this Court to make allegations of fact in the proceeding different to a certain extent from those which were made in the applicant's earlier complaint to the Commission. However, I find nothing, either in the language of par (b) itself or in the example of its operation given in the Senate explanatory memorandum, insofar as that example reveals a legislative intent regarding the operation of par (b), which would support a construction of the paragraph that permitted Mr Charles to allege in the present proceeding the doing by Fuji Xerox after [the date on which the HREOC complaint was made] of any act constituting unlawful disability discrimination in employment.

[42] I add that a construction of s 46PO(3) of the HREOCA which does not permit Mr Charles to allege in the present proceeding the doing by Fuji Xerox after 3 April 1999 [the date on which the HREOC complaint was made] of any act constituting unlawful disability discrimination in employment appears to me to be consistent with the policy of the HREOCA of ensuring that there exists an opportunity for the attempted conciliation of complaints before they are litigated: compare subss 46PF(1) and (4) of the HREOCA. (A similar policy of ensuring an opportunity for attempted conciliation in the first instance was also apparent in the DDA before its amendment by the amending Act.) I note in that connection the following exchange when the

> Opposition sought to amend in the House of Representatives, after its second reading, the Bill which became the amending Act. The Opposition spokesman moved (see HR Hansard, 11 March 1999, p 3754) an amendment whose effect he described as being "to enable complainants to amend a complaint before the Federal Court proceedings, even though that particular issue may not have been dealt with in the commission". The justification which he offered for the proposed amendment was as follows:
>
> > "These matters of discrimination can be flexible in the sense that events can occur which are part of an ongoing process of discrimination but may not themselves have been pleaded or raised in the conciliation proceedings. So we say it is appropriate for a complainant to be able to amend the complaint after conciliation and before commencement in the Federal Court."
> >
> > The Government rejected that proposed amendment, the Attorney General saying (see HR Hansard, 11 March 1999, p 3755):
> >
> > "The government disagrees that there should be a power to add further allegations of discrimination after a matter has been determined in the commission and prior to applying to the Federal Court. This is consistent with the policy of requiring discrimination complaints to go through the HREOC conciliation process."
>
> [43] I add further that a construction of s 46PO(3) of the HREOCA which does not permit Mr Charles to allege in the present proceeding the doing by Fuji Xerox, particularly after 11 May 2000 (the date on which the present proceeding was begun), of any act constituting unlawful disability discrimination in employment would also be consistent with a longstanding judicial approach to litigation. That approach is that a moving party is prevented from relying in a proceeding on a cause of action accruing after the commencement of the proceeding.

212 The jurisdictional limitation imposed by s 46PO(3) therefore works to limit any unlawful discrimination found by this Court to that arising from conduct preceding her complaint to the AHRC on 5 December 2021. Neither Ms Tickle nor the respondents provided submissions that addressed the s 46PO(3) limitation.

213 I turn now to each of the remedies sought by Ms Tickle.

(a) Declaration

214 This Court can make a binding declaration of unlawful discrimination under s 46PO(4) of the AHRC Act or s 21(1) of the *Federal Court of Australia Act 1976* (Cth). The respondents made no submission that a declaration should not be made if unlawful discrimination was found to have taken place.

215 In light of the above finding that indirect gender identity discrimination has taken place, I am satisfied that a declaration to that effect should be made. The respondents did not seem to suggest otherwise, although it is not altogether easy to be sure given the disjointed and somewhat incoherent way their case was run. However, the form of the declaration should be confined to the discriminatory conduct as alleged, not to the definition and other provisions also referred to in the originating application. The contravention was indirect gender identity

discrimination by halting Ms Tickle's access to the Giggle App and thereby engaging in conduct proscribed by s 22 as described in s 5B(2) of the SDA. Subject to the parties providing joint or separate draft proposed terms for the declaration, I will make a declaration of contravention.

(b) General damages

216 The purpose of the Court's statutory power to award damages for any loss or damage suffered because of the conduct under s 46PO(4)(d) is to compensate the applicant, not punish the respondent: ***Wotton*** *v Queensland (No 5)* [2016] FCA 1457; 352 ALR 146 at [1600] (Mortimer J, as the Chief Justice then was). When it came to the question of general damages, the only dispute, if liability was established, was as to quantum. In closing oral submissions, Ms Tickle sought an award of $100,000, while the respondents sought only a nominal sum in the order of a few thousand dollars if a finding of contravention was made. Neither stance was the subject of much more than assertion. The loss was not properly quantified or otherwise explained by Ms Tickle, and the figures advanced by the respondents accorded with their view that even if the Court concluded that they had discriminated, they had not done anything that was really of a kind that warranted more than a nominal response. I am unable to accept either stance.

217 Ms Tickle has adduced no observational, medical or other expert evidence to quantify loss or damage. The only evidence she relies upon is contained in the following three short paragraphs of her affidavit:

> [38] The above events involving the Giggle App and Ms Grover have had a significant impact on my life. The respondents' unilateral decision that I am not a woman, and therefore cannot access the Giggle App, has upset me greatly and has resulted in me having to go to great lengths to prove that I am a woman. It has been exhausting and draining to do so.
>
> [39] Ms Grover's public statements about me and this case have been distressing, demoralising, embarrassing, draining and hurtful. This has led to individuals posting hateful comments towards me online and indirectly inciting others to do the same. Ms Grover's online posts reach large domestic and international audiences, which has led to the scale of online hate towards me being enormous. This has consumed my life outside of my work and sport, which has led to me experiencing constant anxiety and occasional suicidal thoughts.
>
> ...
>
> [41] I have been regularly taking anti-anxiety medication since May 2020 to assist with managing the emotional aspects of my gender transition. Ms Grover's actions and the online hate I have received from her supporters, who are actively working towards stopping me from living as a woman, compounds my extant anxiety. I earnestly wish to wean myself off my anti-anxiety medication now that my gender transition is nearly complete, though I am fearful that my anxiety attacks will return if I do so, due to the

stress and anxiety I have experienced from Ms Grover's actions and this legal case.

218 The whole of the evidence for loss or damage *because of* the unlawful discrimination is contained in [38] and [41]. Paragraph 39 pertains to Ms Tickle's claim for aggravated damages, made on the basis of comments by Ms Grover and her supporters subsequent to the filing of this application, discussed further at Part 6(c)(iv) below. The loss or damage alleged fall in two broad categories: injured feelings (described in [38]) and exacerbation of a pre-existing psychiatric condition (described in [41]). It is appropriate to address each separately.

219 There is no evidence of loss or damage sufferance in any monetary sum, or in any non-monetary sum giving rise to a reasonable basis for equating or approximating it to that quantum. How the $100,000 proposed was arrived at was not explained. In my view such a large sum in the circumstances of this case called for detailed submissions. In the absence of such submissions, I am not satisfied that anything approaching that sum has even been attempted to be justified.

(i) Exacerbation of a pre-existing psychiatric condition

220 It is well established that damages may be awarded for psychiatric injury, including exacerbation of an existing condition. Ms Tickle's evidence at [41] of her affidavit is that she had started regularly taking unspecified anti-anxiety medication in May 2020, to assist with managing what she described as the emotional aspects of her gender transition. She does not say if she had been diagnosed with a psychiatric condition at that time and, if so, what that is, assuming that such evidence from her was admissible. She does not specify in any detail the kind of symptoms that led to a prescription of this medication, though later makes a reference to a fear that her anxiety attacks will return if she stops taking this medication, suggesting this has been a part of her previous experience. In short, the evidence is vague and makes it impossible to identify any starting point from which further harm can be adjudged.

221 Ms Tickle goes on to say that Ms Grover's actions and the online hate she has received from Ms Grover's supporters has compounded her extant anxiety. Two difficulties arise here. The first is that it is not possible to identify how, if at all, the unlawful discrimination contributed to this condition. Her description of Ms Grover's actions must refer, in the context of the affidavit's preceding paragraphs, to her public comments about Ms Tickle (which are part of the basis of her claim for aggravated damages) and the removal of Ms Tickle from the Giggle App. The difficulty for referring to both together is that, as I explain at [261]-[271] below, I do not accept that Ms Grover's comments about Ms Tickle can properly ground an award of aggravated damages. The second is that she also refers to online hate from persons she takes

to be supporters of Ms Grover and again, as explained at [256]-[260] below, I cannot accept this can base an award of damages to be paid by the respondents.

222 In the final part of [41] of Ms Tickle's affidavit, she says that she wishes to halt her use of anti-anxiety medication, but fears that panic attacks will return due to the stress caused by Ms Grover's actions and this proceeding. Again, the reference to Ms Grover's actions must be read as a reference both to the removal of Ms Tickle from the Giggle App and Ms Grover's subsequent comments, the latter of which cannot ground an award of damages. It is similarly unclear whether the stress and anxiety that Ms Tickle has experienced from this proceeding refers to the actions taken by the respondents in the course of this proceeding, and if so which; or from the general stress attached to any legal proceeding. The latter cannot be grounds for aggravated damages. More fundamentally however, this is only evidence of her speculation as to the future effect of halting the use of anti-anxiety medication while experiencing stress and anxiety. It is not a loss or damage that has eventuated. Ms Tickle is not a doctor or otherwise an expert on the matter, and so accordingly I cannot give this self-assessment any real weight.

(ii) Injured feelings

223 The evidence of Ms Tickle's injured feelings is not similarly deficient. I accept that compensation may be awarded under s 46PO(4) for injured feelings, to adopt the term used by May LJ in *Alexander v Home Office* [1988] 1 WLR 968 at 975; [1988] 2 All ER 118 at 122: *Wotton* at [1622].

224 It is convenient to reproduce again the relevant portion of Ms Tickle's evidence, at [38] of her affidavit:

> The above events involving the Giggle App and Ms Grover have had a significant impact on my life. The respondents' unilateral decision that I am not a woman, and therefore cannot access the Giggle App, has upset me greatly and has resulted in me having to go to great lengths to prove that I am a woman. It has been exhausting and draining to do so.

225 Ms Tickle makes clear that the real injury from her exclusion from the Giggle App was the hurt of not being treated as a woman. As I have found, it is most probable that this arose from a reflexive decision by Ms Grover while reviewing Ms Tickle's selfie. Though it was not established in this case that the decision was made because of Ms Tickle's gender identity, the condition that users appear to be cisgendered women on Ms Grover's review of their photos did result in Ms Tickle being treated as a man. The imposed condition was not attuned to distinguish between these groups, therefore causing hurt to Ms Tickle's feelings.

226 The purpose of the prohibition on discrimination on the ground of gender identity discrimination is to address this kind of injury, among others. On Ms Tickle's evidence she had made minimal use of the Giggle App before her removal: see [113] above. I accept Ms Grover's evidence (at [114] above) that Ms Tickle had made no interactions or connections with other Giggle App users, and had not made posts or contributions, especially in the absence of any evidence from Ms Tickle that she did so. The material impact of Ms Tickle being denied the Giggle App's services has therefore not been proven to be more than minimal. Her contemporaneous conduct, explained by her, is that she had given up using the Giggle App because she had found there were not many users to connect with at the time.

227 Despite that conclusion, the emotional effects of her gender identity being denied have some significance. She says that this has upset her greatly. However, I am unable to attribute responsibility to the respondents for her finding this, in her words, exhausting and draining, to have to go to great lengths to prove that she is a woman. Overall, Ms Tickle's evidence as to loss or damage is slight, if not minimal. It does not rise higher than a modest degree of hurt feelings. Taking all of these considerations into account, I find a sufficient basis has been established to make orders for a modest award of compensatory damages.

(iii) Conclusions as to general damages

228 Indirect gender identity discrimination has been established and is compensable, but I conclude that it was brought on a point of principle rather than due to any lasting hurt or disadvantage. Ms Tickle's evidence was that she was not really all that interested in actually using the Giggle App. Her evidence went no further than establishing that she wanted the continued ability to access the Giggle App, rather than having any express or implied intention to actually access it or otherwise use it.

229 As this seems to be the first gender identity discrimination case, there are no prior damage awards to use as any kind of yardstick as to what might be appropriate. I have had regard to the outcomes in a range of other kinds of discrimination cases identified by Mortimer CJ in ***Kaplan*** *v State of Victoria (No 8)* [2023] FCA 1092 at [1640]. However, that has not advanced things very much due to the absence of any yardstick basis for the assessment of an appropriate quantum of damages in this specific area. In the absence of any quantifying evidence, this was the widest and most unguided discretion to exercise, not unlike civil penalty imposition or criminal fine imposition for a new area of proscribed conduct.

230 The features of the conduct that took place have been considered in some detail in these reasons. I am left with an exercise akin to penalty or fine imposition of instinctive synthesis in

which there is no single right or wrong figure, there being nothing precise such as proven economic loss. I consider the amount suggested by the respondents to be far too low, and the figures suggested by Ms Tickle to be far too high. After some considerable thought and reflection, I have arrived at the figure of $10,000 in damages. As I note below, there is one limited basis upon which Ms Tickle's aggravated damages succeeds, but where the harm caused is relatively slight and difficult to quantify: see Part 6(c)(v). The award of damages also reflects that limited aspect of aggravated damages.

231 This award of $10,000 is more than a nominal sum, but remains modest to reflect the reality of what has taken place, the limited evidence that Ms Tickle chose to adduce and the narrow ambit of the harm that has been shown to have been caused. Given the novelty of this claim, I should note that this quantum does not reflect the potential seriousness of gender identity discrimination that might emerge in another case. This kind of discrimination is just as capable of being as harmful as all other kinds of discrimination listed in the SDA, and therefore of justifying substantial awards of damages. The quantum in this case reflects the case that was proven. Had the proven facts differed, or the case been focused or run differently, it is possible that a much higher quantum would have been justified.

(c) Aggravated damages

(i) Authority and principles

232 Next, I turn to the question of aggravated damages. This discussion, and the particular conduct then considered, proceeds upon the basis that conduct which aggravates the conduct falling within the scope of s 46PO(3) is itself within that provision even though it could not have been part of the complaint. Given the conclusions I reach about most aspects of this claim for the reasons given below, the soundness of this assumption does not have to be tested.

233 Again, Ms Tickle seeks $100,000, while the respondents oppose any award at all. This ends up turning on the absence of particulars pleaded, the dire shortage of evidence adduced, and the lack of any compelling argument being advanced of there being any relevant aggravation of the proven indirect gender identity discrimination conduct. Whether there was in fact any proper basis for an award of aggravated damages I will never know, because not even a faint glimmer of a proper basis for this was advanced. I am not persuaded that any proper basis for aggravated damages has been established.

234 It is well established that aggravated damages may be awarded under s 46PO(4)(d) as they are compensatory, not punitive, in nature: see ***Elliott v Nanda*** [2001] FCA 418; (2001) 111 FCR 240 at [179]-[184] (Moore J); *Clarke v Nationwide News Pty Ltd* [2012] FCA 307; 201 FCR

389 at [347], [349] (Barker J); ***Ewin v Vergara*** *(No 3)* [2013] FCA 1311; 307 ALR 576 at [676], [678] (Bromberg J); *Wotton* at [1737] (Mortimer J); *Hughes (t/as Beesley and Hughes Lawyers) v Hill* [2020] FCAFC 126; 277 FCR 511 (***Hughes v Hill)*** at [61]-[64] (Perram J, Reeves and Collier JJ agreeing); *Kaplan* at [1760]-[1763] (Mortimer CJ); ***Taylor*** *v August and Pemberton Pty Ltd* [2023] FCA 1313 at [523]-[524] (Katzmann J).

235 Ms Tickle seeks those additional damages on the basis of:

(a) the respondents' refusal to attend conciliation proceedings held by the AHRC;

(b) the respondents' refusal to reinstate Ms Tickle's access after becoming aware that she is a transgender woman following the AHRC complaint;

(c) a number of public comments made by Ms Grover about Ms Tickle since the filing of her AHRC complaint, amounting to "*a public campaign over two years of persistently belittling Ms Tickle*", which she claims also caused "*online hate*" from other persons towards her;

(d) the respondents' refusal to apologise to Ms Tickle; and

(e) the respondents' conduct at trial, including instructing counsel to plead that Ms Tickle is a man, and to refer to her with male pronouns in written and oral submissions, as well as Ms Grover laughing at a demeaning caricature of Ms Tickle while giving evidence.

236 Basis (d) was averted to in Ms Tickle's amended statement of claim, but was not pressed in her submissions, and there is no evidence of loss or damage that supports it. Basis (c) was not noted as a ground for aggravated damages in her originating application or amended statement of claim, though the respondents raised no objection to it being raised as a ground for aggravated damages in her closing oral submissions.

237 Aggravated damages have traditionally been awarded in tort for additional injured feelings of the applicant incurred by the way in which the respondent committed the tort: see, *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1124 (Lord Diplock). They have also been awarded in defamation proceedings on the basis of the way in which the respondent conducted themselves at trial, where that conduct was characterised as not being bona fide, justifiable or proper: ***Triggell*** *v Pheeny* (1951) 82 CLR 497 at 514 (Dixon, Williams, Webb and Kitto JJ). In *Triggell*, the High Court upheld a direction by the primary judge that the jury could consider whether the pressing of a defence of truth by the defendant was aggravating in circumstances where it was open to the jury to conclude that the defendant did not honestly believe in that defence: *Triggell* at 515-516. Such a stance aggravates the impact of the false defamatory

imputation, so is tied to the tortious conduct by that nexus. However, care must be taken in applying tort reasoning to a statutory cause of action.

238 Reasoning by analogy with tort, this Court has awarded aggravated damages in several discrimination cases on the basis of the way the respondent conducted themselves at trial, or in the lead up to trial, citing the requirements in *Triggell* at 514; see also *Taylor* at [524]-[525] and *Elliot v Nanda* at 297, [180], [182]. Further, *Hughes v Hill*, which does not cite *Triggell* directly, at [61] cites *Ewin v Vergara at* [678] and *Clarke v Nationwide News* at [349], both of which cite *Elliot v Nanda* at 297.

239 In *Elliott v Nanda*, Moore J was asked to consider whether aggravated damages were available for a respondent's failure to appear before a hearing of the complaint before the HREOC (as the AHRC was then named), where that failure had delayed resolution of the complaint by a considerable period, resulting in additional stress and mental anguish for the applicant: at [184]. His Honour was satisfied they were, ordering $5,000 in aggravated damages. In coming to this conclusion, Moore J relied on authority from *Triggell* at 514, described above, at [182]. His Honour also discussed the wide variety of matters which may ground the decision to award aggravated damages in anti-discrimination law cases, referring to a number of court and tribunal decisions:

(a) a Queensland Anti-Discrimination Tribunal decision, *Whittle v Paulette* (1994) EOC ¶92-621, to award $10,000 each to two complainants who had alleged sexual harassment on the part of the first respondent, in contravention of s 119 of the *Anti-Discrimination Act 1991* (Qld), where the Tribunal had noted that the first respondent was arrogant and aggressive in the witness box and insensitive to the effect of his treatment of the complainants: at 77,306;

(b) a HREOC decision, where a complainant had claimed aggravated damages in relation to her sexual harassment complaint on the basis that senior staff in her workplace had not taken her complaints seriously. There, the respondent had made several offers of settlement to the complainant, including payment of the costs to date of the proposed settlement, and the applicant had not been required to establish the facts of her alleged sexual harassment or the respondent's vicarious liability, with the Commission concluding that it should not award aggravated damages: *Greenhalgh v National Australia Bank Ltd* (1997) EOC ¶92-884; and

(c) a decision of the Queensland Supreme Court to uphold an award of aggravated damages by the Queensland Anti-Discrimination Tribunal in an age discrimination case brought

under ss 7(1)(f) and 14(1)(b) of the *Anti-Discrimination Act 1991* (Qld), on the basis that the defendant's method of cross-examination, which involved suggestions that the plaintiff was looking for money because he was out of work, where the applicant had suffered additional distress as a result of the defendant's method of cross-examination: *McIntyre v Tully* (1999) 90 IR 9 (Atkinson J).

240 In *Ewin v Vergara*, an extreme sexual harassment case brought under the SDA resulting in a large award of damages, the applicant sought aggravated damages, claiming that there was always going to be a component in a case like that in which general damages in the discretion would not sufficiently compensate "*the horror, the dislocation, the disruption of life, the smell of flashbacks, the suicide attempts, the change in lifestyle*": at [677]. Bromberg J considered that aggravated damages were compensatory in nature and therefore available under s 46PO(4)(d), and that they could be available in circumstances where a respondent had increased the hurt to the applicant through their conduct of proceedings: at [678]. However, his Honour found that the grounds on which aggravated damages were sought were already reflected in general damages awarded, declining to award aggravated damages on the basis it would amount to double dipping for the applicant: at [678]. It follows that even serious conduct causing substantial hurt will not necessarily result in the awarding of aggravated damages.

241 In *Wotton*, Mortimer J (as the Chief Justice then was) considered whether aggravated damages were available where contraventions of s 9(1) of the *Racial Discrimination Act 1957* (Cth) (**RDA**) had been made out. Her Honour noted that the weight of authority supported the view that awards of aggravated damages were available under s 46PO(4) as they serve a compensatory purpose (at [1737]), but dismissed the claim on bases that are not relevant to the current proceeding.

242 In Mortimer J's discussion of the availability of aggravated damages in *Wotton*, her Honour noted that in some cases, the aggravation comes not from conduct directly associated with or following on from the contravening conduct, but from subsequent conduct that has the same effect: [1733]. In oral submissions in this proceeding, Ms Tickle relied on that statement (as quoted in *Kaplan* at [1762]) as authority for the general proposition that courts may award an applicant aggravated damages under s 46PO(4)(d) based on a respondent's conduct subsequent to the filing of an AHRC complaint. I do not read that statement in *Wotton* as going that far. The rest of the paragraph goes on to cite, as examples of the proposition, *Elliott v Nanda* (see above) and *Houda v New South Wales* [2005] NSWSC 1053, both cases in which aggravated damages were awarded on the basis of the way in which the respondents conducted their part

of the proceeding. I read the statement above as going no further than either authority cited. That conclusion is fortified by the fact that the present question of whether aggravated damages were available for conduct subsequent to the AHRC complaint was not live in *Wotton*.

243 In *Hughes v Hill*, the Full Court upheld an award of aggravated damages by the primary judge in a sexual harassment claim: at [59] (Perram J, Reeves and Collier JJ agreeing). Aggravated damages had been awarded to reflect the additional harm from threats made by the appellant to prevent the respondent complaining of sexual harassment, and the manner in which he conducted his defence at trial, which included blaming the respondent for his conduct due to her manner of dress and alleging she had been sexually abused as a child in order to blacken her name: at [54]-[64].

244 In *Kaplan*, Mortimer CJ affirmed the proposition that aggravated damages were available under s 46PO(4) where racial discrimination under s 9(1) of the RDA had been made out: at [1759]-[1789]. The proceeding involved findings that a state school principal had failed to take steps to address high levels of antisemitic bullying. Aggravated damages were awarded to one of the applicants, a former student, for the school principal's failure to take steps to ensure his safety following an assault at a park, which was found to have increased the applicant's hurt: at [1787]-[1789], citing *New South Wales v* ***Ibbett*** [2006] HCA 57; 229 CLR 638 at [35]. The cited portion of *Ibbett*, for completeness, is authority for no more than the orthodox proposition that, where the conduct giving rise to a tort increases the hurt to the subject of the tort, aggravated damages may be available. *Kaplan* does not state whether the principal's failures were included in, or occurred after the lodging of, the complaint to the AHRC that gave rise to the proceeding.

245 *Taylor* involved successful claims by the applicant of sexual harassment and victimisation by the respondent, in contravention of ss 28B(2) and 94 of the SDA, as well as breach of the applicant's employment contract. Katzmann J considered that it was well established that s 46PO(4) empowered the Court to make awards of aggravated damages, citing *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 at 23-40 (Lockhart J) and 282 (French J), *Ewin v Vergara* and *Hughes v Hill*: at [526]. Her Honour noted that aggravated damages could be awarded to an applicant whose distress was made worse by the respondents' conduct after the wrongful act or acts are committed, and where that conduct was improper, unjustifiable or lacking in bona fides: at [524]-[525], citing *Triggell* at 514. Like Mortimer J's statement in *Wotton*, I read that statement as going no further than the authority cited, which provides only that an award of aggravated damages may be available for a respondent's conduct in the proceeding

(which has already been taken into account in relation to general damages). That is fortified by the nature of the award of aggravated damages in that proceeding, which was made on the basis of the respondent's intimidatory and unjustified legal response to the applicant's AHRC complaint, which included a suggestion that the applicant had manipulated and been flirtatious with the respondent: at [537]-[539].

246 What is really notable about all of the cases discussed above is that they are a far cry from what has happened to Ms Tickle. As considered below, no real attempt was made to marry the conduct relied upon for aggravated damages to the conduct relied upon to establish unlawful discrimination. In light of that, two further observations may be made about awards of aggravated damages in discrimination proceedings.

247 The first observation is that aggravated damages are not an unbounded path to seeking compensation for all harmful conduct by the respondents that falls outside the proceeding that has been brought, even if peripherally related to them. There must be some kind of nexus between the unlawful discrimination and the further hurt arising from that discrimination for which the aggravated damages further compensates. That nexus will be clearest where the further hurt arises from the way in which the unlawful discrimination occurred.

248 The nexus may arise because the actions of the respondent at trial, or perhaps in relation to the conduct of proceedings (see *Taylor*, especially at [538]-[539]), cause further harm to the applicant. In *Taylor*, which involved sexual harassment and victimisation claims brought under the SDA, aggravated damages were awarded on the basis of improper, unjustifiable and non-bona fide accusations by the respondent against the complainant in the course of the trial and in letters from the respondent's solicitors to the complainant's solicitors: at [525], [538]-[539]; see also the Full Court's upholding of aggravated damages in similar circumstances in *Hughes v Hill* at [57]-[64]. Those accusations bear a clear link to the nature of the unlawful discrimination found.

249 The second observation is that it remains unclear how s 46PO(3), which requires unlawful discrimination alleged in applications to this Court to be the same as, or in substance the same as, those contained in the applicant's original complaint to the AHRC, affects the award of damages founded on conduct that occurred subsequently to the filing of the AHRC complaint. As noted above, the Court's power to award compensatory damages is statutory, created by s 46PO(4)(d) which allows an award of damages to be made only where the Court has found unlawful discrimination, as limited by s 46PO(3). None of the authorities in which aggravated

damages have been awarded have addressed that question. Neither party provided submissions related to that question.

250 I draw from the authorities a number of minimum threshold requirements before the present claim for aggravated damages could be entertained. There would need to be:

(a) a compelling evidentiary basis for attributing the conduct said to give rise to the claim for aggravated damages to either or both respondents;

(b) a clear nexus between that conduct and this proceeding, which in turn must be tethered to the complaint to the AHRC which gives rise to this Court's jurisdiction; and

(c) clear evidence of separate or additional harm caused by that conduct.

251 In this case, none of those three criteria are met, any one of which failure would be fatal to the claim for aggravated damages. Moreover, as detailed below, the paucity of the evidence chosen to be advanced by Ms Tickle ended up making this proceeding a poor vehicle to question the outer bounds of the Court's power to award damages for subsequent conduct under s 46PO(4)(d). Each aspect of the claim for aggravated damages is addressed below.

(ii) Refusal to attend AHRC conciliation proceedings

252 No relevant part of Ms Tickle's affidavit, reproduced at [217] above and which is the only evidence of loss or damage suffered by her, makes any reference to harm caused by the respondents' refusal to attend AHRC conciliation proceedings. Proof of the necessary nexus has not even been attempted. There is no apparent basis on the evidence from which I can reasonably infer that the refusal caused any such loss or damage. Ms Tickle does not suggest in her evidence that such a basis exists. The respondents promptly indicated to the Commission that they were unwilling to participate in a conciliation proceeding, leading to the prompt institution of proceedings in the Federal Circuit Court by Ms Tickle.

253 These circumstances can readily be distinguished from the case in *Elliott v Nanda*, in which Moore J awarded damages on the basis of a respondent's failure to appear before a hearing of the complaint before the HREOC. That case, however, arose from the respondent's appeal of the HREOC's adverse findings against him. The logic of the award of aggravated damages was that he had failed to take earlier legitimate steps to contest the applicant's complaint, causing significant additional delay to the resolution of the complaint. Importantly, his Honour was satisfied that the delay had caused additional stress and mental anguish to the applicant: at [185]. The paucity of the evidence of loss means I am unable to make similar findings in the present case.

(iii) Refusal to reinstate Ms Tickle's access to the Giggle App

254 In the alternative, the applicant submits that the refusal to reinstate Ms Tickle's access after she filed her complaint grounds a claim of aggravated damages. However, no part of Ms Tickle's affidavit, being the only evidence of loss or damage, mentions that as a basis for the loss or damage she suffered. There is no factual basis for a finding on the evidence. It was a bare submission without evidentiary support.

(iv) Subsequent comments by Ms Grover and her supporters

255 Unlike grounds (a) and (b), Ms Tickle does refer to the comments made by Ms Grover and her supporters as causing her loss or damage: see [39]-[41] of her affidavit reproduced at [217] above.

Messages and posts by supporters

256 Ms Tickle annexes three messages sent to her on Facebook by a person or persons other than the respondents, as well as several posts about her on X and Facebook by other persons. Many of these messages and posts are plainly offensive. They go much further than expressing, in civil terms, a view on the relationship between sex and gender. Many are personal attacks on Ms Tickle, questioning her motivations for transitioning gender, her appearance and speculating on her smell and mental stability. Some include cartoon images that mock her appearance and include offensive jokes about her transition. Almost all such messages and posts refer to her as a man.

257 In her affidavit, Ms Tickle asserts, without any details or particulars, or other foundation, the conclusion that Ms Grover's public statements about herself and the case had led to and indirectly incited these communications. The difficulty with this bald assertion is that there is no evidence capable of proving a sufficient nexus exists between these posts and the conduct of the respondents. There is no evidence, for example, that the respondents called for such comments to be sent, or said or did anything specific to cause that to happen. The link between the offensive public comments and the conduct of the respondents is tenuous at best. Ms Tickle does not point to any clear basis on which such a link can be inferred. I am unable to accept that this causal link has been established by mere assertion.

258 In a separate annexure, Ms Tickle also refers to an Etsy shopfront operated by an unknown person that sold merchandise in support of Giggle, including products such as T-shirts and mugs printed with the slogan Team Giggle, with nothing more, let alone anything overtly offensive. Ms Grover gave evidence that the profits from these Team Giggle products went to

the crowdfunding for the respondents' legal team. The shopfront also included other products that, in the context of other products expressing support for Giggle, were likely referencing Ms Tickle or transgender people more generally. As they are offensive, I do not see any need to reproduce the messages or portrayals, as that may encourage further dissemination. One is worse than the rest in terms of offensiveness, but again I choose not to replicate it.

259 Ms Grover gave evidence that she was aware of the Team Giggle T-shirts that were sold, and the operator of the shopfront was a friend who had asked her permission to raise funds for the respondents' legal fees through selling Team Giggle products. Ms Grover said that she had purchased that Team Giggle T-shirt but had not further perused the store. She had posted on Twitter encouraging her supporters to buy the Team Giggle T-shirt, including a link to that product. She had also re-posted a post promoting other kinds of Team Giggle merchandise, also apparently including a link to the Team Giggle T-shirt product page.

260 I do not accept that the products printed only with Team Giggle and nothing more caused further hurt to the applicant. Certainly, there is no evidence to that effect from Ms Tickle. Their existence could not indicate anything further than what was already known to the applicant, which was that supporters of the respondents existed. The more offensive item lacked a sufficient nexus with the respondents' conduct. Ms Grover did not promote that product to her followers, and the suggestion that she is somehow responsible for it because she could have asked for the product to be taken down, perhaps with no effect, is a tenuous link. The other products in the shopfront might have been capable of causing further hurt to Ms Tickle, but again the selling of these products lacked a sufficient nexus with the conduct of the respondents. Ms Grover did not promote such products, and it was not established by evidence that she even knew of their existence.

Posts by Ms Grover

261 Ms Tickle also refers to further harm caused by Ms Grover's comments about her and the proceeding, which are included as annexures to her affidavit. They can be grouped in two general categories: comments alleging the Ms Tickle harassed Ms Grover, and comments that Ms Tickle is a man. I note that she also annexed other posts by Ms Grover that discuss transgender women more generally with no reference to the present proceeding or Ms Tickle, but does not refer to these in the text of her affidavit. Given there is no evidence of any loss or damage that might have been caused by these posts, I do not discuss those further.

262 The first difficulty for this part of the claimed basis for aggravated damages is that the evidence of the loss or harm caused by Ms Grover's personal statements is difficult to distinguish from

that caused by posts and messages of her supporters. Given the findings made above, that is a significant challenge for an award of aggravated damages. It is useful to restate the portions relied upon in turn and in full, and then address each.

263 Part of [39] of Ms Tickle's affidavit states:

> Ms Grover's online posts reach large domestic and international audiences, which has led to the scale of online hate towards me being enormous. This has consumed my life outside of my work and sport, which has led to me experiencing constant anxiety and occasional suicidal thoughts.

264 In the second sentence of [39], the word "*This*" must be read as referring to the scale of online hate, rather than Ms Grover's posts, as it refers to a singular object rather than a plural one. I find this portion of Ms Tickle's evidence to then be referring to the harm done by the posts made by persons other than Ms Grover, and therefore incapable of founding an award of damages.

265 Part of [41] of Ms Tickle's affidavit states:

> Ms Grover's actions and the online hate I have received from her supporters, who are actively working towards stopping me from living as a woman, compounds my extant anxiety.

266 In [41], the asserted cause of the compounding of Ms Tickle's extant anxiety is both Ms Grover's actions and those of persons Ms Tickle believes to be Ms Grover's supporters. It is not clear whether this refers to the decision to remove Ms Tickle from the Giggle App, the subsequent posts or her legal response to Ms Tickle's AHRC complaint. It is impossible to identify the asserted cause of that harm. In any case, I find this portion of Ms Tickle's evidence insufficient to establish loss or damage, as it fails to indicate a baseline of her existing anxiety on which the harm done by the respondents' conduct could be measured.

267 The following sentence at [39] of Ms Tickle's affidavit is therefore the only evidence of the loss or damage caused by Ms Grover's statements to which I can afford any weight:

> Ms Grover's public statements about me and this case have been distressing, demoralising, embarrassing, draining and hurtful.

268 This brings us to the second difficulty for this basis: although the statements by Ms Grover that Ms Tickle is not a woman were hurtful, they were made bona fide. As has been made evident in the conduct of these proceedings, what the word "*woman*" means is deeply contested, and there must be scope in which persons can put forward an argument, both in proceedings and in their public discussion of them, where it is genuinely held and a legitimate part of their case. That is to be contrasted with the requirement set out in *Triggell* at 514, and accepted as

applicable for awards of aggravated damages made under s 46OP(4)(d) based on subsequent conduct by respondents in relation to proceedings.

269 The meaning of "*woman*", and whether the applicant can be regarded as one, was a central plank of the respondents' case. Ms Grover is apparently deeply committed to her beliefs on this subject. Although that position was not vindicated in these findings, it would be an overstep by the Court in this context to award aggravated damages on the basis of comments about such beliefs, even though I accept Ms Tickle's evidence as to their effect on her.

270 These comments can be distinguished from allegations made by Ms Grover that Ms Tickle had harassed her, which Ms Grover had alluded to in Twitter posts and in an interview published by the *Weekend Australian Magazine*. Ms Grover also accepted in oral evidence that she had stated in other interviews that she had been harassed by the applicant and that she was afraid of her, although these statements were not referred to in Ms Tickle's affidavit. These statements were misleading to the extent to which they suggested that Ms Grover could really have no idea how Ms Tickle had received her mobile phone number. She had in fact provided it to Ms Tickle in an email exchange. Such an accusation was not a part of the respondents' case (and it would have been improper if it had been), and I would find it very difficult to consider these statements bona fide, given Ms Grover must have been aware that her mobile phone number was included in her email signature even if she had forgotten the specifics of her email exchange with Ms Tickle at the time she made the statements in question. Ms Grover did not resile from those accusations in cross-examination, insisting that she did not know exactly how Ms Tickle had gotten her number. That was disingenuous.

271 These comments however, while hurtful and perhaps even defamatory of Ms Tickle to a limited degree, lacked a sufficient nexus with the unlawful discrimination found. They were in the nature of an attack on Ms Tickle's character, rather than arising from or as an extension of the indirect discrimination I have found occurred.

(v) Conduct at trial

272 There is one aspect of the aggravated damages claim, adverted to in the award of damages, but not otherwise addressed so far, that is sufficiently tied to the conduct of the proceedings to evade the limitations in s 46PO(3), and not to be without some evidentiary support. In Ms Tickle's closing submissions forceful submissions were made as to what was described by senior counsel as the persistent misgendering of Ms Tickle by the respondents, with their counsel referring in written and oral submissions to Ms Tickle with male pronouns, and by pleading that she was a man. Reference was also made to Ms Grover laughing, in the course

of her oral evidence, at a demeaning caricature of Ms Tickle. Counsel submitted that this leads to the conclusion that the distress, embarrassment and hurt experienced by Ms Tickle, in being excluded from a women only space as a woman, has been amplified and compounded by this conduct.

273 As I have noted, the authorities establish that the conduct of a respondent at trial may establish the requisite nexus between the subsequent conduct and the applicant's claim in order to give rise to award of aggravated damages. The respondents' conduct in this case furthered the harm caused by the indirect discrimination found, namely in continuing to treat her as a man, though now with clear intent to do so.

274 The requirement remains, however, that such conduct not be bona fide: *Trigell* at 514; see discussion above at [237]-[238]. In this case, nothing indicates that the respondents are not expressing a genuine, if (as I accept) hurtful, belief that Ms Tickle is a man. No submissions were made by Ms Tickle's counsel to the contrary. While some of the ways in which the respondents expressed this belief could have been avoided, and in that sense were gratuitous, I am not satisfied that on a preponderance of the authorities that that is enough to found an award of aggravated damages.

275 I consider that this conduct falls in the wide berth that Courts must afford defendants in prosecuting their cases. That is not unbounded. The Court is obliged to disallow questions to witnesses that are offensive, humiliating, harassing, belittling, insulting, otherwise inappropriate or with no basis other than stereotype: *Evidence Act 1995* (Cth) s 41(1)(b), (c), (d). At the commencement of the trial, senior counsel for Ms Tickle had requested that the respondents not refer to her using male pronouns or titles in cross-examination. As it turned out, the respondents did not cross-examine her at all, but if they had, s 41(1) could have obliged me to constrain the ways in which they put questions to her.

276 That is not so for Ms Grover laughing in Court at the offensive caricature of Ms Tickle. Her explanation, that it was funny in the context of the courtroom, was obviously disingenuous. It was offensive and belittling, and had no legitimate place in the respondents prosecuting their case. Because I consider the harm that arose from this to be slight and difficult to quantify, however, I consider that this is best assessed as part of the overall award of damages, contributing to the amount to be awarded of $10,000. I should note that specific evidence of harm to applicants from respondents' conduct at trial is generally not necessary for this kind of damages, if for no other reason than it would be an undue burden to an applicant to put on

further evidence of harm at the trial's end. In this case, I am willing to infer some limited degree of harm from the offensiveness of this confined aspect of Ms Grover's conduct.

(vi) Conclusion as to aggravated damages

277 In this case, none of the identified criteria for an award of aggravated damages described above in this section are met, save as to a limited aspect of the conduct of the trial by the respondents. Any failure would be fatal to the claim for aggravated damages, because:

(a) Part of the conduct upon which the claim for aggravated damages arises is that of persons other than the respondents, and no causal relationship between the respondents' conduct and this conduct was established.

(b) No sufficient nexus has been established between the conduct complained about and this proceeding. It is not enough that there is something that Ms Tickle finds offensive or hurtful. It has to be tied in some way to the gender identity discrimination case she has brought via the complaint to the AHRC, and specifically to the indirect discrimination case that succeeded. That case is about the imposition of a condition that had the effect of disadvantaging persons with a transgender woman gender identity, not to anti-transgender sentiment more generally. No real attempt was made to link the two, let alone to link them in a way that ties the conduct to the proceeding so that the damages sought in this proceeding have been shown to be aggravated in some way. It has been advanced in substance as a general claim for hurt feelings arising from non-acceptance of her status as a transgender woman.

(c) The evidence of Ms Tickle makes a global claim for damages and does not sufficiently isolate the effect of this conduct, nor make it at all clear how it has increased the hurt she has suffered. There is an insufficient substratum of facts established by evidence to demonstrate the aggravation of loss asserted.

(d) An apology

278 Ms Tickle also seeks a published written apology from the respondents. It is well-recognised that s 46PO(4)(b) empowers the Court to order respondents to make an apology: *Wotton* at [1552]; see also *Kaplan* at [1791]-[1794]. Section 23 of the *Federal Court of Australia Act 1976* (Cth) provides an alternative basis for such orders: *Wotton* at [1552].

279 This Court has generally been reluctant to order apologies in discrimination cases where they would be unavoidably insincere: see *Kaplan* at [1796]-[1797]; *Wotton* at [1584] and the analysis of Mortimer J (as her Honour then was) of the authorities at [1553]-[1583]; *Jones v*

Toben [2002] FCA 1150; 71 ALD 629 at [106]. That hesitation largely rests on the fact that the purpose of remedies under s 46PO(4) is to compensate the applicant: *Kaplan* at [1794]; *Wotton* at [1584]. An insincere apology would hold little if any benefit in rectifying the hurt to its recipient, while effectively punishing its maker by ordering them to say something they do not believe.

280 Courts have held apologies to be inappropriate where findings that discrimination has occurred are sufficient to recognise the harm done by the respondents: see *Poniatowska v Hickinbotham* [2009] FCA 680 at [324]-[325]. In *Kaplan*, for example, Mortimer CJ ordered an institutional apology by the State of Victoria for unlawful discrimination by a state school because it could be given sincerely and would be meaningful for the applicants: at [1796]. Her Honour declined, however, to order the principal of that school to apologise as such an apology would be insincere. The principal's evidence had made clear that he did not accept failings on his part, and that he did not believe he had acted unlawfully. In the circumstances, the Court's findings of fault were a sufficient vindication of the applicant's rights: at [1797].

281 The applicant's case for an apology to be ordered was sparse to say the least. It is plain that any apology given by Ms Grover, and any apology given by her on behalf of Giggle, would be through clenched teeth and utterly devoid of sincerity. She would be doing no more than *saying* she was sorry, but she would *not* in fact *be* sorry at all. She adheres to her sincerely held beliefs. It is not appropriate to order the giving of an apology in those circumstances and I therefore decline to do so.

(e) Reinstatement

282 The final relief sought is to order that Ms Tickle be given the same access to the Giggle App as is provided to other female users, upon Giggle's usual terms. That app has been shut down, and Ms Grover has expressed a clear intention not to reinstate it unless it is legal to exclude transgender women. Accordingly, at present, Ms Tickle already has the same access as other female users, being none at all. If the Giggle App had been in operation, I could well have ordered reinstatement. In the circumstances, however, it is not appropriate to make an order that is incapable of being complied with. Accordingly, I decline to grant this kind of relief.

PART 7: CONCLUSION

283 Although the applicant did not include seeking costs in her pleadings, costs was argued at the interlocutory hearing last year, and was plainly in the contemplation of both sides since before 1 June 2023. In those circumstances there is no reason way costs should not follow the final outcome of this proceeding. I will order that the respondents pay the applicants costs, but with

a cap of $50,000 in relation to the constitutional validity and statutory construction issues, imposed by order 3 made on 1 June 2023.

I certify that the preceding two hundred and eighty-three (283) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich.

Associate:

Dated: 23 August 2024

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 2 pages comprise the document referred to as Annexure KD-3 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

"Annexure KD-3"

Screenshot of the "Use of funds" section of the website: https://gigglecrowdfund.com/ retrieved 6 February 2025

Join this landmark fight to reclaim sex based rights and protections for all women and girls

Giggle v Tickle

The "what is a woman" case

Federal Court, Sydney, Australia

To appeal the judgement of 5 September 2024

About this case **It Matters** **Constitutional Challenge** **Use of funds**

All donations made via this crowdfund are by way of gift

These funds are being raised in the public interest to ensure that critical legal principles concerning sex-based rights are fully ventilated and determined, allowing this important matter to be properly argued and resolved

The funds raised, less any processing fees, will be used exclusively to cover legal fees and associated costs incurred in the appeal proceedings, any subsequent hearings, and efforts necessary to ensure this important matter is fully and properly determined

Any excess funds remaining at the conclusion of the case will be held on trust and donated to other litigation efforts and advocacy projects supporting sex-based rights, and constitutional legal challenges to ideological overreach

How You Can Help

If you believe in the importance of defending sex-based rights, safeguarding female-only spaces, upholding constitutional principles, and ensuring that same-sex attracted people can lawfully define their identity and advocacy on their own terms, then your support is critical

Every contribution strengthens the fight to restore clarity to Australian anti-discrimination law, to ensure that international human rights treaties are not manipulated to override women's rights, and to protect the fundamental freedoms of women, lesbians, and all those affected by gender ideology's encroachment into law and policy

Thank you for standing with us in this important fight

Latest News

Appeal target
$850,000

Appeal date TBA
Appeal Fund Open

Funds Raised
$265,644

Legal Team led by:
Stuart Wood AM KC, **Barrister**
Aickin Chambers, Melbourne
B K Nolan, **Barrister**
Wentworth Selborne Chambers, Sydney
Anca Costin, **Barrister**
Blackburn Chambers, Melbourne
Katherine Deves, **Lawyer**
PTW Law, Sydney

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 2 pages comprise the document referred to as Annexure KD-4 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

"Annexure KD-4"

Feminist Legal Clinic Inc.
PO Box 273, Summer Hill NSW 2130
Mobile: 0402 467 476
www.feministlegal.org
ABN: 17 360 484 300

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

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

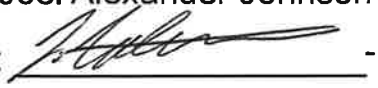
(Respondent)

ANNEXURE SHEET

The following 50 pages comprise the document referred to as Annexure KD-5 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

"Annexure KD-5"

Administrative
Review Tribunal

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**

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

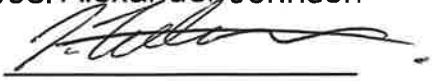
(Respondent)

ANNEXURE SHEET

The following 8 pages comprise the document referred to as Annexure KD-6 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

Transgender woman's exclusion from female-only app was unlawful, judge finds

By Jamie McKinnell Courts

Fri 23 Aug 2024 at 11:01 am

Roxanne Tickle sued the Giggle for Girls app and its CEO for alleged discrimination. *(AAP: Bianca De Marchi)*

In short:

A transgender woman's exclusion from female-only app Giggle for Girls has been constituted as unlawful discrimination.

Roxanne Tickle was manually removed from the platform after her photo was initially accepted on the platform in 2021.

What's next?

Ms Tickle will be paid $10,000 in compensation plus costs, but her request for an apology was declined.

The exclusion of a transgender woman from a female-only app constituted unlawful discrimination due to gender identity, according to a landmark Federal Court ruling.

Roxanne Tickle downloaded the Giggle for Girls social networking platform, which was designed to be an "online refuge" for women, in February 2021.

Users provided a selfie to be assessed by artificial intelligence software to verify they were a woman.

Ms Tickle's photo was accepted, but later that year her account was restricted after a manual override.

The court case she initiated is the first to claim discrimination on the basis of gender identity since changes to the Sex Discrimination Act in 2013.

Sall Grover, chief executive of Giggle for Girls app. *(AAP Image: Bianca De Marchi)*

Lawyers for the app's chief executive officer Sall Grover, who was named as a respondent, denied discriminatory conduct.

They invoked a carve out of sex discrimination law, claiming the app was a special measure designed to achieve substantive equality between men and women.

On Friday Justice Robert Bromwich found there had been indirect gender identity discrimination against Ms Tickle.

The judge ordered that Ms Tickle be paid $10,000 in compensation, plus costs.

The judge found a claim of direct discrimination failed, however the successful claim of indirect discrimination was based on a condition being imposed for the use of the Giggle app that Ms Tickle was required to have the appearance of a cisgender woman.

The court previously heard Ms Tickle has lived as a woman since 2017, had a birth certificate reissued in 2018 to reflect a name change and stating her gender as female, and underwent gender affirming surgery in 2019.

"Up until this instance, everybody has treated me as a woman," she said during her evidence.

Unchangeable sex argument failed, judge says

Ms Tickle's counsel, Georgina Costello KC, said the caselaw made it clear that sex and gender and man and woman were not binary categories.

She argued it was not purely a biological question but partly psychological and partly social.

Reading out a summary of his decision on Friday, Justice Bromwich said the defendants considered sex to mean the sex of a person at birth, which they consider to be unchangeable.

"These arguments failed because the view propounded by the respondents conflicted with a long history of cases decided by courts going back over 30 years," he said.

> "Those cases establish that in its ordinary meaning, sex is changeable."

Ms Costello had also dismissed the argument about the carve out as being part of a series of "artificial, after-the-fact justifications" for discrimination.

Ms Grover's counsel Bridie Nolan argued sex is biological and gender was a social construct, disputing that Ms Tickle had the "psychology of a woman".

She told the court her client felt "harassed and intimidated" by Ms Tickle's efforts to contact her about the Giggle account, including eight unanswered emails before attempted phone contact.

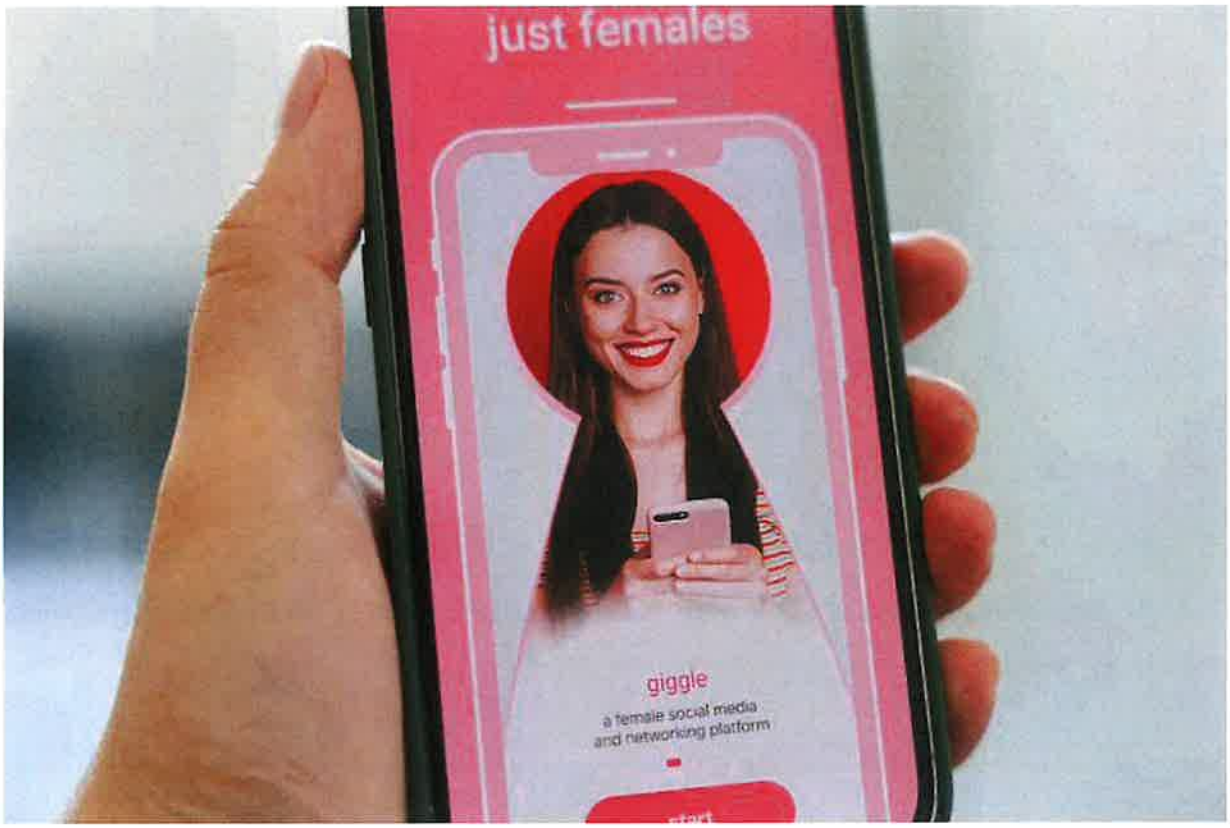
Apology would be made 'through clenched teeth'

The app was intended to be a "corner of the internet" where women could "have refuge away from males", Ms Nolan said, and its creators had "absolutely no idea that males could be considered to be women".

Ms Tickle had also sought orders for a written apology, but Justice Bromwich declined to make those orders.

"It is plain that any apology given by Ms Grover, and any apology given by her on behalf of Giggle, would be through clenched teeth and utterly devoid of sincerity," he said.

> "She would be doing no more than saying she was sorry, but she would not in fact be sorry at all. She adheres to her sincerely held beliefs."



Roxanne Tickle had her access to the app revoked in September 2021. *(AAP)*

Ms Tickle's legal team said she suffered significant distress, hurt and humiliation.

They claimed damages had been aggravated by Ms Grover's refusal to apologise and her "public vilification" of Ms Tickle, including comments which "consistently misgender[ed]" Ms Tickle.

The court also heard offensive merchandise was sold by a third party to raise funds for Ms Grover's legal bills.

'All women are protected from discrimination'

Outside court, Ms Tickle said the court case had "stolen" the last three years of her life.

She spoke of being targeted by hateful online commentary and seeing merchandise created to ridicule and mock her.

"There is so much hate and bile cast on trans and gender diverse people simply because of who we are," she said.

"Sometimes it's difficult to remember that not all people are like that."

Ms Tickle said the hate hadn't just affected her, but hurt many transgender and gender diverse people.

Ms Tickle said the court case had "stolen" the last three years of her life.

She hoped the outcome of the case would be "healing".

"The ruling shows that all women are protected from discrimination," she said.

> **"I brought my case to show trans people that you can be brave and that you can stand up for yourself."**

Sex Discrimination Commissioner at the Australian Human Rights Commission Anna Cody said she was "happy" discrimination had been recognised in the judgement.

"We now know that ... you cannot discriminate on the basis of sexual orientation or gender identity," Dr Cody said.

Sex Discrimination Commissioner Anna Cody welcomed the judgement on Friday.

"I think that this judgement sends the message that we want an inclusive society in which all can participate, and that includes trans people who have a range of sexual orientations.

"She [Ms Tickle] wanted the ability to connect with other women around cooking, around recipes, around housing ... to be able to connect with people."

As Ms Grover left court, she said the decision was what she expected.

"Unfortunately it is the judgement we anticipated and the fight for women's rights in Australia continues."

The app is currently not online.

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Posted Fri 23 Aug 2024 at 11:01am, updated Fri 23 Aug 2024 at 2:56pm

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

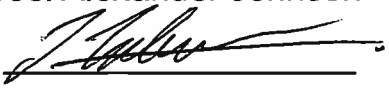
(Respondent)

ANNEXURE SHEET

The following 8 pages comprise the document referred to as Annexure KD-7 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

SKY NEWS LIVE 8:48am

sky news .COM.AU

Hi, Joel

Insights And Analysis

Consequences of Tickle v Giggle

Transgender woman Roxanne Tickle has won a discrimination case after being banned from the female-only app Giggle for Girls.

Last week transgender person Roxanne Tickle won her claim in the Federal

Join the conversation

Recommended

In the Tickle v Giggle case, Federal Court Justice Robert Bromwich ruled Sall Grover and her Giggle for Girls app had "indirectly discriminated" against Tickle.

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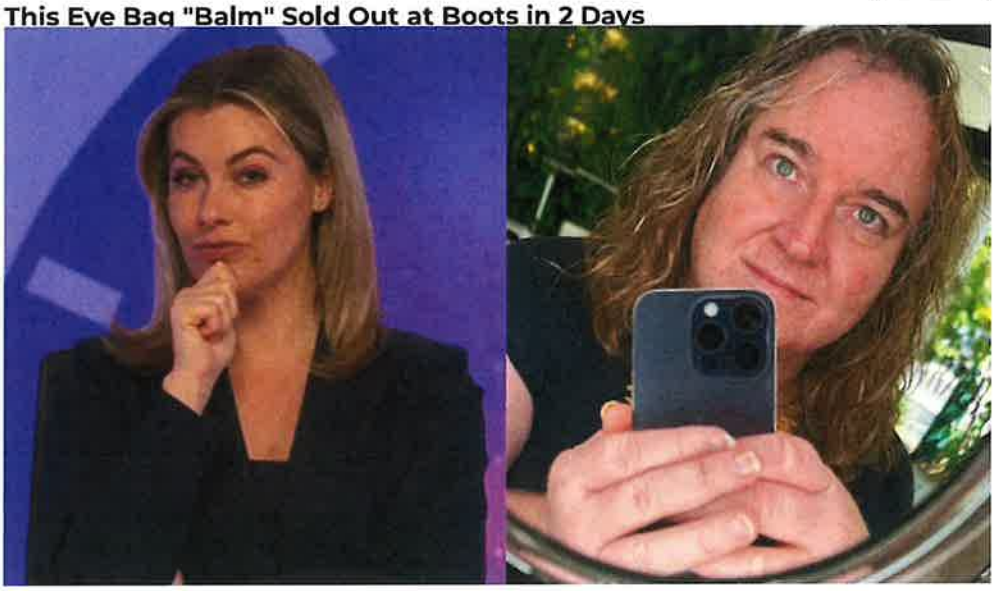
Which is better? Medibank, BUPA...

Tickle, born male but who underwent a surgical sex change in 2019, claimed she was discriminated against by Giggle and Grover on the basis of her being a transgender rather than biological woman.

Watch Now
Doctor Says: Want To Stay Slim at 55? Do This Turmeric Trick Every Morning

The effect of the judgment is that the burning question of "what is a woman?" for the purposes of the law is to be answered if someone identifies as a woman.

Learn More
This Eye Bag "Balm" Sold Out at Boots in 2 Days



Sky News host Gabriella Power has labelled the outcome of a 'what is a woman' court case as a "massive setback" for women's rights.

Be Eligible

In fact, he declared that according to the law "sex is changeable".

The judgement – criticised across the world – means that gender identity is superior to biological sex when it comes to discriminating against individuals in sex-segregated spaces.

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As explained by Patrick Byrne in his book 'Transgender: one shade of grey' the objective of the Commonwealth Sex Discrimination Act 1984, when introduced, was to eliminate discrimination against women, for example in workplaces.

This discrimination arose because of their biological sex, not because of their dress, mannerisms or social characteristics.

Accordingly, the Act included biological definitions of "man" and "woman".

Transgender woman Roxanne Tickle has won a gender identity case against a female-only platform in federal court. Picture: Instagram

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Consequently, domestic violence support services, women's only gyms and sessions in swimming pools were recognised by the courts as non-discriminatory under special measures intended to achieve equality.

In 2013, the Act was amended by removing the definitions of "man" and "woman" and giving protected status to "gender identity", which is defined as "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".

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The explanatory memorandum to the amending Bill stated that its intention was to ensure that transgender women were not excluded from accessing protections from discrimination on the basis of other attributes in the Sex Discrimination Amendment.

The Bill was introduced under the watch, and with the support, of then Prime Minister Julia Gillard.

Giggle CEO Sall Grover says the reality is 'men are stronger than women' and the world continues to live in that reality every day.

Yes, the same Julia Gillard who was celebrated by the sisterhood for her "misogyny" speech, oversaw the apparatus by which women's rights in Australia have been destroyed. And, in doing so, she had the sisterhood right behind her.

Consultation and advocacy on the changes to the Act was led by the Australian Human Rights Commission's then President Catherine Branson KC, described by the Australian Women Lawyers as Active Citizens website as a trailblazer for women in the law.

Another Human Rights Commissioner at the time, Bethany Hender, works for the Women's Legal Centre in Canberra.

Her profile page on the Centre's website boasts that she "brings a strong focus on using the legal process to ensure women can assert their rights and obtain redress".

Giggle Founder Sall Grover says when biological men are included in women's sports it makes a woman "excluded".

Moreover, the judgement in this case has been celebrated by the present Sex Discrimination Commissioner, Anna Cody.

In fact, during hearings in the case, Justice Bromwich asked the Sex Discrimination Commissioner to be a "friend of the court", and in that capacity her barrister claimed that "sex is not a binary concept and it is not exclusively a biological concept", thus laying bare the extent of the assault on women's rights – by women themselves.

This is the same sisterhood that states there is an "epidemic" of violence against women in Australia.

Labor Ministers Katy Gallagher and Amanda Rishworth fulminate about the shame of violence against women and children.

While there may very well be an urgent need for women's only services on this score, the Tickle v Giggle judgement effectively cancels women's only spaces.

Giggle Founder Sall Grover says men can be "identified into the study" of women's pain in Victoria.

The consequences of this are dire.

As parliaments and courts retreat from biological reality, men who adopt the Shania Twain approach ("Man, I feel like a woman") can potentially now claim the same rights, protections and access to services and spaces previously only given to biological women.

Already we have seen male sex offenders claim to be women and sent to women's prisons.

WA Liberal MLC Nick Goiran, in a parliamentary examination into Corrective Services, found that at least one biological male young person is being detained with juvenile females in that state.

Sky News host Rita Panahi says the AFL's policy with transgender players is 'utterly absurd but completely on brand".

Gender self-ID legislation in force in Australian states means a person no longer needs surgical intervention and instead will be able to legally claim another gender for themselves after a doctor has signed a form. Imagine your daughters, sisters, and friends in their sports clubs, working hard and excelling, only to face certain defeat when pitted against biological males and having to share changerooms with them.

As Terry Barnes noted in the Spectator UK, it must be right that questions can be raised over any natural hormonal or chromosomal advantage athletes may or may not have.

Indeed, Tickle's post-judgement statement, referring to her women's hockey team, implies just that.

It is to English novelist Charles Dickens that we owe the saying: "The law is an a**".

A women's rights demonstration held in Melbourne over the weekend collapsed into chaos after it was crashed by Transgender Liberation protesters.

He was right.

When it comes to Australian law, thanks in no small part to the sisterhood, the definition of a woman has fallen out of line with public expectation.

If the question were put to the Australian people, no doubt it would return a different answer than the courts.

Thus, the Tickle v Giggle judgement, with ramifications affecting so many aspects of everyday life, cannot be allowed to hinge on the opinion of a single judge.

Dr Rocco Loiacono is a legal academic, writer and translator. Earlier in his career, he spent a decade practicing as a lawyer with Clayton Utz, one of Australia's top law firms. As well as SkyNews.com.au, he regularly contributes opinion pieces, specialising in politics, freedom and the rule of law, to The Daily Telegraph, The Herald Sun and The Australian.

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 7 pages comprise the document referred to as Annexure KD-8 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed:

"Annexure KD-8"

Terry Barnes

Australia's legal battle to define a 'woman' is not over yet

23 August 2024, 11:45am

Roxanne Tickle (Credit: Getty images)

Giggle v Tickle. The name of this Australian court case sounds like an A.P. Herbert legal parody. Except that it is no parody. It is an action brought by a transgender person and activist Roxanne Tickle against a woman-only website, Giggle for Girls, founded and run by a feminist businesswomar Sall Grover.

Tickle, born male but who underwent a surgical sex change in 2019, claimed she was discriminated against by Giggle and Grover on the basis of her being a transgender rather than biological woman, principally on the basis of a selfie submitted to the website and Grover for review as part of her application. Grover, on the other hand, argued that Tickle was not a woman, sex is not changeable, and it was appropriate to block Tickle from joining Giggle, it being a woman-only space.

In her case, Tickle claimed to have been subjected to unlawful discrimination under Australia's Sex Discrimination Act, and international human rights conventions to which Australia is a party. In response, Grover and Giggle questioned the validity and constitutionality of the Act's provisions, and the relevant parts of the state of Queensland's births, deaths and marriages legislation upon which Tickle relied.

Essentially, Bromwich answered the burning question of 'what is a woman?'

The case was heard by Mr Justice Bromwich of the Federal Court of Australia, and his decision was handed down today. Bromwich ruled that Tickle is a transgender woman 'whose sex is recognised by an official, updated, Queensland birth certificate' and, that blocking Tickle's membership, Giggle (and, by extension, Grover as the sole proprietor and director of the company operating the website), indirectly discriminated against Tickle as one of a class of persons refused service by Giggle.

Essentially, Bromwich answered the burning question of 'what is a woman?' by ruling that if someone identifies as a woman, that is enough. It appears that, in his view, even a surgical transition like Tickle's is not necessary. He awarded Tickle damages of A$10,000 (£5,127) – admittedly far less than the A$200,000 (£102,500) she sought – and costs.

Katharine Birbalsingh

Grover so far has said little publicly. 'Unfortunately, we got the judgment we anticipated. The fight for women's rights continues', she tweeted after the decision

was released.

Tickle, on the other hand, was effusive. 'I'm pleased by the outcome of my case, and I hope it is healing for trans and gender diverse people', she said in a statement. 'The ruling shows that all women are protected from discrimination. I brought my case to show trans people that you can be brave, and you can stand up for yourself. I can now get on with the rest of my life and have a coffee down the road with my friends, play hockey with my team and put this horribleness behind me.'

This 'what is a woman?' case has attracted interest around the world, and Mr Justice Bromwich's judgment was instantly celebrated by progressive media outlets including the *Guardian* and the BBC. The *Guardian* report particularly emphasised the judge's criticism of Grover's case and even her demeanour in court. Indeed, it seems clear from observations in the judgment that Mr Justice Bromwich's sympathies, such as his rebuke of Grover, were more with Tickle, however impartial his actual reasoning.

There's no question that this case is significant well beyond the parties and even Australia. If the judgment is left to stand unchallenged it, and Bromwich's legal reasoning, will be relied on to justify the further intrusion of people identifying as women into woman-only spaces, and activities designated for women only. That now includes online 'spaces' like Giggle as well as physical spaces such as women's change rooms.

Under Bromwich's reasoning, for example, the Algerian and Taiwanese boxers whose gender identity was so controversial at this month's Paris Olympics could not be questioned. Whilst both athletes maintain they are biologically female and eligible to compete, it must be right that questions can be raised over any natural hormonal or chromosomal advantage athletes may or may not have. Indeed Tickle's post-judgment statement, referring to her women's hockey team, implies just that.

Whether Grover is going to appeal this decision is as yet unclear, but for certainty it needs to be. A high-profile precedent such as this, with ramifications affecting so many aspects of everyday life, the relations between the sexes and the fundamental question of who and what a woman is – or, indeed, what makes a man – cannot be allowed to hinge on the opinion of a single judge.

At least, however, we should be grateful to His Honour for highlighting, in his painstaking and legalistic way, the moral and ethical morass that is gender identity

and ideology. This includes the prevailing notion that a person's gender is a matter of personal preference, as fashionably changeable as a suit of clothes and not a product of biology and nature.

Whatever happens next, however, Sall Grover deserves respect. Like JK Rowling, Martina Navratilova (who tweeted her support) and others, Grover has shown personal courage in risking her reputation and livelihood by daring to stand against the repressive and intolerant gender identity zeitgeist. She has been the target of vicious social media trolling and, as with the *Guardian's* report, faced ridicule by much of the progressive establishment – even more courageously so because unlike, say, Rowling, she is not a person of great wealth.

But in her stand, Grover is not alone. This legal battle is not over yet, and the world will be watching.

WRITTEN BY

Terry Barnes

Terry Barnes is a Melbourne-based contributor for The Spectator and The Spectator Australia.

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FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 3 pages comprise the document referred to as Annexure KD-9 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

"Annexure KD-9"

THE AUSTRALIAN

COMMENTARY

PETA CREDLIN

Tickle vs. Giggle: Rights of girls and women deserve better than this

5.00am August 29, 2024 | Updated 10:42am September 01, 2024

In the dying weeks of the Gillard government, Labor's Mark Dreyfus quickly and quietly up-ended the rights of Australian women.

What was positioned as ending discrimination for LGBTIQ people has actually ended up stealing hard-won gains for women and girls to have a "room c Quite literally. And if last week's Federal Court decision between Roxanne Tickle and Sall Grover that relied on Dreyfus's legislative changes goes uncha officially sex is no longer anchored in biology, at least for the purposes of the federal Sex Discrimination Act.

It doesn't matter that a person's DNA can't change. If you can call yourself a woman under the relevant state law, that's that. So, absent a successful appe legislative change, when biology and the law part company it's the law that prevails even though no law can give someone XX chromosomes.

It's probably unfair to blame the judge for this absurdity, although there was no suggestion in Robert Bromwich's judgment that he was uncomfortable with found it to be. This predicament is the largely unanticipated outcome of Gillard era changes to the Sex Discrimination Act to include "gender identity" a claiming unlawful discrimination. This was defined as "the gender-related identity, appearance or mannerisms or other gender-related characteristics of (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth".

Given what we now know, these words should have rung alarm bells but didn't at the time. In introducing the bill, then (and now) Attorney-General Dr elaborate at all about the gender identity provision – perhaps because he didn't want to draw attention to its potential ramifications.

His second reading speech outlining the legislation was a scant 410 words long and claimed the bill was just about ensuring there was no discrimination people in accessing services. The House of Representatives Standing Committee on Social Policy and Legal Affairs declared "the protection of citizens fr discrimination" was "a core matter of social justice" and merely observed that the proposed change would "address gaps in the current anti-discriminatic framework". When it was later subject to a Senate inquiry, even Coalition members of the Senate Legal and Constitutional Affairs Legislation Committe supportive" of the bill.

The only concern about the legislation that was raised by opposition speakers at the time was the possibility that the amendments might make it harder institutions to employ people who'd sustain their ethos.

Yet as it has now turned out, in yet another example of how well-intentioned change can have unintended consequences, this is the opening that has be trans activists in their latest attempt to insist that biological males can actually be women when immutable scientific fact makes clear this is impossible.

In 2020, Queensland woman Grover established the Giggle for Girls smartphone app, which was billed as a safe online space for biological females to con each other. As she told the court, it was created to be "a place without harassment, 'mansplaining', 'dick pics', stalking and aggression and other male patt behaviour". Grover doesn't accept that sex can be a matter of self-identification and has been branded as a "trans-exclusionary radical feminist" like auth Because Grover always intended that her app would be for females only, she required users to submit a selfie that artificial intelligence would scan to we

In February 2020, Grover said, the Giggle app received more than 5000 unwelcome applications from people she determined to be male and excluded. reportedly had 20,000 subscribers in 88 countries, despite, Grover said, a regular "flood of male abuse".

In February 2021, Tickle, a biological male who'd had gender reassignment surgery, was initially accepted to join the app but subsequently excluded onc had studied the selfie that Tickle had submitted.

In December 2021, Tickle complained to the Australian Human Rights Commission about unlawful discrimination. When Grover refused conciliation, t to the Federal Court for determination. After a three-day hearing in April, last Friday Justice Bromwich brought down a judgment that found for Tickle, $10,000 in damages.

Justice Bromwich accepted submissions from the Sex Discrimination Commissioner that he described as "propositions grounded in logic and longstandi These were, he said, that sex "is not confined to being a biological concept referring to whether a person at birth had male or female physical traits, nor a binary concept, limited to the male or female sex, but rather takes a broader ordinary meaning, informed by its use, including in State and Territory le accordingly, sex can refer to a person being male, female or another non-binary status and also encompasses the idea that a person's sex can be changed the judge said, "that Ms Tickle is recorded as female on her updated Queensland birth certificate for her to be, at law, of the female sex".

He went on: "The acceptance that Ms Tickle is correctly described as a woman, reinforcing her gender identity status for the purposes of this proceeding for the purposes of bringing her present claim of gender identity discrimination, is legally unimpeachable."

The judge conceded that if a biological male who hadn't transitioned (a "cisgender man") had sought to join the app, his exclusion might have been justi though, that did not apply here because Tickle was legally a woman though biologically a male. The judge found "the real injury from her exclusion" frc app was not the stress and anxiety attacks that Tickle claimed but "the hurt of not being treated as a woman" and that "prohibition on discrimination or gender identity is to address this kind of injury". Hence the award of $10,000. Notwithstanding Grover's "misgendering" of Tickle, the judge declined to damages and conceded that "what the word 'woman' means is deeply contested and there must be scope in which persons can put forward an argument genuinely held".

And that's the point, isn't it? The definition of woman is indeed deeply contested, between a vociferous and aggressive trans lobby, and those who think biological males claiming to be women to invade women's spaces makes a mockery of female equality. Ask yourself how many trans men are demandin in male sports or in male-only clubs?

In the real world, there's furious division over what defines a woman, but at least as far as Justice Bromwich is concerned the law is crystal clear. Did this because MPs debated the issue and decided that anyone who claims to be a woman really is a woman; or because this question was openly put to voters an election or at a referendum? Of course not. What we are now saddled with is something that has been insinuated into law by stealth.

Sall Grover deserves support to appeal this case. To put this matter beyond the reach of judicial activism, the parliament must remake the laws to protec women and girls.

MORE ON THIS STORY

Tickle v Giggle: Trans discrimination test case finally heard in court

By JOANNA PANAGOPOULOS

Pro-trans agenda 'at heart of the case'

By ELLIE DUDLEY

In 2020, Queensland woman Grover established the Giggle for Girls smartphone app

By JOANNA PANAGOPOULOS, ELLIE DUDLEY

In the real world, there's furious division over what defines a woman

By JACQUELIN MAGNAY

PETA CREDLIN COLUMNIST

Peta Credlin AO is a weekly columnist with The Australian, and also with News Corp Australia's Sunday mastheads, including The Sunday Telegraph and Sunday Herald Sun. Since 2017, she has h prime-time program Credlin on Sky News Australia, Monday to Thursday at 6.00pm. She's won a Kennedy Award for her investigative journalism (2021), two News Awards (2021, 2024) and is a joi winner (2016) for her coverage of federal politics. For 16 years, Peta was a policy adviser to Howard government ministers in the portfolios of defence, communications, immigration, and foreign af and 2013, she was chief of staff to Tony Abbott as Leader of the Opposition and later as Prime Minister. Peta is admitted as a barrister and solicitor in Victoria, with legal qualifications from the Un and the Australian National University.

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 3 pages comprise the document referred to as Annexure KD10 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

The Catholic Weekly

The Catholic Weekly

Tickle v Giggle: If it's 'unimpeachable' that biological sex can change, then impeach me

By **Monica Doumit** *August 23, 2024*

Giggle for Girls founder Sall Grover is seen during a break at the Federal Court in Sydney, Thursday, April 11, 2024. Giggle for Girls founder Sall Grover has defended her actions in blocking trans woman Roxanne Tickle from the female-only platform. (AAP Image/Bianca De Marchi)

During the 2022 federal election debate, journalist Deb Knight asked then-Prime Minister Scott Morrison and Opposition Leader Anthony Albanese how they defined a woman.

What might have seemed a bizarre question in any other leaders' debate in history was somewhat predictable, given that this was the probably the first federal election in which the definition of "woman" seemed to shift from a scientific question, to a political one.

Two years later, it is not only the politicians who have weighed in but the judiciary as well, with Justice Robert Bromwich of the Federal Court of Australia today offering a legal definition of what it means to be a woman.

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The case, *Tickle v Giggle,* has a humorous name but serious implications. It concerned the *Giggle* app, designed by a woman named Sall Grover as a "women-only safe space on the internet, where women could search for roommates and employment opportunities, network, commune and engage in discussion."

Roxanne Tickle is a biological man who, in September 2020, altered his Queensland birth certificate to describe himself as a female. He also took testosterone blockers, oestrogen and progesterone and underwent gender-affirming surgery to alter his physical characteristics to appear female. He downloaded the *Giggle* app and registered an account.

As part of the account registration process, users must upload a selfie. *Giggle* uses artificial intelligence to identify male facial features and filter out men who are trying to access the app. The AI did not filter out Tickle and he gained access.

Months later, a manual review of user photos meant that *Giggle* was made aware of Tickle's masculine features and he was blocked from further use. He then made a claim of discrimination based on gender identity, and the *Tickle v Giggle* case began.

Without wanting to get into the complexities of anti-discrimination law, Grover and *Giggle* argued their case on the basis of a distinction between gender identity and biological sex; that they did not exclude Tickle because he presents as transgender, but because he was a man. *Giggle* is an app for women only, anti-discrimination laws still allow some room for women's only spaces, and *Giggle* was making use of those allowances.

Justice Bromwich was essentially left deciding whether this was a case of lawful discrimination on the basis of sex, or unlawful discrimination on the basis of gender identity.

This is where the question, "What is a woman?" became not only political, but judicial. And with respect to His Honour, it also became Orwellian.

Justice Bromwich ruled that "sex is not confined to being a biological concept … nor confined to being a binary concept, limited to the male or female sex." "Sex can refer to a person being male, female or another non-binary status," he wrote. "A person's sex can be changed."

Justice Bromwich wrote that if a "cisgender" man (a biological man who identifies as a man) had made an anti-discrimination claim against *Giggle*, he may not have been successful. But in finding in favour of Tickle and awarding him $20,000 in damages and up to $50,000 in legal fees, decided that Tickle is legally and socially a woman.

What's more, Justice Bromwich wrote that "the acceptance that Ms Tickle is correctly described as a woman … is legally unimpeachable."

Legally unimpeachable. Just let that sink in for a moment.

The Cambridge Dictionary defines "unimpeachable" as being "of such a high standard of honesty and moral goodness that it cannot be doubted or criticised." Here, a Federal Court judge and the highest Australian authority, so far, to opine on "What is a woman?" has said that as far as Australian law goes, calling a biological man a woman because he has gone through hormonal and surgical alterations and filled out some government forms is of such a high standard of honesty that it puts it beyond doubt.

This decision does not only have implications for the *Giggle* app, but for every women-only space you can think of: girls' schools, women's prisons and domestic violence shelters, gyms and more, because these spaces can no longer say that they are lawfully excluding biological males on the basis of sex, they will have to justify the reasonableness of exclusion on gender identity grounds instead.

The implications are extensive. Ironically, Albanese and Scott Morrison's 2022 answers would now appear to have been wrong, by the Federal Court's standard.

When asked to define a woman, Albanese said it was "an adult female," while Morrison used "a member of the female sex." Each went on to say that they didn't think this was a confusing concept at all. Maybe we should make them judges.

"If thought corrupts language, language can also corrupt thought. A bad usage can spread by tradition and imitation even among people who should and do know better," wrote George Orwell. I wonder what he would write if he was alive today.

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

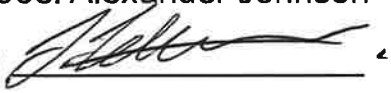
(Respondent)

ANNEXURE SHEET

The following 9 pages comprise the document referred to as Annexure KD-11 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

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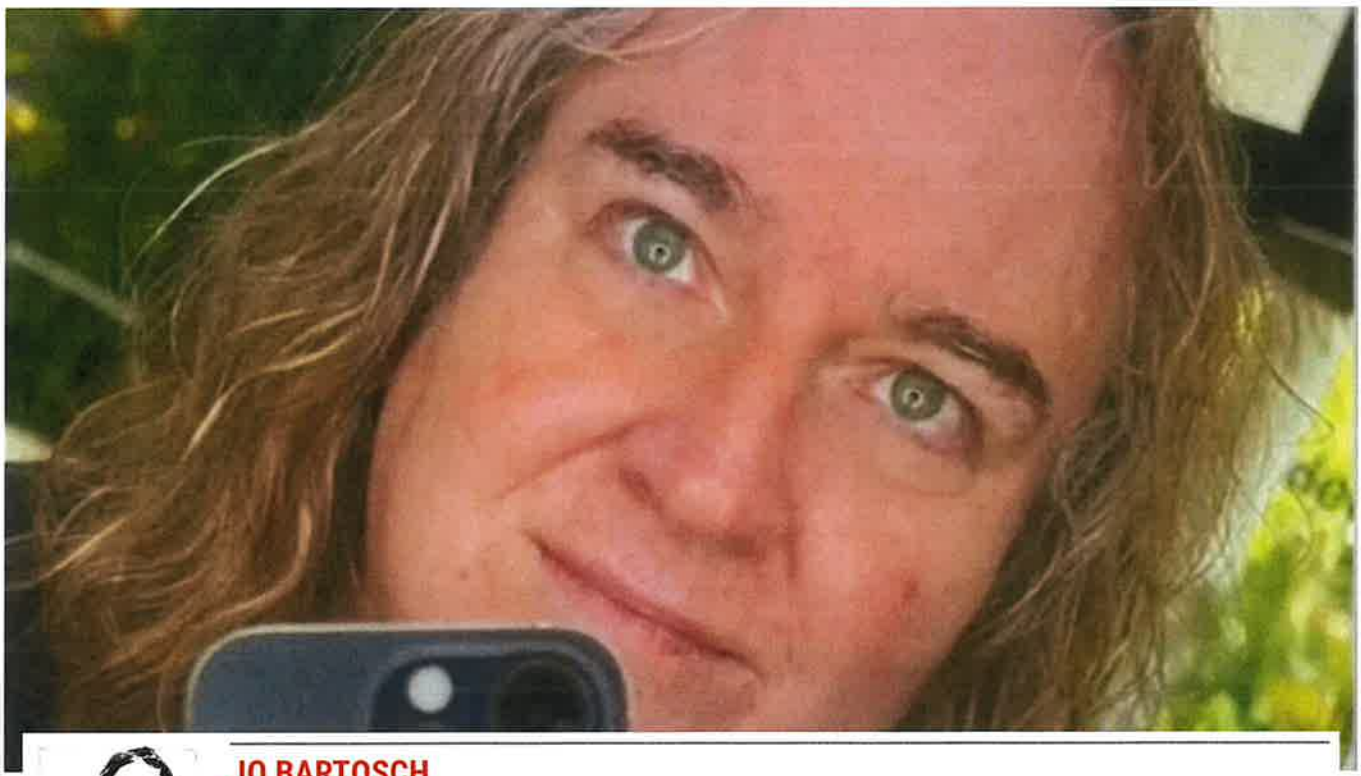

JO BARTOSCH

23rd August 2024

Topics FEMINISM IDENTITY POLITICS WORLD

The courts Down Under have gone topsy-turvy. At 9am Sydney time, a judge handed down a ruling that eradicated the category of sex in law, finding in favour of a man who was denied access to a women-only app. Justice Robert Bromwich stated that according to Australian law, sex is 'changeable and not necessarily binary'. The case, known as *Tickle vs Giggle*, has set a dangerous legal precedent that the world may now follow.

The legal row started when Tickle – an angry man in a frock who changed his name to Roxanne – saw some posts on social media that annoyed him. He is a trans activist who has gone to some lengths to 'pass' as female. He had so-called gender-affirmation surgery in 2019 and changed his birth certificate to obfuscate the fact that he was, to use his words, 'assigned male at birth'. His sex obviously remains male, as perfectly illustrated in photos by his five o'clock shadow, even if on paper he is legally a 'woman'.

The tweets that upset Tickle were posted by Sall Grover, founder of the women-only social-media app, Giggle for Girls. Giggle, a small tech start-up, used facial-recognition software to screen out men. Tickle put this to the test, and initially was accepted on to the app. But after seven months his picture was clocked, either by Grover or the screening function, and his access was restricted.

Tickle then responded in the way that unpleasant, petulant men do when they're spurned. He huffed, puffed and sent numerous emails and made phone calls to Grover. When that failed to get him reinstated, he took her to court.

Tickle argued he had a right to use Giggle because he is a woman on paper. The judge agreed, noting 'the imposed condition of needing to appear to be a cisgendered female in photos submitted to the Giggle app had the effect of disadvantaging transgender women who did not meet that condition'. ('Cisgendered female' is trans-speak for 'real woman', while 'transgender women' refers to men.)

For their part, Grover's legal team agreed that Tickle had been discriminated against – but on the grounds of his male sex, not his claims to have a female gender identity.

The judge went on to explain that although the science of sex difference was not in dispute, 'the issues in this case involve wider issues than biology'. He considered and then dismissed expert opinion from evolutionary biologist Colin Wright, author and philosopher Kathleen Stock, and campaigner Helen Joyce. Remarkably, he declared Joyce,

author of a best-selling book on transgenderism, as having 'no recognised expertise in any of the areas in which she expresses an opinion'.

Reading the ruling, it is clear that Justice Bromwich understands that blokes can't become Sheilas; he just didn't think that biology was relevant to the case. Instead, he stuck to a narrow, administrative understanding of sex and gender, stating that 'Tickle is a legal female, as reflected in her updated birth certificate issued under Queensland law' (sic).

Strip away the robes and legalese, law is supposed to uphold what we collectively agree as a society to be right. But trans activists have broken that covenant. They are twisting justice itself to meet the desire of an entitled few to be affirmed as something they are not. Perhaps Justice Bromwich ought to consider the words of the great Australian feminist, Germaine Greer: 'Just because you lop off your dick and then wear a dress doesn't make you a fucking woman. I've asked my doctor to give me long ears and liver spots and I'm going to wear a brown coat but that doesn't turn me into a fucking Cocker Spaniel.'

What ought to send a shiver down the spine of all right-thinking people is that this ruling could have huge ramifications for those in other countries across the globe. The Convention to Eliminate All forms of Discrimination Against Women (CEDAW) is an international treaty adopted in 1979 by the UN. It is an agreement that recognises the specific needs of women. Giggle's defence argued that Australia's ratification of CEDAW obliges the state to protect women's rights, including single-sex spaces. That Justice Bromwich rejected this will have ramifications for the 186 countries that have ratified CEDAW, as judges across the world look to landmark rulings like this to inform domestic decisions.

The real cost of Justice Bromwich deciding that 'female' is a legal identity rather than a biological reality is likely to be felt by those in CEDAW signatory countries where violence against women is highest. Judges in countries including Pakistan, El Salvador (the femicide capital of the world) and South Africa (which has the highest reported rate of rape in the world) are now likely to take their lead on the interpretation of CEDAW from Australia. Even if misogynist imans in Pakistan, woman-killers in El Salvador and rapists in South Africa all know which sex they are targeting, there is now a real risk their nations' judges will follow in the heavy tread of Australia in abolishing the category of woman.

The human rights of the most marginalised women in the world have been put at further risk – all because an angry man in Australia wasn't allowed to play with the girls on a social-media app. Despite the comical name, there is really nothing funny about *Tickle vs Giggle*.

Jo Bartosch is a journalist campaigning for the rights of women and girls.

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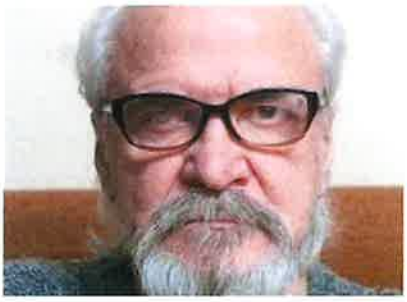

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Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

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The following 12 pages comprise the document referred to as Annexure KD-12 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

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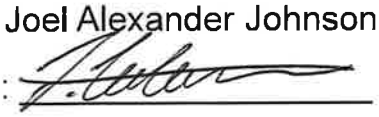
Signed: 

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 3 pages comprise the document referred to as Annexure KD-13 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

Sex Discrimination Commissioner comments on Federal Court judgment in Tickle v Giggle for Girls Pty Ltd

Sex Discrimination

Content type: Media Release
Published: Friday 23 August, 2024
Topic(s): Sex Discrimination

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Today, the Federal Court handed down judgment in the case of *Tickle v Giggle for Girls Pty Ltd*. Justice Robert Bromwich held that Roxanne Tickle was discriminated against when she was refused access to a social media app described as being 'made for women by women'. The Court ordered the respondents to pay $10,000 in compensation and to pay her legal costs.

The Court found that Ms Tickle, a trans woman, was excluded from the app based on her appearance, and that this was discrimination on the ground of her gender identity. The case went to court after Ms Tickle's complaint to the Australian Human Rights Commission in 2021 could not be conciliated and is the first case alleging gender identity discrimination to be heard by the Federal Court.

"The 2013 changes to the *Sex Discrimination Act* make it clear it is unlawful under federal law to discriminate against a person on the basis of gender identity," says Sex Discrimination Commissioner Dr Anna Cody. "We are pleased this case has recognised that every individual, regardless of their gender identity, deserves equal and fair treatment under the law."

The role of the Sex Discrimination Commissioner in this case was as a 'friend of the court' (*amicus curiae*). Dr Cody assisted the Court by providing submissions about the meaning, scope and validity of relevant provisions of the *Sex Discrimination Act 1984* (Cth).

"Gender equality means equal treatment for people of all genders, including trans people. Sex and gender identity are interconnected, not mutually exclusive, and access to justice for one group does not come at the expense of another, but rather strengthens our collective commitment to equality and justice for all.

"We must continue to recognise the worth and dignity of every person and reject the harmful stigmas and stereotypes that cause discrimination. No one in Australia should face exclusion or discrimination based on sex or gender identity, and we will continue to stand with trans communities and advocate for the rights of all women, including women who are trans."

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

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(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 5 pages comprise the document referred to as Annexure KD-14 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

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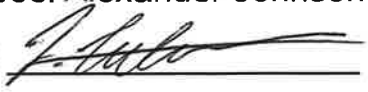
Signed: 

"Annexure KD-14"

UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER

PRESS RELEASES | SPECIAL PROCEDURES

Special Rapporteur decries Australia's Federal Court ruling further eroding rights to female-only spaces

04 September 2024

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GENEVA – In a **statement** today, the Special Rapporteur on violence against women and girls, Reem Alsalem, expressed grave concern over a decision by the Federal Court of Australia in the case of **Roxanne Tickle v. Giggle for Girls Pty Ltd and Sally Grover,** that the exclusion of a male who identifies as a woman and is recognised as female under the law from a female-only social media platform constitutes unjustified indirect discrimination.

"The ruling demonstrates the concrete consequences that result when gender identity is allowed to supplant sex and override women's rights to female-only services and spaces," said Alsalem.

She noted that the ruling concerned the Australian Sex Discrimination Act, and that while the Act differentiates between the concepts of sex and gender identity, this distinction is abandoned in practice. She said the Act severed the term sex from its ordinary meaning of biological sex, operating on what she described as a built-in and fictitious premise that every human being has a gender identity. Consequently, she said that the Federal Court had argued that the Convention on Discrimination against Women (CEDAW), ratified by Australia in 1983, was irrelevant to certain aspects of this case, on the pretext that gender identity discrimination was not alleged in favor of a man or men. However, in her view, the Court ignored the fact that the CEDAW Convention recognises that there are women who are more vulnerable to discrimination as a result of the interplay between sex and other factors that affect their lives.

Alsalem said that the Federal Court relied on a general anti-discrimination provision of the International Covenant on Civil and Political Rights (ICCPR), article 26, next to Australian legislation to argue the prohibition of discrimination based on gender identity. However, as noted by the UN Human Rights Committee, "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".

The Special Rapporteur referred to the **position paper** she issued in relation to this court case, which highlighted that "where tension may

arise between the right to non-discrimination based on sex and non-discrimination based on 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".

The Special Rapporteur expressed concern that the court decision could make it potentially harder for women and girls to argue for the proportionality, legitimacy and necessity of female-only spaces in some circumstances.

Reem Alsalem, Special Rapporteur on violence against women and girls, its causes and consequences.

The Special Rapporteurs are part of what is known as the **Special Procedures** of the Human Rights Council. Special Procedures, the largest body of independent experts in the UN Human Rights system, address either specific country situations or thematic issues in all parts of the world. Special Procedures' experts work on a voluntary basis; they are not UN staff and do not receive a salary for their work. They are independent from any government or organization and

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 2 pages comprise the document referred to as Annexure KD-15 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
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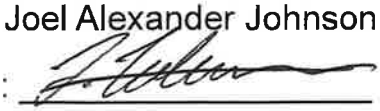
Signed: 

UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES
SPECIAL RAPPORTEURS, INDEPENDENT EXPERTS & WORKING GROUPS

Statement on the decision of the Federal Court of Australia in the case of Roxanne Tickle v. Giggle for Girls Pty Ltd and Sally Grover

Special Rapporteur on violence against women and girls, Reem Alsalem*

I am gravely concerned over the decision of the Federal Court of Australia in the case of *Roxanne Tickle v. Giggle for Girls Pty Ltd and Sally Grover*, which ruled that the exclusion of a male who identifies as a woman and is recognized as a female under the law from a female-only social media platform constitutes unjustified indirect discrimination.

The ruling demonstrates the concrete consequences that result when gender identity is allowed to supplant sex - and override women's rights to female-only services and spaces.

The Federal Court of Australia's ruling concerned the Australian Sex Discrimination Act. While the Act differentiates between the concepts of sex and gender identity, this distinction is abandoned in practice. The Act also severed the term sex from its ordinary meaning of biological sex, operating what I would describe as a built-in and fictious premise that every human being has a gender identity. Consequently, the Federal Court has argued that the Convention on Discrimination against Women (CEDAW), ratified by Australia in 1983, was irrelevant to certain aspects of the case, on the pretext that gender identity discrimination was not alleged in favor of a man or men. However, it is my view that the Court ignored the fact that the CEDAW Convention recognizes that women suffer discrimination on intersecting grounds and that there are women that are more vulnerable to discrimination as a result of the interplay between sex and other factors that affect their lives.

Furthermore, the Federal Court relied on a general anti-discrimination provision of the International Covenant on Civil and Political Rights (ICCPR), article 26, next to Australian legislation to argue the prohibition of discrimination based on gender identity. However, as noted by the United Nations Human Rights Committee, "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant" (General Comment No. 18 (1989) on non-discrimination, para. 13).

I take the opportunity to refer to the position paper I issued at the request of the Australian Human Rights Commission in March 2024, in relation to this court case, which highlighted that "where tension may arise between the right to non-discrimination based on sex and non-discrimination based on 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 discrimination based on sex to other rights".

I am also concerned that the court decision could make it potentially harder for women and girls to argue for the proportionality, legitimacy and necessity of female-only spaces in some circumstances. Even if unintentional, the ruling by the Federal Court may have made it potentially harder for women and girls in Australia to avail themselves of the full breadth of protections provided by the international human rights treaties that Australia is part to, including CEDAW and the ICCPR, and which require States to ensure equal rights for men and women and not to discriminate on the basis of sex.

The Sex Discrimination Act contains provisions that could potentially justify the maintenance of single sex services or the reasonableness of distinguishing on the basis of biological sex. They were unfortunately not relied on in this case, leaving it unclear whether Australian law is fully compatible with international obligations to eliminate all forms of discrimination against women and girls.

I hope that if the case moves to the appeal stage, all parties would consider applicable international laws and their obligations, as well as the circumstances in which exceptions can be applied.

4 September 2024

*** The Special Rapporteur on violence against women and girls, as a Special Procedures mandate of the Human Rights Council, serves in her individual capacity independent from any government or organization.**

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

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ROXANNE TICKLE

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ANNEXURE SHEET

The following 7 pages comprise the document referred to as Annexure KD-16 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

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INSIGHTS

Why Tickle v. Giggle Is No Laughing Matter: Australia Steps Toward Substantive Trans Inclusion

At a moment marked by an upsurge of anti-gender movements within legislatures and courtrooms globally, it is imperative to acknowledge and celebrate victories for lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ) communities as they arise. In August 2024, the Federal Court of Australia–a superior court with jurisdiction over unresolved anti-discrimination complaints arising from the Australian Human Rights Commission–delivered a landmark affirmation of transgender rights. This ruling emerged from a case in which Roxanne ("Roxy") Tickle, a transgender woman, sued the "women-only" social media application Giggle for Girls Pty Ltd and its founder, Sally ("Sall") Grover, for discrimination after being blocked from the app due to her appearance. The court ruled in Tickle's favor, marking the first judicial decision to confirm that the country's federal sex discrimination law, the Sex Discrimination

Act 1984 (Cth) ("SDA"), protects transgender people from gender identity discrimination.

The real victory, as we will explain here, was not merely a win in the courtroom for Tickle, but also the court's repudiation of gender-restrictive rhetoric: indeed, the respondent, Grover rejected wholesale the existence and validity of transgender women, opposed the 2013 amendments to the SDA which explicitly included gender identity as a protected category, and even challenged their constitutionality. Given the rise of trans-exclusionary feminism in legal discourse, the outcome of this case demonstrates that decades of progressive jurisprudence on transgender rights can serve as a strong defense against such exclusionary views gaining mainstream acceptance. Now that Grover has appealed the court's decision to the Full Federal Court, it is important to consider the key points from the ruling and what could be at risk if it is overturned.

Factual Background

The Giggle for Girls app was developed by Grover in 2019 in order to "create a little corner of the Internet where women... could have a refuge away from men" for networking, support, and friendship (paragraph 95 of the decision). Her precise intentions for the women-only "refuge" and whom it aimed to exclude became clearer through her testimony about the onboarding process. Grover had enlisted the support of a "gender detection" feature from the artificial intelligence (AI) system Kairos to screen users. According to Grover's affidavit, the AI facial recognition process was "the digital equivalent of what human beings do every day in perceiving sex, in particular male sex." As she further clarified, she "did not consider the use of the word 'gender' in the context of its 'gender detection feature' to mean anything other than the detection of biological sex." Implied in this sex/gender equivalence, and later explicitly admitted in cross-examination, was Grover's belief that the term "women" only included cisgender women.

In February 2021, when Tickle, a transgender woman, uploaded a selfie and the AI system allowed her access to the app, Grover's vision of an exclusive women-only space and Tickle's gender identity were set on a collision course. About eight months after joining Giggle, Tickle found that she could no longer post content or comment on posts by other users. Soon after, when she tried to buy premium features on the app, she received a "User Blocked" message. Unbeknownst to her, Grover had been manually reviewing admitted users' onboarding selfies. The court later found that Grover had personally blocked Tickle's access to the app based on a "quick and reflexive" judgment that she appeared to be male. After her access was blocked, Tickle tried to contact Grover several times by email and phone, but aside from one missed call from Grover, they had no communication. Tickle's access to the app was never restored.

Legal Issues and Findings

In December 2021, Tickle made a complaint to the Australian Human Rights Commission (AHRC) claiming that she had faced discrimination on the basis of her gender identity. Once the AHRC terminated the complaint on the basis that it could not be resolved through conciliation, Tickle had the legal grounds to escalate the dispute to the Federal Court of Australia. Aside from the factual findings discussed above, the following legal issues, all of them implicating the Sex Discrimination Act (SDA), were raised before the court:

1. Whether Giggle for Girls and Grover had **directly discriminated** against Tickle on the basis of her gender identity (contrary to section 5B(1) of the SDA) by denying access to goods and services (contrary to section 22 of the SDA)?

2. Whether Giggle for Girls and Grover had **indirectly discriminated** against Tickle on the basis of her gender identity (contrary to section 5B(2) of the SDA) by denying access to goods and services (contrary to section 22 of the SDA)?

3. Whether section 22 of the SDA, which prohibits discrimination against a person on the basis of their gender identity in the provision of goods and services, is unconstitutional?

Despite the obviousness of Grover's transphobic stance, the court had a very specific decision to make in relation to the nature of the discrimination alleged. As discussed above, the court found that Grover likely made a "quick and reflexive" decision to remove Tickle, driven by a policy to exclude users on the basis of their appearance, rather than actual knowledge of Tickle's transgender identity. As a result, Tickle failed to prove direct discrimination. However, relying on the same evidence, the court found that Grover's policy of requiring users to "appear to be a cisgendered female" amounted to indirect discrimination, because it imposed a condition disadvantaging transgender women who could not meet this arbitrary standard (paragraph 134 of the decision).

In the constitutional challenge, the court had to determine whether the applicable gender identity discrimination provision in the SDA was a valid exercise of legislative power. The court ruled that the SDA, both in its original form and with the 2013 amendments, fell under the Federal Parliament's "external affairs" power, allowing it to enact laws to meet international treaty obligations. Specifically, the court found that Article 26 of the International Covenant on Civil and Political Rights (1966), which prohibits discrimination based on "race, colour, sex, language... or other status," includes gender identity as a protected category under "other status." The court also determined that the Federal Parliament had the power to pass laws requiring corporations and their officers to refrain from discriminating based on gender identity in the provision of goods and services. Because Giggle was incorporated in Australia and Grover was its executive officer, she was legally ıated not to discriminate against anyone on the basis of gender identity.

Since the court found that Giggle and Grover had indirectly discriminated against Tickle, they were ordered to pay $10,000 in damages and Tickle's legal fees.

The Question of Sex

At the heart of Grover's arguments in the case was the belief that "biology at birth permanently dictates the language that must be used to describe a person" (paragraph 45 of the decision). This understanding was reflected in her defense: that she had not discriminated against a "woman" because, in her view, Tickle was an "adult human male." Apropos of this, the court noted that "a key dispute is not one of what has taken place, except on the periphery, but rather one of characterisation, with the respondents essentially taking issue with the very concept of gender identity." The court noted with concern that Grover appeared to "contend that a claim of gender identity discrimination can be answered by asserting that sex discrimination occurred, and that the kind of sex discrimination they engaged in is a special measures exception under s 7D" of the SDA, which covers instances of lawful sex discrimination that aim to achieve substantive equality between two protected groups.

Grover's ability to present these arguments in court stemmed from the lack of a defined meaning for "sex" in the SDA. However, as the court clarified, this did not imply that the term lacked an established meaning in Australian common law. The court rejected Grover's essentialist interpretation of "sex," emphasizing that the term had acquired a "broader ordinary meaning", shaped by its use in legal gender recognition statutes in Australia's states and territories (paragraph 55 of the decision). Referencing past cases, the court affirmed that the legal recognition of nonbinary sex in Australia acknowledges the possibility of a person's sex being changeable. Additionally, the court highlighted the 2013 amendments to the SDA, which not only included "gender identity" as a prohibited ground of discrimination, but also reflected deliberate changes in terminology, including the linguistic shift from "the opposite sex" to "a different sex" and the repeal of the definitions of "man" and "woman."

The court's handling of Grover's sex/gender equivalence is instructive because of how strongly it reflects radical iterations of gender justice. Historically, cultural feminists upheld the idea of biologically determined gender, viewing sex differences as inherent and immutable. However, scholars in sex variance and queer theory challenged this, demonstrating how early gendered socialization shapes behavior. Anne Fausto-Sterling, for example, argued that social factors influence the developing body. Judith Butler revolutionized this line of thinking by arguing that gender is not determined by biological sex, but that gender—as a social construct—shapes how sex is understood. According to Butler, sex is not a biological fact, but a cultural norm that is shaped and reinforced over time. They emphasize that our very understanding of sex is shaped by language and norms, meaning that we cannot think of sex outside the social constructs that define it. The court's ruling echoes Butler's insights, in legal terms, by scrutinizing Grover's transphobic rhetoric and actively rejecting her worldview. The court's conclusion—that sex is fluid and encompasses

a "broader ordinary meaning" than Grover's narrow perspective allows—marks a meaningful affirmation of Butler's ideas, and establishes their postmodern understanding of "sex" as the law in Australia.

Legal Gender Recognition: To See the Way Forward, Look Back

Tickle's case underscores the vital intersection between anti-discrimination laws and legal gender recognition for transgender people. It was significant that many years prior to this case, Tickle had undergone what was at the time a challenging and highly medicalized legal gender recognition process to update her state-issued birth certificate to "female" in her home state of Queensland. It was on this basis that the court concluded that Tickle's self-identification as a woman was "legally unimpeachable." Today, all states and territories in Australia permit transgender and gender-diverse individuals to have their gender legally recognized based on self-declaration. New South Wales, the last state to mandate sexual reassignment surgery for legal gender recognition, repealed this requirement in October 2024, shortly after the court's ruling. However, progress has not always been so assured. It is essential to recognize that landmark precedents like this do not emerge out of thin air; they are the product of a cumulative process of judicial interpretation and social progress. Equally, it often takes one brave litigant to permanently alter legal reality.

Tickle's case bears the imprint of the 2001 landmark decision in Re Kevin, where the Full Court of the Family Court of Australia upheld the marriage of a transgender man and a cisgender woman at a time when same-sex marriage was not yet legal in Australia. This marriage occurred in defiance of the Attorney-General's advice, which stated that Kevin had no right to marry and warned him of criminal prosecution for doing so. Kevin's refusal to back down provided the Family Court with the opportunity to overturn long-standing precedent, rejecting the notion that "biological sexual constitution" was the sole legal criterion for determining one's gender in marriage. Re Kevin thus became a crucial milestone in the journey toward trans equality in Australia and beyond, its findings echoed in subsequent cases around the world. In 2024, this precedent would be cited to affirm Roxanne Tickle's womanhood against an adversary who steadfastly refused to acknowledge her as such.

Finally, it is critical to note that this progress trajectory should not be taken for granted. As Professor Paula Gerber, a prominent human rights scholar at Monash University, has observed, there is mounting apprehension that a "US-style anti-trans campaign" is gaining momentum in Australia – a phenomenon aptly illustrated by Grover's arguments in the case. Indeed, the very fact that Grover attempted to overturn legal precedent going back thirty years signals a wider phenomenon in which transphobia is leveraged to gain celebrity status. Since the case began, Grover has gained significant social media traction, while publicly acing her status as a "TERF" (trans-exclusionary radical feminist). It needs to be recognized that this issue extends beyond Grover herself: indeed, a chorus of right-wing

voices around the world are profitably peddling transphobia, building massive audiences on that carefully constructed rhetoric of hate and exclusion. While it is yet to be determined whether the Federal Court's decision in Tickle v. Giggle will be upheld or overturned, it represents an important, albeit tentative, step forward in an increasingly hostile world for gender-diverse people.

The author of this piece, Jarri Haider, Fellow with Outright International's Queer Legal Futures Program has interviewed the applicant in this case, Roxy Tickle on her firsthand experience of taking on a landmark legal challenge, along with the Director of Outright International's Global Trans Program, Rikki Nathanson. Read the full interview.

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TOPIC(S)
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Sexual Orientation and Gender Identity
Trans
LGBTIQ Issues

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Commentary

AUTHOR(S)
Muhammed Jarri Syed

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

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FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 3 pages comprise the document referred to as Annexure KD-17 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

TICKLE V GIGGLE

A 2024 decision of the Federal Court has established that "sex" is changeable, and that gender identity is a constitutionally valid ground of discrimination under Australian law.

The case, Tickle v Giggle[1], in finding that a trans woman, Roxanne Tickle, had been discriminated against by the women's app Giggle[2], clarifies some key concepts in relation to sex:

- Sex is not confined to a biological concept[3]
- Sex is not a binary concept, nor it is limited to the male or female sex[4]
- "In it's contemporary ordinary meaning, sex is changeable."[5]

The case also confirmed that gender identity is a constitutionally valid ground of discrimination under the Sex Discrimination Act 1984 (Cth) (SDA).[6]

FACTUAL BACKGROUND

Roxanne Tickle (the Applicant) is a woman who was assigned male at birth. She took social, legal and medical steps to affirm her gender in June 2017 and was issued with a new birth certificate with a female gender marker by the Queensland Register of Births, Deaths and Marriages in September 2020.

Giggle for Girls Pty Ltd (Respondent 1) was an app for women established and owned by Sally (Sall) Grover (Respondent 2). The purpose of the app was to be a safe, online social, messaging and dating space for women.

In February 2021, Ms Tickle downloaded the app and successfully registered as a member. In order to register, applicants had to provide their phone number and submit a 'selfie' photo, which was screened by AI technology to determine whether the applicants were female, or had the characteristics of being female.

In September 2021, Ms Grover manually checked Ms Tickle's photo, and proceeded to block Ms Tickle's access to the app.

Ms Tickle then sued the Respondents for unlawful discrimination in the provision of goods and services by reason of gender identity under s 22 of the SDA.[7]

DIRECT AND INDIRECT DISCRIMINATION

The Applicant pleaded direct discrimination and indirect discrimination in the alternative. [8]

- For **direct discrimination**, the Applicant had to establish that the Respondents treated her less favourably by reason of her gender identity, when compared to a cisgender woman.
- For **indirect discrimination**, the Applicant had to establish that the Respondents imposed a condition or practice that had the effect of disadvantaging the Applicant because of her gender identity, or a

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

[2] Giggle for Girls Pty Ltd and it's owner/founder, Sally Grover.

[3] Tickle v Giggle [55]

[4] Tickle v Giggle [55]

[5] Tickle v Giggle [62]

[6] Sex Discrimination Act 1984 (Cth), s 5B

[7] Sex Discrimination Act 1984 (Cth), s 22

[8] Direct and indirect discrimination cannot be pleaded together, or both found to have occurred at once. They are mutually exclusive. Tickle v Giggle [46(d)] and *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; 256 FCR 247 at [14]-[16].

category of persons with the same gender identity.

In the judgment handed down on 23 August 2024, **Justice Bromwich made a finding of unlawful indirect discrimination** - that the condition imposed of women accessing the app having to be cisgender or have the appearance of being cisgender, had a disadvantaging effect on Ms Tickle and presumably any other trans women who were not able to "pass" as cisgender in accessing the app. The Respondents were ordered to pay Ms Tickle $10,000 in damages and pay her legal costs.

Justice Bromwich said that the condition imposed was more reflective of a policy of direct discrimination, and that if the evidence had established Ms Grover's awareness of Ms Tickle's trans gender identity before blocking her access, then a finding of direct discrimination could have been made.

SEX

Despite the Respondents contending that the categories of transgender and cisgender are false, that sex is immutable from birth, and that the only valid definitions of sex are 'adult human males' and 'adult human women,' Justice Bromwich was not convinced. He found:

"The acceptance that Ms Tickle is correctly described as a woman, reinforcing her gender identity status for the purposes of this proceeding, and therefore for the purposes of bringing her present claim of gender identity discrimination, **is legally unimpeachable**."[9]

Further, and **crucially, he confirmed an expansive definition of sex, setting out that it goes beyond the binary, is not limited to categories of male and female, and is ultimately changeable.** [10]

GENDER IDENTITY

The court confirmed that gender identity is a constitutionally valid ground of discrimination under the SDA. Justice Bromwich stated that gender identity discrimination under s 22 (provision of goods and services) and s 5B of the SDA, constitutes a valid implementation of Article 26 of the International Covenant on Civil and Political Rights (ICCPR), by way of the Commonwealth's external affairs power in s 51(xxix) of the Constitution. Article 26 of the ICCPR creates an obligation for State parties to prohibit discrimination on a number of grounds, including 'other status', which is inclusive of gender identity.[11]

COMMENTARY

The judgment is a win for equality, inclusivity, and for trans and gender diverse Australians.

---

[9] Tickle v Giggle [63]

[10] Tickle v Giggle [see paras 55-62]

[11] See Tickle v Giggle [187]: "That gender identity is an "*other status*" that is subject to the non-discrimination obligation in Art 26 is affirmed by several communications from the Human Rights Committee, which is empowered under the Convention's Optional Protocol to hear and provide views on allegations that States Parties have violated individuals' rights under the ICCPR: see Human Rights Committee, *G v Australia*, Communication No. 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) at [7.2]; Human Rights Committee, *MZBM v Denmark*, Communication No. 2593/2015, UN Doc CCPR/C/119/D/2593/2015 (12 May 2017) at [6.6]; Human Rights Committee, *Nepomnyashchiy v Russian Federation*, Communication No. 2318/2013, UN Doc CCPR/C/123/D/2318/2013 (23 August 2018) at [7.3]; Human Rights Committee, *Ivanov v Russian Federation*, Communication No. 2635/2015, UN Doc CCPR/C/131/D/2635/2015 (14 May 2021) at [7.12]; Human Rights Committee, *Alekseev v Russian Federation*, Communication No. 2757/2016, UN Doc CCPR/C/130/D/2757/2016 (9 June 2021) at [9.14]; Human Rights Committee, *Mikhailova et al v Russian Federation*, Communications No. 2943/2017, UN Doc CCPR/C/134/D/2943/2017 (29 August 2022) at [9.12]; Human Rights Committee, *Savolaynen v Russian Federation*, Communication No. 2830/2016, UN Doc CCPR/C/135/D/2830/2016 (23 January 2023) at [7.15]."

The law now upholds what should be common sense, that all women must be treated equally, regardless of gender identity.

APPEAL

The Respondents are expected to file an appeal to the full Federal Court by 8 October 2024.

For more information contact our Legal Director, Emily Gray at emily.gray@equalityaustralia.org.au.

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 5 pages comprise the document referred to as Annexure KD-18 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

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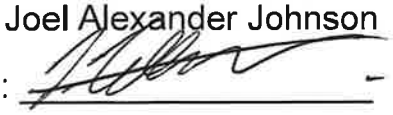
Signed: 

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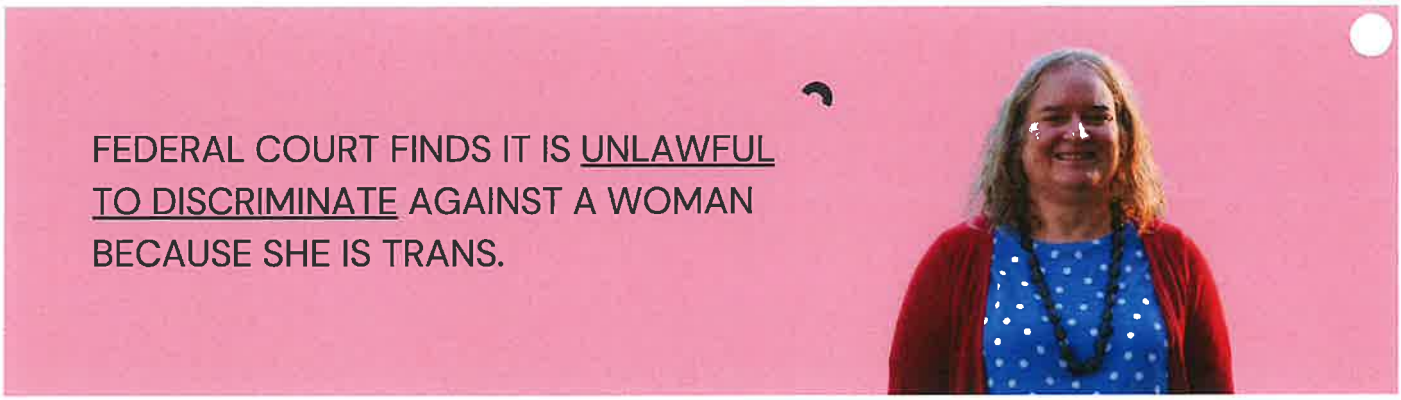

23 August 2024

MEDIA RELEASE: Tickle v Giggle: The Federal Court finds it is unlawful to discriminate against a woman because she is trans

Today, the Federal Court has affirmed Ms Roxanne Tickle's right to be treated with dignity and respect, finding that Giggle for Girls women's app and its owner Ms Sally Grover indirectly discriminated against her by removing her from the app.

Justice Bromwich found that Ms Tickle as a trans woman is protected against unlawful discrimination under the *Sex Discrimination Act 1984* (Cth) ('**SDA**'). Ms Tickle has the right to access services free from discrimination, the same as all women.

His Honour also found that the protections against gender identity discrimination in the SDA are constitutionally valid, meaning that other trans people experiencing discrimination will be able to challenge this in court with the confidence the law protects them as intended.

In his decision, Justice Bromwich commented on the behaviour of Ms Grover, including laughing at an offensive caricature of Ms Tickle during the trial:

"[Ms Grover's] explanation, that it was funny in the context of the courtroom, was obviously disingenuous. It was offensive and belittling, and had no legitimate place in the respondents prosecuting their case."

Ms Roxanne Tickle

Statement from Ms Roxanne Tickle

SHARE

"Mostly I get to just live my life and be who I am. But a small group of people have taken it upon themselves to declare that I am not who I know I am and they have set about making my life miserable.

"This case and the unlawful and discriminatory exclusion from the Giggle app has stolen the last three years of my life.

"I have been targeted by hateful online commentary and degrading merchandise designed to ridicule and mock me.

"There is so much hate and bile cast on trans and gender diverse people, simply because of who we are. Sometimes it's difficult to remember that not all people think like that. When I walked into the courtroom for the hearing in April I felt safe because I was treated with courtesy and respect and allowed to tell my story.

"The hate has not just affected me, it's hurt so many trans and gender diverse people.

"Since I found out this week that the decision is finally coming I've been bursting into tears at different moments because I know that soon this will be over.

"I'm pleased by the outcome of my case, and I hope it is healing for trans and gender diverse people. The ruling shows that all women are protected from discrimination. I brought my case to show trans people that you can be brave, and you can stand up for yourself. I know that I can now get on with the rest of my life and have a coffee down the road with my friends, play hockey with my team and put this horribleness behind me."

Quote attributable to Jackie Turner, Trans Justice Project

"The decision today is a major step forward for the freedom and equality of all women. It affirms that women who are trans are indeed protected from discrimination under the current laws, the same as all other women."

"Roxy has shown incredible bravery in standing up to a campaign of bullying and harassment to fight for the rights of the trans and gender diverse community. She should be incredibly proud of what she has managed to achieve."

"Our 2023 research found that 1 in 2 trans and gender diverse people had experienced anti-trans hate in the last 12 months. This included workplace bullying, streetbased harassment and threats o violence and sexual assault."

Quote attributable to Eloise Brook, Health and Communications Manager, The Gender Centre

"Trans women want the same thing as everyone else, to live our lives in peace and be treated with dignity and respect. Unfortunately, a vocal minority is bizarrely obsessed with our existence, and makes it their job to try to ruin our lives. I'm proud of Roxy for standing up for our right to live free from discrimination, and secure a more inclusive and caring society for us all."

Quote attributable to Professor Paula Gerber, Faculty of Law, Monash University

"This decision is a great win for transgender women in Australia. The Court explicitly found that the Giggle for Girls App indirectly discriminated against Roxanne Tickle on the basis of her gender identity, in breach of the *Sex Discrimination Act*. She was excluded after Sally Grover, the Chief Executive, looked at the photo Roxanne Tickle had uploaded with her application, and reached the visual conclusion that she was a man.

"This case sends a clear message to all Australians that it is unlawful to treat transgender women differently from cisgender women. It is not lawful to make decisions about whether a person is a woman based on how feminine they appear.

"The Federal Court also rejected Giggle's argument that the *Sex Discrimination Act* is unconstitutional because the Federal Government did not have the power to enact such laws. Justice Bromwich found that reign Affairs power in the Australian Constitution authorises the government to enact laws giving

SHARE

effect to its international treaty obligations. The *Sex Discrimination Act* gave effect to Australia's obligations under Article 26 of the International Covenant on Civil and Political Rights, which provides that *'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or* ***other status****.'* The judge held that the words 'other status' include discrimination on the basis of gender identity. Thus, the *Sex Discrimination Act*, including the 2013 amendments to it regarding gender identity discrimination were constitutional.

More comments from Professor Gerber are available in the Monash University media release.

Quotes attributable to Isabelle Reinecke, Founder and Executive Director, Grata Fund

"This case is about trans and gender diverse people having the freedom to be themselves, to find belonging in their communities, and to be treated fairly and equally before the law."

"Throughout history there have always been those who have tried to stop equality by separating women out based on their race, class, sexuality and gender identity and Ms Tickle's case has affirmed the right for all women to be treated with dignity and respect."

Ms Tickle was represented by Barry Nilsson instructing Georgina Costello KC, Briana Goding and Elodie Nadon of counsel. Grata Fund provided the financial backing Ms Tickle needed to get her case to court.

Media inquires: Belinda Lowe, belinda@gratafund.org.au or 0428 805 696

- **Spokes are available for comment.**
- **Media assets and a decision summary are available here.**

Case background

Ms Roxanne Tickle has claimed alleged unlawful discrimination on the basis of gender identity under the *Sex Discrimination Act 1984* (Cth) (**SDA**). Ms Tickle is a transgender woman living in New South Wales. She was assigned male at birth and has since undergone gender affirmation surgery. Her birth certificate has been amended to record her sex as female. The respondents Giggle for Girls Pty Ltd and its CEO, Ms Sally Grover operate Giggle, a social media app advertised as an app exclusively for women.

The Giggle app requires users to upload a 'selfie' as part of the registration process. The respondents then use a combination of AI and visual observation to make an assessment of each potential user's sex before they are registered. Ms Grover has said publicly that she does not consider transgender women to be women and that they are not permitted to access the Giggle app.

In 2021, the applicant signed up for an account on Giggle, uploaded a selfie and was initially able to use the app. However, shortly after, her access to the app's features was highly restricted. She attempted to resolve this issue with the respondents but the respondents continued to deny her access to the app. In April 2022, Ms Grover told *The Australian* that the applicant was manually removed from the Giggle app because "they are male", based on a visual assessment of the applicant's selfie.

In December 2021 Ms Tickle filed her complaint of discrimination on the ground of gender identity with the Australian Human Rights Commission. The complaint was terminated by AHRC in April 2022 because Ms Grover refused to participate in the conciliation. Ms Tickle filed her discrimination matter in the Federal Court in December 2022.

A decision summary is available here.

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 7 pages comprise the document referred to as Annexure KD-19 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
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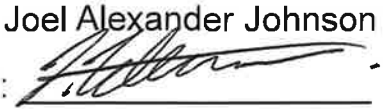
Signed: 

Human Rights Law Centre

Federal Court of Australia finds that a transgender woman was indirectly discriminated against after exclusion from 'women-only' social media app

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

Summary

On 23 August, the Federal Court found that 'Giggle for Girls' had indirectly discriminated against a transgender woman by excluding her from an app which was designed as a 'women-only safe space.' This is the first court decision that determined that the *Sex Discrimination Act 1984* (Cth) (***SDA***) protects transgender women from discrimination on the basis of their gender identity.

Facts

Roxanne Tickle is a transgender woman. She was assigned male at birth but after her transition was recognised as female under the *Births, Deaths and Marriages Registration Act 2003* (Qld) (***Qld BDM Registration Act***). In 2021, Ms Tickle downloaded the Giggle for Girls App (**Giggle App**) and provided a selfie as a part of registration. The Giggle App is marketed as a 'digital women-only safe space' and provides the selfies to a third-party artificial intelligence software (**AI software**) designed to distinguish between the facial appearance of men and women. The AI software was deliberately set to err on the side of inclusion – meaning it was more likely

'blocked' and could no longer use some of the app's functions, such as post content, or read comments on posts made by other users.

In December 2021, Ms Tickle made a complaint to the AHRC claiming that she was being discriminated against on the basis of her gender identity. After deciding the complaint had no reasonable prospect of settling at conciliation, the AHRC terminated the complaint. This allowed Ms Tickle to initiate proceedings in the Federal Court.

The Federal Court found that the Giggle App allows staff to review the AI approved selfies and to reach a different decision. This is likely what happened in Ms Tickle's case: that a Giggle for Girls (**Giggle**) staff member later examined her photograph and decided to remove her access to the App.

In the proceedings, Ms Tickle alleged that Giggle had discriminated against her in the provision of their service because of her gender identity. Ms Tickle argued two forms of discrimination: direct discrimination under section 5B(1) of the *SDA*, and indirect discrimination under section 5B(2) of the *SDA*. Ms Tickle used 'cisgender' to refer to a person whose gender corresponds to their sex at birth, and 'transgender' to describe a person whose gender does not correspond with their sex at birth.

Giggle denied all of Ms Tickle's allegations. They believed that Ms Tickle was an adult male and chose to describe her according to her sex at birth. Giggle argued that Ms Tickle was removed from the app for this reason and that she cannot bring a gender discrimination case under the *SDA*. Two added arguments that Giggle put forward aimed to challenge the validity of the *SDA* under the Australian *Constitution*.

Decision

Direct Discrimination - section 5B(1)

Section 5B(1) of the *SDA* provides that a person (**the discriminator**) discriminates against another person on the grounds of the person's gender identity if, because of the person's gender identity or a characteristic of it, they treat the person less favourably than they would treat someone of a different gender identity in similar circumstances.

legitimacy. Instead, the facts suggested that the decision to exclude Ms Giggle was 'quick or reflexive choice' that Ms Tickle *appeared* to Ms Grover (**Giggle CEO**) to be a male. The court explained that this is likely because Giggle had a policy of excluding those who were perceived as men in the selfies, including both cisgender men and transgender women.

Indirect discrimination – section 5B(2)

Indirect discrimination occurs when the discriminator imposes a condition which is likely to have the effect of disadvantaging people of the same gender identity as the aggrieved person.

The court found that the 'imposed condition' was the need to appear to be a cisgendered female in the photos submitted to Giggle. The court compared the treatment of transgender women with the treatment of cisgender women. Ultimately, the court found that the imposed condition of needing to appear as a cisgendered female did indirectly discriminate against transgender women, and Ms Giggle, by excluding them from the app.

Constitutional Challenges

Giggle argued that the *SDA* provisions relied upon by Ms Tickle are not valid under the Australian *Constitution*. Both constitutional arguments put forward by Giggle were unsuccessful. The two arguments were:

(a) Section 22 SDA

Part V of the *Constitution* lists the areas that Parliament can make laws about. A federal law can be challenged in court by arguing that Parliament did not have the power to make the law because it is not covered by one of the areas listed in Part V of the *Constitution*. Giggle argued that section 22 of the *SDA*, which prohibits gender identity discrimination, is invalid because it does not fall within one of the powers listed in Part V of the *Constitution*.

However, the court found that section 22 of the *SDA* falls under multiple powers in the *Constitution*. The court held that section 22 falls under the 'external affairs power' because it was modelled off one of Australia's treaty obligations under

(b) *Section 24(4) Qld BDM Registration Act*

Under section 109 of the *Constitution*, if a state law is inconsistent with a federal law, the state law will become invalid. This is what Giggle tried to argue in relation to section *24(24)* of the *Qld BDM Registration Act*, which was a Queensland state law that if a person changed their sex, and it was 'noted' under the Act, that person became a legal member of the new sex. Giggle argued that section 24(4) of the *Qld BDM Registration Act* is inconsistent with the *SDA*. However, the court found that section 24(4) complements the *SDA*, and that there is no conflict between them.

Remedies

The Court ordered a range of remedies for the indirect discrimination by Giggle against Ms Tickle, including:

(a) A binding declaration of unlawful discrimination, which is a record confirming that Giggle did discriminate against Ms Tickle;

(b) A 'modest' amount of general damages, being $10,000, because evidence of actual loss or damage was 'slight, if not minimal', and;

(c) That Giggle pay Ms Tickle's legal costs, with the legal costs from the time spent on the constitutional validity issues being capped at $50,000.

However, the court did not order the following remedies although they were requested by Ms Tickle:

(a) Aggravated damages, because the criteria wasn't met except in limited circumstances relating to offensive conduct of the respondent towards Ms Tickle throughout the proceedings;

(b) An apology, because Ms Grover 'adheres to her genuinely held beliefs' and any apology 'would have been insincere', and;

Commentary

Tickle v Giggle is significant because it is the first case where the court has been asked to decide if a transgender person can be protected from discrimination under the *SDA*.

The proceedings gained significant media attention as an important decision for trans rights in Australia. It has been described as a great win for transgender women. The Sex Discrimination Commissioner Anna Cody has said that the decision demonstrates that Australia wants "an inclusive society in which all can participate, including trans people."

Importantly, the case shows how direct and indirect discrimination can be argued as alternatives. The judgment reveals that to satisfy the threshold for 'direct' discrimination, it must be proven that the discriminator was actually aware of the person's gender identity (and not making an assumption that they are a different gender based on their appearance, for example). It also showed that a case of indirect discrimination can be made out by comparing the treatment of transgender women to the treatment of cisgender women, where a particular condition has been imposed that can specially affect the former group.

The case also established that section 22 of the *SDA* is valid under Part V of the Constitution.

A link to the full text of the judgment can be found here.

Authored by Lilian Bender, Associate, and Georgia Holmes, Paralegal, Wotton + Kearney.

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District Registry: New South Wales

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AND

ROXANNE TICKLE

(Respondent)

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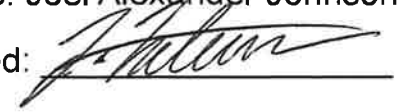
Signed: 

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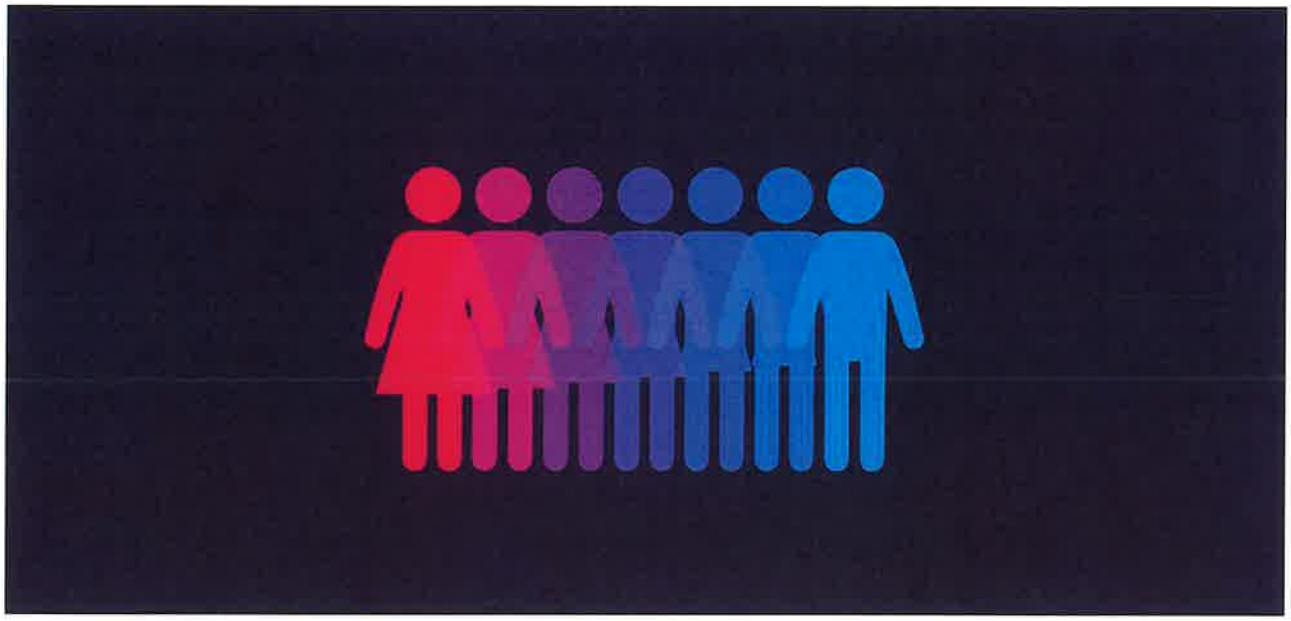
Tickle v Giggle: Gender identity discrimination, AI and the human in the loop



AAA

BY WENDY YANG - SEP 24, 2024 2:30 PM AEST

In a 93 page judgment, his Honour Justice Bromwich handed down his decision in Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960 (23 August 2024) (Tickle v Giggle). The decision has sparked interest as it is the first time that provisions in the Sex Discrimination Act 1984 (Cth) (SDA) have been tested in court since the SDA was amended in 2013.

Although the Court did not find that any direct discrimination had taken place, it found that "ignorance of Ms Tickle's gender identity is no defence to the indirect discrimination claim. The imposed condition of needing to appear to be a cisgendered female in photos submitted to the Giggle App had the effect of disadvantaging transgender women who did not meet that condition, in particular Ms Tickle."

"the Federal Court held that the provision is supported by the external affairs power and corporations power, and applied to Giggle," says Dane Luo, Doctor of Philosophy candidate at Oxford University.

The Court was required to consider a range of issues from gender identity discrimination, constitutional law to human rights.

Tickle v Giggle: Recap

Roxanne Tickle is a transgender woman. She was born male but underwent sexual reassignment surgery. As a result, she obtained an official updated Queensland birth certificate which recognised her as being of the female sex.

Around February 2021, Tickle downloaded the Giggle App and followed the registration process to gain access to the app. As part of the sign-up process, she uploaded a selfie of her face. This photo was assessed by a third-party artificial intelligence software that was designed to differentiate between the facial appearance of men and women. The photo was reviewed by the Sally Grover, the CEO of the Giggle App, who determined that the photo was of a man.

Tickle was unable to continue using the app and she subsequently commenced legal action against Giggle for Girls Pty Ltd and its CEO after she was allegedly blocked from the app due to her gender identity.

Tickle alleged that Giggle engaged in unlawful gender identity discrimination and their actions were contrary to section 22 of the *SDA*.

Why is the judgment significant?

According to Paula Gerber, Professor at Law at Monash University and an internationally renowned scholar with expertise in international human rights law, "this is the first case that has tested the provisions of the *Sex Discrimination Act* since it was amended in 2013 to add gender identity and sexual orientation and intersex status into the legislation as protected categories," she says.

She stresses that "it is a really important and significant judgment. [Justice Bromwich] did a great job of unpacking what is sex, what is gender, what is gender identity in very clear, precise language because none of those terms are defined in the legislation."

"[His Honour] used the term 'cisgender' and he recognised that just like everyone has a sexual orientation, everyone also has a gender identity ... there is a spectrum of gender identities," she says.

So far as Gerber is aware, "self-identification" is not a legal term, and it has not been defined by statute. "Self-identification is when a person says, this is my gender identity and it either aligns with the sex that was presumed and recorded at birth, or it doesn't," explains Gerber.

Legal recognition of change in sex varies across each state and territory. Gerber explains that "this is one of the problems in our Federation because the laws are inconsistent in different jurisdictions. New South Wales is the only one that still requires surgery before you can change the sex on your birth certificate."

is ... but particularly for intersex people that may be wrong," she says.

Secondly, the Court found that there had been indirect rather than direct discrimination as the decision to remove Tickle from the app was based on a "visual assessment of a photo. Transwomen may have more difficulty satisfying that [criteria] than cisgender women," says Gerber.

The decision raises important questions regarding the role of technology, AI and facial recognition technology.

She says, "this is an example that none of us had really considered in this way before, that an assessment of someone, whether they are a woman or not, [can] be based on a very fleeting scan of a photo."

Gerber is concerned about the use of AI in this manner and says that use of technology to exclude transwomen by not identifying them as being women is going to be problematic moving forward.

Human in the loop and the use of AI

The decision raises important questions regarding the role of technology, AI and facial recognition technology.

Lauren Perry, Responsible Technology Policy Specialist, Human Technology Institute at the University of Technology Sydney (UTS) says "... this is right up our alley from a Human Technology Institute perspective, where we do a lot of work in this space trying to curb the harms from AI, facial recognition, looking at the kind of biases and the guardrails that need to be in place to address the biases," she says.

The decision "is really important being the first case alleging gender identity discrimination that's gone to the Federal Court," she says.

Perry points out that in this instance, "... it actually isn't the technology or the facial recognition system that caused the discrimination. It was actually the human in the loop coming back to review the decision which caused the discrimination," she says.

Sarah Sacher, Policy Specialist, also at the Human Technology Institute at UTS agrees. "It's also worth noting that facial recognition is kind of notorious for being less accurate for certain protected groups including women, including people with darker skin so that kind of ups the level of risk when you are using these systems that you're going to potentially discriminate in some way," she says.

As use of AI and facial recognition technology spreads, there is concern that the use of such technology can lead to bias and discrimination without proper systems or checks or balances in place.

"If there aren't people in the background checking what the machine is starting to learn, checking how these labels end up being put out, then you end up having this perpetuation of historical biases that come out the other end.

"If you've got a machine making decisions around what a man looks like, what a woman looks like – that's entirely fraught because there's no single, or even common way that a person presents. ... There are huge concerns with using these sorts of technologies anyway, for this kind of decision making, particularly about those very personal protected attributes," says Perry.

Sacher points out that "it's worth noting that this decision could just as easily have been made by the app. ... it doesn't really matter what tool is used to make the decision, ultimately discrimination law applies the same way, it's about the decision," she says.

She acknowledges that AI is still "... a novel technology. There's lots of novel issues that arise but ultimately the law still applies."

Perry and Sacher both agree that "just because the technology is accurate, doesn't mean that you should be using it. You need to have those broader protections to place limitations on how and when it's appropriate to use the technology."

Sacher stresses that it's crucial to have a human in the background checking the data and the decisions. "There needs to be that responsibility, there needs to be that accountability. There needs to be that check on these kinds of decision making. But having said that, as this case shows, humans are fallible," she says.

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 3 pages comprise the document referred to as Annexure KD-21 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

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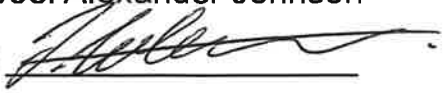
Signed: 

"Women-only safe space" app loses transgender discrimination case

John Steenhof August 30, 2024

A social media app designed as a safe space for women to network, communicate, and make friends with other women has lost its case against a transgender activist.

The Federal Court of Australia recently ruled in the case of *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, finding that Roxanne Tickle, a male who identifies as a woman, faced unlawful discrimination when he was denied access to the female-only networking app Giggle. The court determined that Tickle experienced "indirect discrimination" and ordered Giggle to pay $10,000 in compensation, along with legal costs.

The Giggle app was developed by Sall Grover to be a social media site for women: "a means for women to communicate with one another in what was described as a digital women-only safe space."

Tickle argued that, as someone legally recognised as female, he should have access to spaces reserved for women. After being removed from the app, he sued Giggle and Ms Grover for unlawful discrimination under the *Sex Discrimination Act 1984 (Cth)* (the "SDA").

In her defence, Ms Grover argued that women have the right to single-sex spaces, both online and offline, to protect their privacy and safety.

Justice Bromwich rejected this defence, concluding that the SDA's provisions did not protect the app's exclusionary policy as a "special measure."

He made the following findings as part of the judgment:

> *"The substance of the respondents' defence is that discrimination did occur, but not prohibited discrimination. They claim that Ms Tickle was discriminated against on the basis of her sex, which they consider to be male, not her gender identity. They consider sex to mean the sex of a person at birth, and that this is unchangeable.*
>
> *Those arguments failed, because the view propounded by the respondents conflicted with a long history of cases decided by courts going back over 30 years. Those cases establish that, on its ordinary meaning, sex is changeable".*

The decision has drawn considerable attention and criticism for its finding that sex under the SDA is changeable and not necessarily binary.

Associate Professor Neil Foster has written an analysis of the decision, arguing that the exclusion was reasonable and justified under the SDA's provisions for special measures and indirect discrimination:

> *"In any event, with respect, his Honour's comments that "sex, as it is deployed in the SDA, ... is changeable and not necessarily binary" (at [59]) are not well supported by the authority he cites. He refers to three cases which, it is claimed, demonstrate a "30 year history" of sex being changeable. Yet in 2 of the 3 decisions cited this was not a necessary part of the court's decision, and in the other one the views expressed have not been supported by the High Court."*

He has expressed concerns about the broader implications of the ruling:

> *"I think this decision is incorrect as a matter of law, and the implications of this decision are bad for society as a whole, and women in particular. I hope it will be overturned on appeal".*

At the time of the hearing, Ms Grover said:

> *"For decades, women's movements have fought for the right to have female spaces in society. Yet today, the clock is being wound back.*
>
> *"I designed my app to give women their own space to network. It is a legal fiction that Tickle is a woman. His birth certificate has been altered from male to female, but he is a biological man, and always will be. A woman's-only app isn't about discrimination. It's about freedom of speech, belief and association.*
>
> *"We are taking a stand for the safety of all women's only spaces, but also for basic reality and truth, which the law should reflect."*

ADF International supported Ms Grover's defence "on the basis that Australian law must uphold the truth of biological reality and in line with the protections for women enshrined in international human rights law".

The Tickle case is one of several Australian legal cases currently challenging women's protections and gender ideology.

HRLA client Chris Elston ("Billboard Chris") is involved in a related case after his tweet questioning gender ideology was censored. HRLA is representing Mr Elston and ADF International is supporting his case.

Following the ruling in Tickle v Giggle, Mr Elston said:

> *"The judgment in Tickle v. Giggle turns back the clock on women's rights and exposes the deep ideological distortions that have permeated our societies and our legal systems. It is a fiction that Tickle is a woman. While his birth certificate may have been altered, no man can ever become a woman.*
>
> *"Preventing a male from joining a woman's only app has nothing to do with discrimination. It's about staying true to biological reality and women's rights to their own spaces, both online and in real life. I hope further legal steps can be taken to correct this grave injustice and I stand with Sall Grover and the Giggle team."*

Child psychiatrist and HRLA client Jillian Spencer is similarly pushing back against forced gender ideology. Increasingly, people who try to speak up against gender ideology are being silenced through legal actions.

HRLA works on behalf of all Australians to ensure that freedom of speech, religion, and conscience is protected.

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District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 5 pages comprise the document referred to as Annexure KD-22 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

Press Release | August 23, 2024

"Sex is not confined to being a biological concept" rules Australian Court

- **Biological male "Roxanne Tickle," who identifies as a woman, sued "Giggle for Girls" app and founder Sall Grover over female-only membership policy**
- **Federal Court of Australia holds that Tickle was unlawfully discriminated against when rejected for membership on the women's app; ADF International supported Giggle's defence**

SYDNEY (23 August 2024) – The Federal Court of Australia has ruled in *Roxanne Tickle v. Giggle for Girls* (*Tickle v. Giggle*) that "Roxanne Tickle," a biological male who identifies as a woman, experienced unlawful discrimination when prevented from joining "female-only networking app Giggle."

> **"In ruling that Tickle, a biological male, was a victim of discrimination when prevented from joining a woman's app,** the court has delivered an egregiously flawed judgment that removes protections for women."
>
> - Robert Clarke, Director of Advocacy for ADF International, who supported Giggle's defence

"For decades, women's movements have fought for the right to have female spaces in society. Yet today, the clock is being wound back.

"I designed my app to give women their own space to network. It is a legal fiction that Tickle is a woman. His birth certificate has been altered from male to female, but he is a biological man, and always will be. A woman's-only app isn't about discrimination. It's about freedom of speech, belief and association.

"We are taking a stand for the safety of all women's only spaces, but also for basic reality and truth, which the law should reflect."

Grover has previously said that she would appeal the court's decision and will fight the case all the way to the High Court of Australia.

Robert Clarke, Director of Advocacy for ADF International, which provided support for the case, reflected on the judgment:

"In ruling that Tickle, a biological male, was a victim of discrimination when prevented from joining a woman's app, the court has delivered an egregiously flawed judgment that removes protections for women.

"Contrary to what the judge held, sex is never changeable. The judgment is a severe setback for women and girls, failing to uphold the basic truth of biological reality—that men cannot become women. Tickle did not experience unjust discrimination, but was simply disqualified from membership on the Giggle app because he is not a woman."

Court ignores international legal protections for women's rights

The [illegible] argued that the Australian government acted unconstitutionally in amending the Sex Discrimination Act of 1984 to include "gender identity" as a protected characteristic against the purposes for which the Act was designed, and for which there is no basis in international law.

The Court found that Australia's Sex Discrimination Act section 5b which prohibits discrimination on the ground of gender identity is in line with the [illegible] provisions in the International Covenant on Civil and Political Rights (ICCPR). The ICCPR makes no reference to "gender identity," and instead prohibits discrimination on the basis of sex.

Further, the Court rejected the defendant's argument with regard to the disqualification of Giggle on the basis that Australia was obligated to protect women's rights, including single-sex spaces, under the Convention on the Elimination of Discrimination Against Women.

"The judge had read in a false right to protection on the basis of gender identity in international law where none exists. The ICCPR is clear that discrimination is to be prohibited on the basis of sex. There is no mention of gender identity in the treaty.

The ruling is not only anti-women and disingenuous, but also it creates a dangerous precedent for conjuring up false rights to the detriment of real rights. Here the real rights in jeopardy are those of women. By ignoring Australia's obligations under CEDAW to protect women's rights, the court is positioning Australia in direct violation of its basic human rights obligations to women," stated Clarke.

Challenges across Australia

Tickle v Giggle is one of a number of legal proceedings in Australia challenging protections for women. Chris Elston, Billboard Chris, is in a legal battle with Australian authorities alongside X, after his tweet challenging gender ideology was removed by the E-Safety Commissioner. ADF International are supporting his case.

Christian street artist, Billboard Chris, also has a [illegible] proceedings in Australia remonstrated on the judgment.

"The judgment in Tickle v Giggle turns back the clock on women's rights and exposes the deep ideological distortions that have permeated our societies and our legal systems. It is a fiction that Tickle is a woman. While his birth certificate may have been altered, no man can ever become a woman.

"Preventing a male from joining a woman's only app has nothing to do with discrimination. It's about staying true to biological reality and women's rights to their own spaces, both online and in real life. I hope further legal steps can be taken to correct this grave injustice and I stand with Sall Grover and the Giggle team."

[illegible]

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District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 10 pages comprise the document referred to as Annexure KD-23 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

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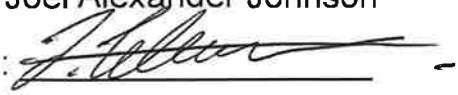
Signed: 

Economy | LGBTQ

Transgender woman's ban from female-only app discriminatory, court rules

Australian judge orders trans woman be paid $6,700 in compensation over exclusion from Giggle for Girls networking app.

Tickle v Giggle is the latest flashpoint in an ongoing culture war over how to define sex and gender [Armando Franca/AP Photo]

23 Aug 2024

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Roxanne Tickle, a transgender woman from the state of New South Wales, was subjected to "indirect gender discrimination" when she was blocked from the Giggle for Girls app in 2021 on the basis that she was born a man, the Federal Court of Australia said on Friday.

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Giggle for Girls creator Sall Grover had argued that women-only spaces should be allowed to limit access to "cisgender" women, or those whose birth sex aligns with their gender identity.

But Justice Robert Bromwich found that the app had discriminated against Tickle as its use was conditioned on her having the "appearance of a cisgender woman."

"It is not denied or otherwise in doubt that the basis for the exclusion of Ms Tickle was that she was perceived to have a male appearance, that is, she was perceived to have been male at birth. Indeed, this was the very essence of the respondents' case," Bromwich said in his ruling.

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“Nor do the respondents deny in this proceeding that the effect of this condition was that it would not just exclude men who were male sex at birth, but also transgender women too, including transgender women who are legally regarded as female.”

Bromwich said that Tickle was considered female under the law, as reflected in her updated birth certificate, and that it was outside his purview to “consider, far less determine, the general nature of biological sex.”

“The science behind that evidence is not, as far as it goes, in dispute. It is just that the issues in this case involve wider issues than biology,” he said.

Bromwich ordered that Tickle be paid 10,000 Australian dollars ($6,700) in compensation, plus costs. He declined Tickle’s claim for an apology, finding that it would be “futile and inappropriate to require an inevitably insincere apology to be made”.

Tickle, who underwent gender-affirming surgery in 2019, told Australia’s national broadcaster outside court that she hoped the outcome would promote “healing”.

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Grover, who has said she created the app after facing social media abuse from men while working as a screenwriter in Hollywood, said in a post on social media that she had "anticipated" the ruling.

"The fight for women's rights continues," she said on X.

The case, dubbed Tickle v Giggle, had generated significant attention outside Australia amid an ongoing culture war over how to define sex and gender.

LGBTQ activists have argued that trans women should be treated the same as other women when it comes to traditionally segregated areas of life, such as changing rooms and sports.

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So-called gender-critical feminists and other critics of trans activists have argued that women need female-only spaces in light of the biological differences between the sexes.

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ANNEXURE SHEET

The following 6 pages comprise the document referred to as Annexure KD-24 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

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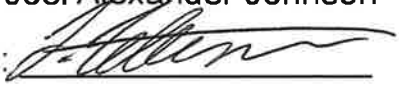
Signed: 

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Australian court rules in landmark case that asked 'what is a woman?'

23 August 2024

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Sofia Bettiza
Gender and Identity Correspondent, BBC World Service

Roxanne Tickle (centre) won a landmark discrimination case against a women-only social media app

A transgender woman from Australia has won a discrimination case against a women-only social media app, after she was denied access on the basis of being male.

The Federal Court found that although Roxanne Tickle had not been directly discriminated against, she was a victim of indirect discrimination - which refers to when a decision disadvantages a person with a particular attribute - and ordered the app to pay her A$10,000 ($6,700; £5,100) plus costs.

It's a landmark ruling when it comes to gender identity, and at the very heart of the case was the ever more contentious question: what is a woman?

In 2021, Tickle downloaded "Giggle for Girls", an app marketed as an online refuge where women could share their experiences in a safe space, and where men were not allowed.

In order to gain access, she had to upload a selfie to prove she was a woman, which was assessed by gender recognition software designed to screen out men.

However, seven months later - after successfully joining the platform - her membership was revoked.

As someone who identifies as a woman, Tickle claimed she was legally entitled to use services meant for women, and that she was discriminated against based on her gender identity.

She sued the social media platform, as well as its CEO Sall Grover, and sought damages amounting to A$200,000, claiming that "persistent misgendering" by Grover had prompted "constant anxiety and occasional suicidal thoughts".

"Grover's public statements about me and this case have been distressing, demoralising, embarrassing, draining and hurtful. This has led to individuals posting hateful comments towards me online and indirectly inciting others to do the same," Tickle said in an affidavit.

Giggle's legal team argued throughout the case that sex is a biological concept.

They freely concede that Tickle was discriminated against - but on the grounds of sex, rather than gender identity. Refusing to allow Tickle to use the app constituted lawful sex discrimination, they say. The app is designed to exclude men, and because its founder perceives Tickle to be male - she argues that denying her access to the app was lawful.

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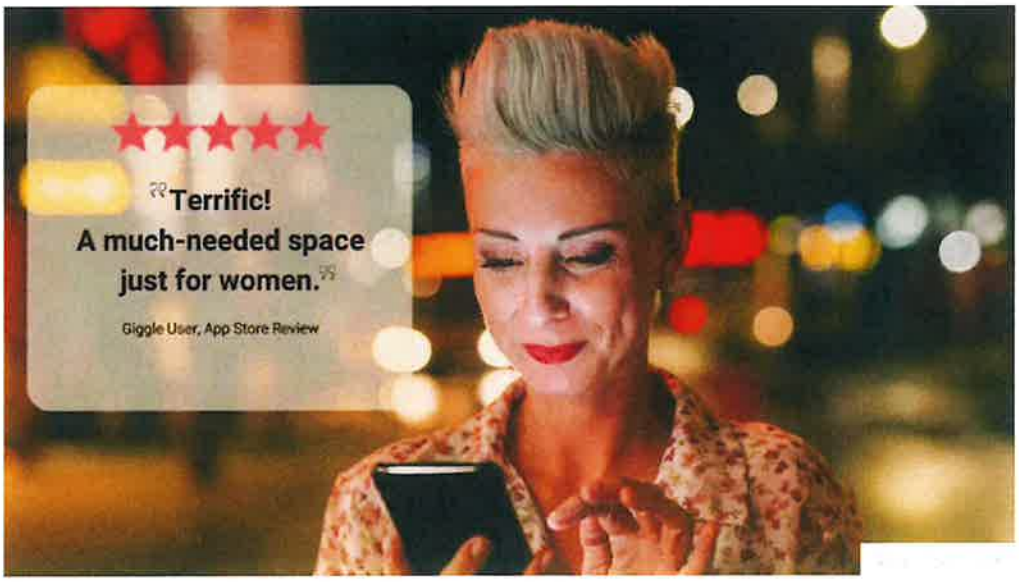

The women-only social media app markets itself as an online refuge for women

But Justice Robert Bromwich said in his decision on Friday that case law has consistently found sex is "changeable and not necessarily binary", ultimately dismissing Giggle's argument.

Tickle said the ruling "shows that all women are protected from discrimination" and that she hoped the case would be "healing for trans and gender diverse people".

"Unfortunately, we got the judgement we anticipated. The fight for women's rights continues," Grover wrote on X, responding to the decision.

Known as "Tickle vs Giggle", the case is the first time alleged gender identity discrimination has been heard by the federal court in Australia.

It encapsulates how one of the most acrimonious ideological debates - trans inclusion versus sex-based rights - can play out in court.

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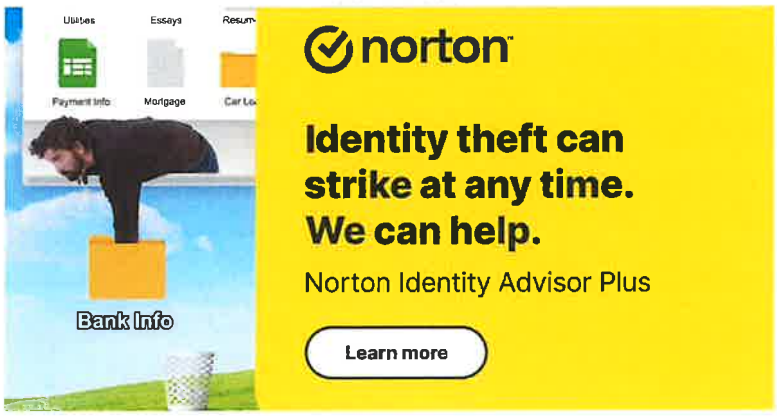

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'Everybody has treated me as a woman'

Tickle was born male, but changed her gender and has been living as a woman since 2017.

When giving evidence to the court, she said: "Up until this instance, everybody has treated me as a woman."

"I do from time to time get frowns and stares and questioning looks which is quite disconcerting…but they'll let me go about my business."

But Grover believes no human being has or can change sex - which is the pillar of gender-critical ideology.

When Tickle's lawyer Georgina Costello KC cross examined Grover, she said:

"Even where a person who was assigned male at birth transitions to a woman by having surgery, hormones, gets rid of facial hair, undergoes facial reconstruction, grows their hair long, wears make up, wears female clothes, describes themselves as a woman, introduces themselves as a woman, uses female changing rooms, changes their birth certificate – you don't accept that is a woman?"

"No", Grover replied.

She also said she would refuse to address Tickle as "Ms," and that "Tickle is a biological male."

The app's founder Sall Grover (centre) created Giggle for Girls in 2020 after experiencing online abuse by men

Grover is a self-declared Terf, which stands for "trans-exclusionary radical feminist". Typically used as a derogatory term for those considered hostile to transgender people, it has also been claimed by some to describe their own gender-critical beliefs.

"I'm being taken to federal court by a man who claims to be a woman because he wants to use a woman-only space I created," she posted on X.

"There isn't a woman in the world who'd have to take me to court to use this woman only space. It takes a man for this case to exist."

She says she created her app "Giggle for Girls" in 2020 after receiving a lot of social media abuse by men while she worked in Hollywood as a screenwriter.

"I wanted to create a safe, women-only space in the palm of your hand," she said.

"It is a legal fiction that Tickle is a woman. His birth certificate has been altered from male to female, but he is a biological man, and always will be."

"We are taking a stand for the safety of all women's only spaces, but also for basic reality and truth, which the law should reflect."

Grover has previously said that she would appeal against the court's decision and will fight the case all the way to the High Court of Australia.

A legal precedent

The outcome of this case could set a legal precedent for the resolution of conflicts between gender identity rights and sex-based rights in other countries.

Crucial to understanding this is the Convention on the Elimination of Discrimination Against Women (CEDAW). This is an international treaty adopted in 1979 by the UN - effectively an international bill of rights for women.

Giggle's defence argued that Australia's ratification of CEDAW obliges the State to protect women's rights, including single-sex spaces.

Tickle said she hoped the case would be 'healing for trans and gender diverse people'

So today's ruling in favour of Tickle will be significant for all the 189 countries where CEDAW has been ratified - from Brazil to India to South Africa.

When it comes to interpreting international treaties, national courts often look at how other countries have done it.

Australia's interpretation of the law in a case that got this level of media attention is likely to have global repercussions.

If over time a growing number of courts rule in favour of gender identity claims - it is more likely that other countries will follow suit.

Update 30 October: Additional context was added to this article on the day of publication to explain that the term 'terf' though typically used as a derogatory term for those considered hostile to transgender people, has also been claimed by some to describe their own gender-critical beliefs.

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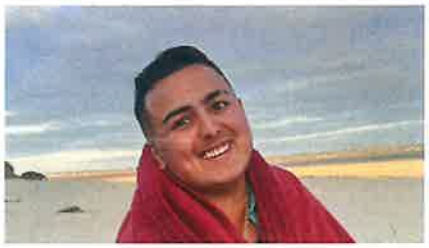

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

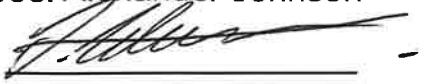
(Respondent)

ANNEXURE SHEET

The following 9 pages comprise the document referred to as Annexure KD-25 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

Trouble with Tickle

There's simply no evidence that Australia's MPs meant to vaporise the sex-based rights females

SEP 03, 2024

66 2 10 Sl

Affiliation of Australian Women's Action Alliances

Photo by Edu Lauton on Unsplash

Some questionable claims have been made recently about gender, sex, what it mea be a woman, and women's rights. But one statement from Justice Robert Bromwic the *Tickle v Giggle* case[1] really takes the biscuit.

Set aside, if you can, Justice Bromwich's declaration in the Federal Court that "on ordinary meaning, sex is changeable" and consider his claims around the "overt ar deliberate" intention [2] of the Australian Federal Parliament in 2013 to amend the *Discrimination Act 1984* to redefine sex. The logical consequence of this apparent intention is that women must now accept transgender women into their specifical female spaces and services.

But the evidence in Hansard and other contemporary records just isn't there. Noth was said in the relevant parliamentary debates about redefining "sex" or "woman" about women's rights, while the now famous explanatory memorandum to the Act notably excluded "special measures"—that is, measures that previously allowed fo female services and spaces—from the 2013 changes.

It is well worth remembering that the Australian High Court has upheld the "prin of legality" that judges must not interpret legislation as diminishing rights, impos new burdens, or altering the common law unless the legislation does so expressly "unmistakable and unambiguous language." As the High Court has previously explained: this presumption is not merely "a commonsense guide to what a parliar in a liberal democracy is likely to have intended," but "an aspect of the rule of law.

These are complex matters but not beyond the capacity of the Federal Court, and t Australian Human Rights Commission (AHRC), which advised the court, to understand. [4] Nor should it be beyond their comprehension that the Act allows for both the protection of transgender people from discrimination and the maintenan female-only spaces—including in cyberspace, where the *Tickle v Giggle* matter was centred.

Had Justice Bromwich and the AHRC examined the historical context more carefu the court would not have come to this egregious ruling that, left unchallenged, wil have far-reaching consequences for women.

The Australian Parliament enacted the *Sex Discrimination Act* in 1984 to give mean to the Convention on the Elimination of All Forms of Discrimination Against Wor [5] The Act was intended both to prohibit discrimination against women in defined areas such as employment and education, and to authorise "special measures" to

promote gender equality. The Act included in its interpretation section a definitio woman as "a member of the female sex, irrespective of age."

Parliament has since amended the Act, including in 1995 to clarify and encourage use of "special measures." This has specific implications for *Tickle v Giggle*. As the Attorney-General Michael Lavarch explained at the time, the 1995 amendments w to ensure that "special measures" were "not to be treated as a form of discriminati but to be understood as an expression of equality." [6]

In 1996, the Human Rights and Equal Opportunities Commissions, the precursor t the AHRC, noted that these amendments were specifically designed to "to save initiatives to promote equality from attack on the ground of discrimination." [7] Its policy guidelines on special measures initiatives included examples of health and l services run by women, for women—services to meet women's unmet needs, inclu physiological needs. The Federal Court has also upheld the legality of permissible special measures, such as single-sex exercise classes for women. [8]

The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* was introduced to Parliament in early 2013. The House of Representatives considered it in March and May and the Senate twice in June befc the text passed both houses with minor amendments. [9] The Senate Legal and Constitutional Affairs Committee received 90 submissions on the Bill, including o from the AHRC. It did not hold public hearings but sought to clarify some issues i writing with the Attorney-General's Department.

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No new definition

Attorney-General Mark Dreyfus and all those who spoke to the Bill in Parliament focussed their remarks on the Bill's purpose in introducing new grounds for discrimination—on the basis of sexual orientation, gender identity, and intersex st —in the areas defined in the Act. No one mentioned the pre-existing rights of wor including special measures. And for that matter, no one discussed a possible new definition of woman. Was this an oversight or a sleight of hand? Neither. Why? Because the explanatory memorandum to the Act makes clear that the introductio the new grounds for protection against discrimination were to apply subject to the existing provisions in the Act for "special measures" to achieve gender equality. In fact, the explanatory memorandum makes this point repeatedly. [10]

Asked to clarify certain aspects of the operation of the Bill by the Senate committe department officials repeatedly ruled out any broader policy changes intended by t amendments beyond introducing the new grounds for protection from discrimina The AHRC's own submission to the committee noted the original purpose of the A to eliminate discrimination and promote substantive gender equality but noted th proposed amendments impacted the former but not the latter. [11]

And what of the "definition of woman"? Both Justice Bromwich's statement of rea in *Tickle v Giggle* and the AHRC amicus brief to the Federal Court make much of tl fact that the *Amendment Act* repealed the definition of woman from Section 4 (interpretations) of the *Sex Discrimination Act* and elsewhere changed references fr "opposite sex" to "different sex." Both quote paragraph 18 of the explanatory memorandum—

> "These definitions [of man and woman] are repealed in order to ensure that mai and woman are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the bas other attributes contained in the [*Sex Discrimination Act*]."

According to Justice Bromwich, the introduction of the new discrimination provis the change of all references to the "opposite sex" to "different sex" and the repeal the definitions of men and women "all point forcibly to an understanding of sex, a

is deployed in the *Sex Discrimination Act*, that is changeable and not necessarily bir
[12]

But the explanatory memorandum's comments on repealing the definition of "wor must be considered in conjunction with its repeated emphasis that the introductic the new grounds for discrimination remained subject to the Act's provisions for special measures aimed at achieving equality. This caveat was also clearly noted ir document's explanation of the new operative provisions, including where the Bill amended the Act to refer to "different sex" rather than "opposite sex."

As for pointing forcefully to an understanding that sex is changeable, there is no evidence of that in Hansard. And the notion that sex is not necessarily binary aros the context of new provisions concerning "intersex status" but not elsewhere. The explanatory memorandum also notes in the context of the repeal of the definition man and woman that "to the extent that these terms [man and woman] appear in t Act [and they do repeatedly] they will take their ordinary meaning."

So what was Parliament to understand as the "ordinary meaning" of woman? In th context of certain permanent exemptions in the Act, such as for sport, the ordinar meaning of woman still clearly carried the sense of biological difference. In the context of "special measures," there is Commonwealth legislation addressing this concept, notably the *Equal Opportunities (Commonwealth Authorities) Act 1987* and t *Workplace Gender Equality Act 2012* both of which define "woman" as a "member o female sex."

Was it an oversight by officials from the Attorney-General's Department not to propose amending these Acts to reflect a fluid definition of woman, especially sin the 2013 Bill amended four other Acts, including the *Fair Work Act 2009* and the *Migration Act 1958*? It's possible. But a far more plausible explanation is that Parliament intended its 2013 amendments to apply solely to discrimination matte defined in the Act and not to special measures. To assume otherwise is to suggest Parliament had been deliberately untrue to the 1995 amendments that special measures are not to be considered a form of discrimination but rather an expressi equality.

Let's revisit Justice Bromwich's statement of reasons in *Tickle v Giggle*. Because he feels the 2013 changes to the *Sex Discrimination Act* (SDA) were "overt and delibera and "point forcefully to an understanding of sex, as deployed by the SDA, that is changeable and not necessarily binary," he concludes any interpretation that "spec measures" aimed at advancing substantive equality between men and women prov a "shield from gender identity discrimination" is "untenable, unworkable, and nonsensical."

Seriously? If these changes were so clearly intended to alter the application of spe measures, why did the AHRC state in its submission to the Senate committee that special measures would be unaffected? If these changes were so "overt and deliber why was there no commentary at the time—or even some objections—given the amendments would modify the pre-existing rights women enjoyed regarding "spe measures"? Yet, this seemingly overt and deliberate interpretation did not occur t anyone, including many human rights lawyers who made submissions on the Bill. two submissions noted a potential risk to women's rights: these cautioned that the amendments should not diminish protections based on sex, but then concluded th their view, the current Bill did not decrease that protection. [13]

If this were an overt and deliberate intention, where was the Office of the Status o Women within the Department of Prime Minister and Cabinet, the government's agency responsible for advising on policies impacting women? Surely they would understood the potential impact of the amendments on "special measures" aimed achieving equality—regardless of their views on expanding the Act's discriminatic prohibitions to cover sexual orientation, gender identity, and intersex status. But r The Office provided no written advice to the Prime Minister on the Bill, nor did it correspond with officials from the Attorney-General's Department about it, accor to a request under Freedom of Information law.

So what can we expect next?

At the time of writing, it's not known if the High Court will consider the case of *T v Giggle*. If it does, here's hoping it upholds the principle of legality and rejects the notion that Parliament redefined "sex" as a concept that is "changeable and not

necessarily binary" in all circumstances. Most importantly, it must also recognise Parliament did not intend to diminish the rights that Australian women previousl enjoyed to female spaces and services, and certainly did not do so in "unmistakabl and unambiguous language." Parliament must also now revisit the *Sex Discriminati Act* to remove any possible ambiguity surrounding the rights of Australian women special measures. It may be necessary to recognise the circumstances under which women are entitled to "special measures"—in other words, where discrimination i lawful to ensure equality.

The starting point must be those circumstances where women and girls are vulner or disadvantaged—where their human rights are at risk—because of their sex, suc in rape crisis services and prisons. It is also imperative to ensure the safety of won and girls in other circumstances, such as toilets and change rooms, and in health c The law must also protect the freedom of association of lesbians who are vulnerab the predations of some men who may claim a lesbian identity to gain access to lesl spaces. It should also extend to allow women to seek safety and privacy in cybersp

It is more than likely some commentators will characterise this call as "anti-trans. is no such thing. Laws and policies that lessen stigma and expand protections agai discrimination on the basis of gender identity are welcome, including the 2013 amendments as they were intended and understood at the time. A rational and compassionate society—and its representatives in Parliament—should be able to g the distinction between discrimination in areas defined by the *Sex Discrimination A* and the rights afforded by the Act to women through special measures, maximisin protections against the former while respecting the latter.

This article was originally published on the Affiliation of Australian Women's Action Alliances website. UK legal academic Michael Foran has commented on their argument h and the group have posted a reply here.

Thanks for reading Gender Clinic News! This post is public so feel free to share it.

1 In *Tickle v Giggle*, an Australian Federal Court judge ruled that Giggle for Girls, a femal only social media platform, and its director were liable for indirect gender identity discrimination because the director had removed transgender woman Roxy Tickle from site. Giggle's director Sall Grover has foreshadowed an appeal to the full Federal Court.

2 Federal Court of Australia, *Tickle v Giggle for Girls Pty Ltd* (No 2) [2024] FCA 960, 24 Aug 2024, 1 paragraph 59.

3 Gleeson et al. in *Electrolux*, HCA 40; 221 CLR 309; 209 ALR 116; 78 ALJR 1231, 2 Septem 2004.

4 Submissions of the Sex Discrimination Commissioner in *Tickle v Giggle*, 10 August 2023

5 *Sex Discrimination Act 1984*.

6 House of Representatives, Official Hansard, 28 June 1995, pp. 2457ff.

7 1996 guidelines for special measures under the *Sex Discrimination Act 1984*.

8 *Walker v Cormack* [2011] FCA 861, 3 August 2011.

9 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill*

10 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill* explanatory memorandum, see, for example 32, 36, and 40.

11 Senate Standing Committee on Legal and Constitutional Affairs, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, AHRC Submission 9), April 2013.

12 Federal Court of Australia, Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960, 24 August 2024, 13 paragraphs 59 and 86.

13 Senate Standing Committee on Legal and Constitutional Affairs, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, submissions, Equality Rights Alliance (submission 21), April 2013, Women's Legal Servi NSW (submission 78), April 2013.

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Gay J 3 Sept

We are protesting, but in the main it falls on deaf ears. It is extraordinary that previously a man, entering a women's changing room and divesting himself of his clothes, would be charged with indecency. Now it's the case that a woman, encountering the same man, could be in trouble fo complaining.

LIKE (14) REPLY

dd 3 Sept *Edited*

It is so strange to me how women's groups and general feminists are allowing, with little protes redefinition of "woman" to potentially completely hollow out what has been carved out for wor rights.

LIKE (10) REPLY

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 11 pages comprise the document referred to as Annexure KD-26 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed:

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Australian transgender woman wins landmark case against female-only app

By **Renju Jose**

August 23, 2024 5:07 PM GMT+10 · Updated 5 months ago

[1/2] Transgender woman Roxanne Tickle leaves the Federal Court of Australia in Sydney, Australia, August 23, 2024. AAP/Dean Lewins via REUTERS Purchase Licensing Rights

SYDNEY, Aug 23 (Reuters) - An Australian court ruled on Friday that removing a transgender woman from female-only social networking platform Giggle for Girls constituted discrimination, in a landmark decision on gender identity for the country.

Roxanne Tickle in 2022 sued the Australian app and founder Sally Grover for unlawful gender identity discrimination in its services, saying Grover revoked Tickle's account after seeing her photo and "considered her to be male."

The Federal Court, Australia's second-highest, ordered Giggle for Girls to pay Tickle A$10,000 ($6,700) plus legal costs but declined to order the company to issue a written apology, which Tickle had sought.

"Tickle's claim of direct gender identity discrimination fails, but her claim of indirect gender identity discrimination succeeds," Judge Robert Bromwich said.

The case marks the first time that the Federal Court has made a ruling on gender identity discrimination since changes were made to the Sex Discrimination Act in 2013.

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"This decision is a great win for transgender women in Australia," said Professor Paula Gerber at Monash University's Faculty of Law.

"This case sends a clear message to all Australians that it is unlawful to treat transgender women differently from cisgender women. It is not lawful to make decisions about whether a person is a woman based on how feminine they appear," Gerber said.

Giggle for Girls was marketed as a "safe space" for women to discuss and share their experiences and had some 20,000 users in 2021, court filings show. It suspended operations in 2022 but is due to be relaunched soon, according to Grover.

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Bromwich said Giggle for Girls considered only sex at birth as being a valid basis on which a person may claim to be a man or woman. Tickle was of male sex at the time of birth but underwent gender-affirming surgery and Tickle's birth certificate was updated, he said.

"Unfortunately, we got the judgement we anticipated. The fight for women's rights continues," Grover said in a post on X.

Tickle called the verdict "healing" and said she had received hateful comments online and that merchandise was created specifically to mock her.

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"There is so much hate and bile cast on trans and gender diverse people simply because of who we are," Australian media quoted her as saying outside the court.

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Saudi Arabia, in swift response to Trump, says no ties with Israel without Palestinian state

Middle East · February 5, 2025 · 4:29 PM GMT+11 · 8 min ago

Saudi Arabia said it would not establish ties with Israel without the creation of a Palestinian state, contradicting President Donald Trump's claim that Riyadh was not demanding a Palestinian homeland when he said the U.S. wants to take over the Gaza Strip.

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IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 3 pages comprise the document referred to as Annexure KD-27 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

Judge hands transgender woman win against female-only app in landmark case

By Greg Wehner

Published August [illegible], 2024

Fox News

A judge in Australia ruled Friday that the owner of a female-only social networking platform discriminated against a transgender woman by removing her from the app because she was born a male.

Reuters reported that Roxanne Tickle sued the Australian app Giggle for Girls, as well as its founder, Sally Grover, for unlawful gender identity discrimination in its services.

The suit claimed Grover removed Tickle's account from the platform after she saw her photo and "considered her to be male."

In a landmark decision on gender identity in Australia, the Federal Court — considered to be the country's second-highest court — ordered Giggle for Girls to pay Tickle 10,000 Australian dollars ($6,700 U.S.) plus legal costs.

GENDER DYSPHORIA AND EATING DISORDERS HAVE SKYROCKETED SINCE PANDEMIC, REPORT REVEALS: 'RIPPLE EFFECTS'

Transgender woman Roxanne Tickle leaves the Federal Court of Australia in Sydney, Australia, August 23, 2024. (AAP/Dean Lewins via REUTERS)

Judge Robert Bromwich, who oversaw the trial, did not order Giggle for Girls to issue a written apology, which Tickle had sought.

"Tickle's claim of direct gender identity discrimination fails, but her claim of indirect gender identity discrimination succeeds," Bromwich said.

This is the first time the Australian Federal Court has made a ruling on gender identity discrimination since the Sex Discrimination Act was modified in 2013.

Professor Paula Gerber of Monash University's Faculty of Law said the court's decision was "a great win for transgender women in Australia."

TRANS CHILDREN WHO TOOK PUBERTY-BLOCKING DRUGS HAD MENTAL HEALTH ISSUES, UK STUDY FOUND

Transgender woman Roxanne Tickle leaves the Federal Court of Australia in Sydney, on Friday. (AAP/Dean Lewins via REUTERS)

"This case sends a clear message to all Australians that it is unlawful to treat transgender women differently from cisgender women. It is not lawful to make decisions about whether a person is a woman based on how feminine they appear," she said.

The platform Giggle for Girls was marketed as a "safe space" for women to share and discuss their experiences. Reuters reported

that court filings show the platform had about 20,000 users in 2021.

The company placed a temporary stop to operations in 2022, but Grover says the platform will be relaunched soon.

'GENDER-AFFIRMING' TREATMENTS DON'T BENEFIT YOUTH, SAYS PEDIATRICIANS GROUP: 'IRREVERSIBLE CONSEQUENCES'

A judge in Australia ruled Friday that the owner of a female-only social networking platform discriminated against a transgender woman. (iStock)

In his decision, the judge claimed the platform considered only sex at birth as being a valid basis for a person to claim to be a man or woman.

The plaintiff was born a male and had sex reassignment surgery before Tickle's birth certificate was updated, Bromwich said.

"Unfortunately, we got the [judgment] we anticipated," Grover said in a post on X. "The fight for women's rights continues."

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Tickle reportedly called the judge's decision "healing," after receiving hateful comments online and seeing merchandise created specifically to mock her.

"There is so much hate and bile cast on trans and gender-diverse people simply because of who we are," Australian media quoted her as saying outside the court.

Reuters contributed to this report.

Greg Wehner is a breaking news reporter for Fox News Digital.

Story tips and ideas can be sent to Greg.Wehner@Fox.com and on Twitter @GregWehner.

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GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 5 pages comprise the document referred to as Annexure KD-28 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

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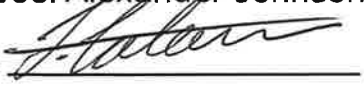
Signed: 

The Absurdity of "Tickle v. Giggle"

fairerdisputations.org/tickle-v-giggle/

Petra Bueskens

August 30, 2024

First international tournée of animation (1970). Public Domain.

Tickle v. Giggle is an Australian court case that, in its very name, evokes the absurd. Since it has scratched a legal itch and produced much gallows humour, there is something of a cosmic joke about the nomenclature of the case, which is the latest battle in the existential war over the category of "woman."

So, what is it all about? Who are the central protagonists, and what are the implications?

Roxanne Tickle, a trans-identifying male, is the plaintiff who has brought the first case of "gender identity discrimination" in the Federal Court of Australia against the (now-defunct) woman-only app "Giggle for Girls." Tickle, who was barred from the app in September 2021, claims that the exclusion of males who identify as transgender women is illegal discrimination. Thus, most of the proceedings have concentrated on what constitutes the legal definition of woman. The main question is whether Tickle can *identify into* the category of woman, and therefore whether sex is mutable in the eyes of the law.

As expected, the Federal Court ruled in favour of Tickle. In doing so, the court came down categorically on the side of gender identity, discriminating against women in the process and, paradoxically, using their own laws to do so.

Far from being a feminist victory, this ruling—and the ideology it represents—is a subversion of the work of foundational thinkers like Simone de Beauvoir. These women critiqued cultural conceptions of gender norms in order to free women from arbitrary constraints—not to deny biology or take away their access to private female-only spaces.

A Landmark Case

The Giggle for Girls app was created as a single-sex online space. All single-sex spaces are by definition discriminatory, albeit in a manner accepted within the law. Such legitimate discrimination on the basis of sex necessarily excludes males, no matter how they view themselves. However, if the law protects "gender identity," it prevents the exclusion of males who identify as transgender women.

This landmark case was the inevitable result of legal changes instituted in 2013, when the Sex Discrimination Act of 1984 was amended to include protections on the basis of sexual orientation, gender identity, and intersex status. This created an implicit ontological conflict between competing claims to the category of woman. Is a woman defined by biological sex or by gender identity? These are overlapping but not identical categories.

Both cannot be protected at once. One definition refers to natal females—those whose bodies are ordered toward the production of large gametes (eggs) and the gestation of children—and sets a definitional and legal limit around biological sex. The other newer definition includes those who *identify as women*, even if they lack XX chromosomes, non-surgically constructed female genitalia, and naturally produced female hormones. But the human species is sexually dimorphic, and the sex of these individuals is male.

Eleven years later, this legal conflict has now been "resolved" in the Federal Court of Australia.

"Sex is Changeable"

While the court found Roxanne Tickle did not face "direct" unlawful treatment on the basis of gender identity, the exclusion of males—including Tickle—resulted in "indirect discrimination."

Justice Bromwich ordered the defendants to pay Tickle A$10,000 compensation. This is significantly less than the $200,000 Tickle was claiming. The court also ordered the respondents pay Tickle's legal costs, capped at $50,000. Tickle had also sought an

apology, but the judge declined to order that, stating that it would be "futile and inappropriate to require an inevitably insincere apology to be made."

However, the real bombshell, the one that ends Australian women's claim to their own sex category (and so much else besides) is this: Justice Bromwich concluded that, "in its contemporary ordinary meaning, sex is changeable." Moreover,

> The acceptance that Ms Tickle is correctly described as a woman, reinforcing her gender-identity status for the purposes of this proceeding, and therefore for the purposes of bringing her present claim of gender identity discrimination, is legally unimpeachable.

As I (and others) have observed before, this debate is not a mere political disagreement. Rather, it is a disagreement about the nature of reality itself. By replacing sex with gender and accepting that men can "opt in" to the female category, we reject the materiality of the body and accept a disembodied, non-falsifiable internal feeling as the basis of identity—and of human nature itself. If sex can change, where has the "sex" in sex change gone? It has been culturally eviscerated, elasticised beyond all recognition, and "disappeared" into a superordinate category of gender.

To protect self-proclaimed gender identity as the determining attribute of female status not only means that "transgender women" now legally have the right to call themselves women. It also means that natal women have *lost the right* to call those same individuals "men." As has become obvious in country after country, this prevents legitimate exclusions hitherto built into the law to protect women's sex-based rights and single-sex spaces (sports, awards, toilets, change rooms, prisons, apps).

Gender identity trumps sex: so says the second highest court in our land. This outcome has significant implications for Australian society and will serve as a precedent across the West.

Is One Born or Made a Woman?

When Simone de Beauvoir wrote her most famous passage in *The Second Sex* (1949), "One is not born, but rather becomes a woman," she grabbed the thin edge of a wedge that women's advocates had been using to leverage their way out of misogynist caricatures since the early fifteenth century.

De Beauvoir's claim was quite simply—yet radically—that women's "failure" to achieve in the public sphere—the world of politics, law, economics, society, and culture—was because there were "sexist" beliefs, laws, and customs. (How quaint the term "sexist" now seems.) Women were defined as lacking intellectual capacity: parochial, small-minded, emotional, at the behest of their sexuality and passions,

stupid, immature, partial, biased, incapable of science or philosophy or art, and naturally subordinate. Woman was existentially confined to the status of "the Other," de Beauvoir conjectured, never "the Subject" of her own destiny, let alone of History.

In throwing off the yoke of these constraining cultural beliefs and redefining them not as statements of fact but of prejudice, de Beauvoir forged what has now become the well-worn distinction between sex and gender. The former was defined as the biological substrate—the materiality and embodiment of the "adult human female"—and the latter as a societal belief system that was historically specific, contingent, and mutable. Into the latter could be breathed new life in the form of a vision of Woman as Subject. Contra Freud, for de Beauvoir, biology was *not* destiny, but it was extremely significant. "The body being the instrument of our grasp upon the world, the world is bound to seem a very different thing when apprehended in one manner [male] or another [female]," she observed.

It is important not to forget or misrepresent this history as some are now doing (see also here) when they blame feminists for prying apart sex and gender, as if this inevitably produced the transgender cultural colossus. Critics suggest that in separating sex and gender, intellectually and politically, feminists were "denying biological sex" and in some way aiding and abetting the erasure of sex that is now being carried out by gender ideologues. But most feminists, until the third or even fourth wave, defined sex as intrinsic to women's being, and thus to women's rights—for example, to equal pay or maternity leave.

Gender, within feminist theory, is simply not the same as "gender identity" as it is used today by trans rights activists. The heuristic distinction between sex and gender, carved by feminist thinkers like de Beauvoir, was never absolute. Using it to justify identitarian claims of gender inversion is to rip it out of its original context and dump it somewhere that would have been anathema to its progenitors.

Second-wave feminists relativised gender to demonstrate prejudice. Identitarians relativise sex so as to define it as changeable. As a result, reductive gender stereotypes are paradoxically reified and essentialised, even as womanhood is obliterated in law and policy. Sex is, in this new view, an essentialist ruse *always already* presaged by the "text" of gender. Or, as Judith Butler more economically puts it, "Sex is no longer a bodily given." In this conception, gender identity is a free-floating signifier that relativises matter out of existence, or at least out of relevance. In short, "gender identity" advocates pillage and subvert feminist history, declaring that gender trumps and subsumes sex.

In the current narrative battle, one cannot be both born and made a woman. So which one is it? Australia has decided that one is made a woman, not by biology or culture or conditioning as de Beauvoir had it, but by self-identification and legal sanction.

We can only hope that the case will be appealed, and that the justices of the High Court will reject the just-so story of the gender ideologues and restore the rights of women.

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

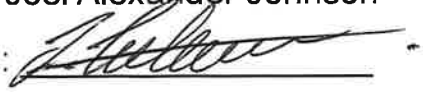
(Respondent)

ANNEXURE SHEET

The following 6 pages comprise the document referred to as Annexure KD-29 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

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What does Tickle vs. Giggle mean for single-sex spaces?

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Words and phrases like 'cisgender', 'transgender' and 'assigned at birth' are peppered throughout the written judgement in the Australian gender identity discrimination case, Tickle vs Giggle. At the turn of this century, these words had barely made an impression on society; now they are part of lexicon. So, where did they spring from? And, importantly, what effect do these words combined with the Federal Court landmark judgement have on our understanding of same sex spaces?

But first, the Federal Court landmark decision, which says sex 'is changeable and not necessarily binary'.

Roxanne Tickle, a transwoman, brought a case of gender identity discrimination against, Giggle, a social media site for women, run by Sall Grover. Tickle was originally admitted to the Giggle on the basis of an AI app screening Tickle's selfie. Grover later viewed the selfie and denied Tickle access to Giggle after she deemed the photo to be that of a male.

2013 changes to the Sex Discrimination Act (ADA) have made it unlawful to discriminate against a person on the basis of gender identity, sexual orientation or intersex status. The ADA does not define gender but explains that gender identity:

> *'...means 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.'*

Tickle was born a man but started identifying as a woman seven years ago at the age of 47, and has an official updated Queensland birth certificate stating Tickle is female. Tickle has also undergone gender reassignment surgery. 'She began to use female changing rooms and started playing in a local women's hockey team. She began shopping from the women's side of clothing stores and began a process of removing her facial hair,' Justice Robert Bromwich wrote in his judgement.

Justice Bromwich found that Tickle had been indirectly discriminated 'because she did not look sufficiently female'

'The Federal Court judgement now appears to have set a precedent in dealing with women's only spaces. It is gender identity rather than biology that takes priority over who is accepted into female spaces. The judgement also appears to be telling women they cannot lawfully refuse entry to biological men who identify as women in female-only spaces even if these individuals have the physical attributes of men.'

'I find that even if the Giggle app could have been considered a special measure to achieve equality between men and women, that would not have allowed the respondents to discriminate on the basis of gender identity, which is different from discriminating against women on the basis of sex under the SDA,' Justice Bromwich wrote.

He chose to use the terms 'cisgender' and 'transgender' in his judgement because 'both terms (are) useful and convenient for the purpose of deciding and discussing the relevant facts'.

Cisgender, in particular, is a contested term, used to denote someone whose sex aligns with their gender identity. It started appearing in academic papers in the US in the 1990s, but gained popularity after the book *Whipping Girl* by American biologist and transwoman Julia Serano was published in 2007. Serano, who identifies as a lesbian, worked at the University of California Berkley for 17 years. Much of book, a series of essays, deals with gender identity, which is defined as a person having an inner psychological feeling of being a man or woman or another category of gender. If a person feels their inner identity as a woman or man misaligns with the sex they were born with (gender ideology uses the term 'assigned' female or male), then they are transgender. 'People who are not transgender maybe described as cisgender,' Serano writes.

Since the publication of Serano's book, there have been a bevy of academic papers and texts as well as memoirs published on 21st century gender and, most significantly, on gender identity, which now encompasses a cornucopia of identities such as non-binary, transmasculine and demigender. The gender theories that were developed in universities have now spilled out into the general community and are reflected in law

So where does this leave single-sex spaces for females?

Women have fought decades and decades to have female-only spaces, particularly for vulnerable women. Many stories abound about women fighting for and setting up Australia's first women's shelter, Elsie in Sydney, in 1975. Before that time there was no place for women to go to escape male violence.

Rape crisis centres started to open in Australia in the 1970s. They were staffed by women who gave female rape victims counselling and medical advice. These services were set up not because of someone's gender identity but because of the need to cater for women of the sex category.

Since the 2013 ADA amendments, spaces explicitly for females have admitted trans women. For example, some biological men who identify as women have been placed in women's prisons in Australia. One case in Victoria saw female prisoners demanding that a transwoman who had assaulted women be removed.

Research shows that female prisoners often come from disadvantaged backgrounds and are living in poverty. They are also likely to have experienced male violence and childhood trauma. It is for these reasons that women need their own space for privacy, dignity and safety.

The Federal Court judgement now appears to have set a precedent in dealing with women's only spaces. It is gender identity rather than biology that takes priority over who is accepted into female spaces. The judgement also appears to be telling women they cannot lawfully refuse entry to biological men who identify as women in female-only spaces even if these individuals have the physical attributes of men.

Many women walking in public and using public transport, particularly at night, size up people and work out who is safe to be around. Invariably it's men who women may not feel comfortable sharing their space. Women determine this using their eyes, their judgement, and not by asking someone their gender identity.

But this conversation is not just about female-only spaces.

Recently I had a conversation with a 78er, a gay man who attended the first Mardi Gras

cared for men with AIDS. He was particularly concerned about biological gay men losing their own spaces for socialising. 'Trans men are attending our nights. It's f—ing not on,' he said. It would be interesting if a trans man brought a case of gender identity discrimination against a gay club that banned them from an event for biological males.

Sall Grover has said she plans to appeal the Federal Court decision to the High Court. The Tickle vs Giggle ruling marks the most significant shift to date in how Australian society and law views gender, sex, and single-sex spaces. While women-only spaces have long been deemed essential, outweighing the disadvantage to excluded males, this verdict leaves users of such spaces with little choice but to accept the inclusion of newly-recognised legal women who are biologically male and potentially compromise what makes these spaces necessary in the first place. Here, despite legal good intentions, we would do well to recognise that sometimes in the rush to right a perceived wrong, we risk creating another.

Dr Erica Cervini is a freelance journalist and sessional academic.

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

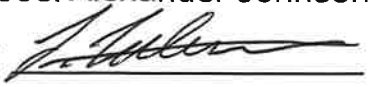
(Respondent)

ANNEXURE SHEET

The following 37 pages comprise the document referred to as Annexure KD-30 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

Australian judge rules sex is 'changeable' in landmark case

BY JOAN SMITH

Roxanne Tickle outside court following the judgment. Credit: Dean Lewins/AAP

ANTHONY ALBANESE AUSTRALIA GENDER GIGGLE ROW SCIENCE SEX TRANS RIGHTS

Newsroom AUGUST 23, 2024 - 10:00AM

Women no longer exist as a separate category in Australia. Sex is "changeable", according to the judge who has just ruled in a case that effectively destroys single-sex spaces and services for Australian women. It's a devastating blow for female rights in the country, which is experiencing an "epidemic" of violence against women according to Prime Minister Anthony Albanese.

The court case turned on whether a women-only app, Giggle for Girls, could legally exclude a trans woman. The judge decided that Roxanne Tickle, who is biologically male, suffered indirect discrimination when he was excluded from the app by its CEO, Sall Grover. She set up the app as an "online refuge" for women after experiencing the damaging effects of social media abuse while living in the US.

The implications of the judgment, while not directly about sexual and domestic violence, are far-reaching. There has never been a more urgent case for single-sex services in Australia, yet the outcome confirms that "gender identity" now takes precedence over sex. One of the most shocking features of the case is that the result has been welcomed by Australia's Sex Discrimination Commissioner, who issued a press release stuffed with familiar jargon.

"Gender equality means equal treatment for people of all genders, including trans people," the statement said. "We will continue to stand with trans communities and advocate for the rights of all women, including women who are trans." The extent of the assault on women's rights was exposed during the hearings, when a barrister acting for the Australian Human Rights Commission claimed that "sex is not a binary concept and it is not exclusively a biological concept".

These are shocking sentiments, elevating an undefinable — and unverifiable — "gender identity" above biological sex. But while an array of courts, politicians and human rights organisations have decided that sex is no longer obvious and

immutable, the same cannot be said about the assumptions of men who murder women.

Last year, 64 women were killed by someone known to them in Australia, a higher rate even than in the UK. In April, six people — five of them women — were murdered in a rampage in a shopping mall in Sydney. It belongs in a horrific series of attacks based on sex that stretches all the way back to the Montreal massacre in 1989, when 14 female engineering students were murdered. The latest addition to this grim list happened in the UK last month, when three little girls were killed at a Taylor Swift-themed dance class in Southport.

This judgment will no doubt be appealed. But a senator from Tasmania, Claire Chandler, is clear about what it means for Australian women. "The Sex Discrimination Act which is supposed to protect women and girls is now a tool to punish women trying to offer female-only spaces," she declared on X.

The reality is even starker. We are now in a bizarre situation where sexual predators and domestic abusers know what a woman is, but most of Australia's political class can't answer the question.

Joan Smith is a novelist and columnist. She was previously Chair of the Mayor of London's Violence Against Women and Girls Board, and is on the advisory group for Sex Matters. Her book *Unfortunately, She Was A Nymphomaniac: A New History of Rome's Imperial Women* was published in November 2024.

𝕏 polblonde

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249 COMMENTS

Most Voted

Emmanuel MARTIN 3 months ago

This judge should be punished for treason. In democracies, laws come from parliament and judges legislating from the bench should be dealt with as well as litigators attempting to get legislation changes via the judiciary.

0 0

Dennis Roberts 3 months ago

Reply to Emmanuel MARTIN

Australia has a common law system

Arthur King 5 months ago

Reply to Emmanuel MARTIN

In Canada, the unelected judicial branch has been making law for decades. And it is getting worse. New loyalty oaths to progressive values drive out non progressive voices. The recent decision against Jordan Peterson which will force him into ideological training to keep his psychologist license is telling about Canada.

0 0

S Wilkinson 5 months ago

Reply to Emmanuel MARTIN

You haven't understood the situation – the judge has interpreted the Australian Sex Discrimination Act as it currently stands where 'sex' has been replaced with 'gender identity'. He has not tried to make or subvert the legislation but has shown it up for the nonsense it is.

Whilst his ludicrous remarks do seem to mark him as a fan of gender ideology, I fail to see how he could have ruled differently.

It is the law that is wrong and the case will now proceed on appeal to the High Court where the legislation and its effects will come under closer scrutiny. Hopefully this will lead to clarification and legislative amendments.

0 0

Janet G 5 months ago

Reply to S Wilkinson

Let's hope there is a huge popular cry for the 2013 amendments to the Act law to be scrapped.

0 0

Andrew Buckley 5 months ago

What I fail to understand in all this is that the App appears to be a private endeavour. How can any private group be forced to include someone they don't want?

I manage a couple of private Facebook groups, am I open to a law suit by refusing entry?

We also have a local group, which has questions before admitting people, similarly, is this group at risk of prosecution by denying access to someone who lives miles away?

0 0

RM Parker 5 months ago

Reply to Andrew Buckley

Fair, sane point. I'd like to know the answer to that as well. This has all the flavour of unjustifiable intrusion in a private endeavour and I find it distastefully heavy handed.

0 0

Michael McElwee 5 months ago

Reply to RM Parker

You and Mr. Buckley are hitting the nail on the head. What we are watching is the modern world repudiating what it means to be modern; namely, the distinction between state and society or the distinction between the public and private spheres. In the now disappearing private sphere one could do as one pleased. We can have none of that any longer, can we?

0 0

Warren Trees 5 months ago

Reply to RM Parker

It's not just distasteful, it's completely illogical and unscientific.

"sex is not a binary concept and it is not exclusively a biological concept".

Really? We have suddenly allowed this change in thought after 5,000 years of human history, precedent and understanding. How "progressive". Perhaps we can now chose to identify as any color or profession also. If so, I'm now a black pediatric surgeon.

0 0

Jonathan Nash 5 months ago

Reply to Andrew Buckley

I suspect there will be a commercial element to it: i.e. you have to pay to join, even if it is a small membership fee. At that point, the full weight of discrimination and equality legislation falls on your head.

0 0

Talia Perkins 5 months ago

Reply to Andrew Buckley

"How can any private group be forced to include someone they don't want?"

How about truth in advertising?

0 0

Dee Harris 5 months ago

Reply to Talia Perkins

Er, not just off-topic, but off-planet...

0 0

Talia Perkins 5 months ago

Reply to Dee Harris

No, they were apparently a fee for access public entity.

0 0

Red Reynard 5 months ago

Reply to Andrew Buckley

It is.fairly simple; if you refuse to offer your groups' services to an individual (or class of individuals) on the basis of a 'protected characteristic' which is protected by law – you are guilty of discrimination.

0 0

Obadiah B Long 5 months ago

Reply to Red Reynard

As a bald person with ridiculously bushy eyebrows, I find that egregiously unfair, as I am so far without recourse.

0 0

UnHerd Reader 5 months ago

Reply to Red Reynard

The Tickle Vs Giggle case is 'indirect discrimination' because under Australian law Roxy Tickle is a woman, & can access any women's service. It's irrelevant that they're trans, & so to exclude them or any other trans woman from a service for women is indirect discrimination. In the UK there is a Supreme Court case in November which will clarify whether a trans woman w a Gender Recognition Certificate (a 'legal woman') has full rights to all women's services, or whether some rights are only for biological women. Even if it is established that some services may exclude 'legal women', there will need to be a clear reason. It's not certain an app such as the one in this case could meet that.

0 0

UnHerd Reader 5 months ago

Reply to UnHerd Reader

The "state" that can legislate away genetics is a clear and present danger.

0 0

Obadiah B Long 5 months ago

Reply to Andrew Buckley

Yes, if you exclude on a basis that is specified protected by law. No, if you exclude on some other characteristics.

0 0

Jon Barrow 5 months ago

Reply to Andrew Buckley

As a rule you can't exclude ppl from a business/organisation etc. on the basis of a 'protected characteristic': race, gender, age, etc. Exceptions would be eg 'over-65s club', 'Brythonic DNA group' etc. Yes you can be subject to a lawsuit if shown to be breaking equality laws ie discriminating on 'innate/protected characteristics' rather than suitability of individual character.

0 0

Janet G 5 months ago

This case actually dates back to 2013 when the Julia Gillard government amended the Australian Sex Discrimination Act to make gender a protected characteristic, and to remove the definitions of "man" and "woman". It was a sneaky move and most people in Australia had no idea it had happened, but we have been living with the results ever since. The Tickle vs Giggle case represents the first time the amended law has been tested in a court. Now, suddenly, everyone is shocked when the judge tells us what our law says: Gender trumps sex. Woman must 'include' men who say they are women.

0 0

Stephen Follows 5 months ago

Reply to Janet G

The action of a woman prime minister – oh, the irony!

0 0

LindaMB 5 months ago

Reply to Stephen Follows

Activist prime minister

0 0

Nancy G 5 months ago

Reply to Stephen Follows

Sometimes women are their own worst enemies.

0 0

Thomas Wagner 5 months ago

Reply to Janet G

Tickle vs Giggle. How did I miss that?

0 0

Jeremy Bray 5 months ago

Reply to Janet G

Yes, women have been stitched up by Gillard and her party. Only altering the daft statute will bring back sanity. It is 1984 or Alice in Wonderland where the state says words mean exactly what I want them to mean.

0 0

Adrian Smith 5 months ago

Edit

This Post was made on the basis of misinformation in the Unherd article and the linked to BBC article.

I always felt this was the wrong hill to mount a stand on. Now I have read the actual judgment (see my other post) I am further convinced of that but my further opinion is Sal Grover should cough up the $60k and let sleeping dogs lie.

End edit

I was afraid this might happen, as the case for biological female only online spaces is not as compelling as the case for physical spaces, but the ruling here will get applied across all spaces. This only applies in Australia for now, but those who want men to have access to women's spaces here will point to it as an important precedent.

The only potential cause for hope is that Maya Forstater lost her initial case and sanity only prevailed on appeal and that is what we need to hope for here.

0 0

LindaMB 5 months ago

Reply to Adrian Smith

It's a dating app, they're going to end up in physical spaces.

The government is making it so that Lesbians will have to go `underground' if they want to be comfortable, safe and date other females.

0 0

Talia Perkins 5 months ago

Reply to LindaMB

You TERFs are already persona non grata, thrown out of every LGBTQ venue I know of but your own. It's because you are not in fact lesbian as a first matter, but misandric troglodytic LGBTQ hating bigots first and foremost. You hate the near half of the LGBTQ who are men, those who you think are men, and view as infantile sex traitors those who you think are women and say they are men. You're down to yourself at best tolerating at most 1 quarter of the LGBTQ community, but are so hateful to the other 3/4ths most of that 1 quarter want nothing to do with you when take your mask off.

Those TERFs who are lesbian have made yourselves the enemy inside the wire.

It's all only on you.

0 0

Andrew Holmes 5 months ago

Reply to Talia Perkins

I suggest that you read Andrew Sullivan's "The Weekly Dish"on this subject. Assuming the statistics in the US are similar to the distribution in Australia, your numbers are wrong. Also, Sullivan led the movement for marriage equality in the US, so his *bona fides* are unimpeachable. He believes that that the passionate adherence to Trans ideology, such as you've expressed, harms children who in fact will be gay or lesbian if they are not automatically affirmed. Further, he holds that that ideology harms the distinct communities of LGB people. Even should you disagree with him, addressing a different perspective may be useful.

0 0

Talia Perkins 5 months ago

Reply to Andrew Holmes

I suggest you not pretend I am not already aware of Sullivan's deliberately ignorant bigotries with regard to transgender people — I am.

His "bone fides" are trash — he is a bigot who has secured license as he sees fit from the all powerful state and who has no compunction about it as long as it also oppresses those he thinks to be his lessers.

0 0

UnHerd Reader 5 months ago

Reply to Talia Perkins

It appears that the only actual bigot on this thread is Talia.

0 0

Talia Perkins 5 months ago

Reply to UnHerd Reader

Apparently you don't know what a bigot is.

> **the fact of having and expressing strong, unreasonable beliefs and disliking other people who have different beliefs or a different way of life**:

My strong dislike of you is brought about by your insistence you should and have the right to disadvantage, injure, mutilate, and abuse transgender people. It is not bigotry because facts show my views are perfectly reasonable. Sullivan's in this case are not.

Neither of you have any facts which justify you.

0 0

UnHerd Reader 5 months ago

Reply to Talia Perkins

Your violent anti-human delusions are part and parcel with the spittle flecked rage that sustains your delusions. The only large scale violence regarding the gender dysmorohia you embrace us that of gender delusionists attacking those who fail to enable their delusions, and against themselves when the medically or surgically poison or disfigure themselves.

0 0

Talia Perkins 5 months ago

Reply to UnHerd Reader

You can not name any violent or anti-human delusions I have, or any delusions at all.

You also have no ability to defend yourself factually from the perfectly true observation you want to hurt transgender adults and children. You do.

Poison and disfigurement have nothing to do with it, and your claims only point out how insane you are.

Of the two falsehoods all gender critical cultists believe, which one do you have? That gender has no physical existence, or, that it is magickally always the same as the sex of a person?

0 0

Graeme Crosby 5 months ago

Reply to Talia Perkins

Are you on drugs?

What an incoherent rant of ignorance.

0 0

Talia Perkins 5 months ago

Reply to Graeme Crosby

Prove it, "What an incoherent rant of ignorance.", and, no.

0 0

Graeme Crosby 5 months ago

Reply to Talia Perkins

Google "incoherent".

Your answer is a click away.....

0 0

Talia Perkins 5 months ago

Reply to Graeme Crosby

No fool, I know what I wrote is not incoherent — that's just the dodge you are trying because all you really bring to the discussion is mindless hatred and factless stupidity.

0 0

UnHerd Reader 5 months ago

Reply to Talia Perkins

Speaking of hateful troglodyte.....

0 0

Talia Perkins 5 months ago

Reply to UnHerd Reader

That is yourself, yes. And without a relevant fact a one in your pocket.

0 0

Janet G 5 months ago

Reply to LindaMB

This has already happened in Australia. The Lesbian Action Group is on to it.
https://lesbianactiongroup.org.au/about-lag

0 0

UnHerd Reader 5 months ago

Reply to Adrian Smith

It has already happening in Scotland. The Edinburgh Rxxe Crisis Center is run (the last time I looked) by a trans women (aka a man). There is at least man who works there. Women have left, because they don't want to talk about their rxxewith a pervert, excuse me, a man in a dress. These women are transphobic and need to reeducate themselves. The man who runs the center once wondered out loud if a woman had an oxxxxxm when she was being rxxxd.

0 0

Abiel Tsegai 5 months ago

And in similar cases in the western world, biological men are taking over women's sports, and biological men can "self-identify" as females in order to be on the female side of the jail instead of with the rest of the men.

So clearly, society has gone crazy. And what gets lost in all of this is that it is secularization that has led to all this madness. When some geniuses thought it would be to the benefit of society to secularize the west, we have come to a place where we don't even know what a male or female is. in Romans 1, this is called God's judgement, and no matter how much intellectual society becomes, society only becomes more confused and immoral–this judgment remains unless we turn to Jesus Christ for salvation.

0 0

Lancashire Lad 5 months ago

Reply to Abiel Tsegai

Before the old and new testaments were written (by whoever and whenever that was) do you seriously think biological sex was a matter of confusion? If not, what makes you think those scripts make the blindest bit of difference?

0 0

MJ Reid 5 months ago

Reply to Abiel Tsegai

Unfortunately religion plays into the whole "men can become women and vice versa" dialogue especially in societies where homosexuality is seen as immoral or illegal. Part of the problem is religion, all religion.

Science has proven that mammals do not change sex and cannot change sex. Even those thought to be "intersex" still have either XX or XY chromosomes. It doesnt matter what a changed birth certificate says, ask any pathologist what they find after death... Only what biology and science gives them, the person was born either male or female.

0 0

Brett H 5 months ago

Reply to MJ Reid

"religion plays into the whole "men can become women and vice versa" dialogue"

That needs a bit of explaining.

0 0

LindaMB

Reply to MJ Reid

'Progressivism' is the new religion. Unlike older religions it offers no grace or forgiveness

0 0

Ian_S 5 months ago

Reply to Abiel Tsegai

All these new men-can-be-women laws will be overturned, not by Christians who have turned the other cheek, but by the large immigrant Islamic contingents that the virtuous

Guardianista elites have let in.

0 0

Hugh Bryant 5 months ago

What's utterly baffling about all this is why so many women go along with it. That has to be the best example of gaslighting in history.

0 0

Stephen Follows 5 months ago

Reply to Hugh Bryant

See the comment above about Julia Gillard.

0 0

Melissa Martin 5 months ago

Reply to Hugh Bryant

1) Young females are profoundly naive. Deep genetic coding so males have sexual access. Normally we'd be profoundly realistic at 20 having birthed the resulting baby & it not surviving if we're not. But we aren't having babies til 30 if at all. It's changed everything.

2) Intra-sexual competition. Females now have power outside the domestic sphere for the first time in history & we only really compete with our own sex. If overarching legal protections are removed from ALL women, a Patrician & Plebian class of women emerges. Julia Gillard et al are far more powerful vis a vis other females as a class now. They (& their daughters) will never need a bed in a rape refuge or prison cell. It's immoral but not illogical.

0 0

Fafa Fafa 5 months ago

Reply to Melissa Martin

Both are very smart insights, pointing beyond the usual posturing about the topic. Thank you.

0 0

Jack Robertson 5 months ago

Reply to Melissa Martin

Acute, thanks.

0 0

N Forster 5 months ago

Reply to Hugh Bryant

Mary Harrington has written about why.

0 0

Robert 5 months ago

Reply to Hugh Bryant

Women didn't so much as go along with it, they CREATED it. From the Wikipedia site for fourth-wave feminism:

Fourth-wave feminism broadens its focus to other groups, including people who are homosexual, transgender and people of colour, and advocates for their increased societal participation and power.

It also notes the new focus on 'intersectionality' starting around 2010. Granted, a lot of women are shaking their heads in wonder and disbelief as are most men. But, make no mistake – this was brought to us by a large contingent of women who are feminist thinkers and academics.

0 0

Janet G 5 months ago

Reply to Robert

And the money to support it has been provided by male billionaires.

0 0

Talia Perkins 5 months ago

Reply to Janet G

Imbecile, no such thing is true.

You make of yourself an obvious, hysterical, confabulationist idiot to claim it.

0 0

Janet G 5 months ago

Reply to Talia Perkins

Have you seen the videos and articles where Jennifer Bilek outlines the situation? I don't appreciate the insults.

0 0

Talia Perkins 5 months ago

Reply to Janet G

I have no reason to care that you think accurate description of you is any insult. Jennifer Bilek can no more outline the the situation than a Flat Earther can prove the Earth is flat.

0 0

Janet G 5 months ago

Reply to Talia Perkins

So you have not watched or read anything produced by Jennifer Bilek?

0 0

Talia Perkins 5 months ago

Reply to Janet G

I have no reason to, she can say nothing true which is relevant, if she is pretending that people being transgender is caused by a billionaire.

Effectively she is on a "no Moon landing" level of conspiracist imbecile.

I know the history of people being transgender. She plainly does not – it quite predates all billionaires now living, and by about — oh — 100, 200, 300 thousand years at least. It is solely a matter of genetics and what influences the expression of genes.

And nothing more new.

0 0

Graeme Crosby 5 months ago

Reply to Talia Perkins

You sure about the drugs?

0 0

Fafa Fafa 5 months ago

Reply to Hugh Bryant

Once I wrote something on a thread in response to a K Stock article, that feminists may want to realize that men, in general, are not the enemy. (Women comfortable in their woman-ness know it *ab ovo*, so to say ..) Normal, well-socialized men are protective of women, especially

against abnormally socialized male thugs and cheats. The idea that women need men as much as fish need a bicycle has always been biologically illogical, but it is also, clearly, socially destructive. Women can't go it alone.

0 0

Hugh Bryant 5 months ago

Reply to Fafa Fafa

Women can't go it alone.

Neither can men. We need women to do the things that only women can do – not to try to do the things that only men can do.

0 0

Janet G 5 months ago

Reply to Hugh Bryant

(1) Women respond to the Be Kind message from transactivists. (2) Women with offspring who transition become warriors for the cause. Some of them are members of parliament.

0 0

Jim Veenbaas 5 months ago

Australia is doomed..

0 0

Brett H 5 months ago

Reply to Jim Veenbaas

Why is that?

0 0

Arthur King 5 months ago

Reply to Jim Veenbaas

I agree. It will follow what is happening in Canada. Judicial tyranny.

0 0

Russell Hamilton 5 months ago

Reply to Jim Veenbaas

"Australia is doomed"

Here you go Jim: https://en.wikipedia.org/wiki/Said_Hanrahan

0 0

Right-Wing Hippie 5 months ago

Trying to combat an epidemic of violence against women, rather than eliminate the violence they chose to eliminate women.

0 0

Peter B 5 months ago

Reply to Right-Wing Hippie

I agree this is both serious and ludicrous and that the only way back is to scrap all this "protected characteristic" nonsense and stick with biological reality.

But I'm far from convinced there really is any "epidemic of violence" either in Australia or here, whether against women, "women" or in general. The word epidemic gets bandied around a little too freely these days and can result in all sorts of unwanted side effects (like two year lockdowns).

0 0

MJ Reid 5 months ago

Reply to Peter B

A woman is killed by a man, usually a man she knows, every 3 days in the UK. It is documented here https://www.femicidecensus.org

Very few make the headlines.

We know that men kill more men than women, the media tells us often in graphic detail. But women are killed too but these murders and homicides are not reported in the same way. It is only the ones done by men in positions of authority that make the headlines.

0 0

N Forster 5 months ago

Reply to MJ Reid

We also know from stats published some time ago in Unherd that TW (men) are a great danger to the public than the public are to TW. When a TW is killed, it makes the headlines, when the killer is a TW, it tends not to.

0 0

Talia Perkins 5 months ago

Reply to N Forster

No, you don't know that. No such statistics exist, because the idea is your wishcasting and nothing other.

0 0

UnHerd Reader 5 months ago

Reply to N Forster

That's because a TW hasn't been murdered in years in Britain. Same thing in Europe. Google it.

0 0

LindaMB 5 months ago

Reply to Peter B

But it will lead to male rapists declaring that they are *women* and should be housed in a female prison, increasing the pool of victims.

It also brings up the obscene spectacle of rape victims having to refer to the rapist as she/her, and `her' p***s. This has happened in UK courtrooms. The judge wouldn't want the rapist to have hurt feelings.

0 0

Peter B 5 months ago

Reply to LindaMB

Not sure we disagree here.

One more thing – we need to get rid of this ridiculous modern idea that feelings have any place in UK courts. Or that the law can or should be used to protect feelings. Harriet Harman was one of those who introduced this dangerous nonsense with the absurd "victim impact statements". Stretching things a bit, it's almost as if once we abandon a clear binary view of the world (e.g. there is a) evidence and b) other stuff that's not relevant and inadmissable in a court), we're fully signed up to two (or three/four/many more) tier justice.

0 0

N Fahey 5 months ago

This judge has now ruled that feelings and ideology take precedence over the facts. This insanity, for that's the only accurate term for it, seems to get a lot worse with time

0 0

Fafa Fafa 5 months ago

Reply to N Fahey

It goes along with the definition of "fact" in law. A "fact" in law is what a judge decides to be a "fact", objective reality be damned.

0 0

Thomas Wagner 5 months ago

> ...a barrister acting for the Australian Human Rights Commission claimed that "sex is not a binary concept and it is not exclusively a biological concept".

God is laughing. Bitterly.

0 0

Janet G 5 months ago

Reply to Thomas Wagner

Yes, the Australian Human Rights Commission is no friend of women.

0 0

Clare De Mayo 5 months ago

Australia is a very difficult place for women. Be white, thin, silent and compliant, and you'll succeed. It's important to remember that the First Fleet ships that arrived initially only brought.men. When the women arrived it was, well lets say, consent didn't come into it. It's been a man's world ever since. I know many Australian women are feeling very depressed tonight. We saw this coming, the wider culture supports our erasure. All power to Sally and all hope that an appeal may succeed in a higher court.

0 0

Brett H 5 months ago

Reply to Clare De Mayo

"the wider culture supports our erasure."

Of course this is not true and you are attacking the vast majority that do support women on this issue. And it's not true that the first fleet brought only men.

0 0

Clare De Mayo 5 months ago

Reply to Brett H

Do you live in Australia? The wider culture is very dismissive of women who stray from beach babe/compliant wife role, or, god forbid, a woman who speaks her mind and has opinions. As for the first fleet, the first 3 ships carried 400 men and only 24 women. On the second day the Lady Penryhn arrived with 130 odd women. The men outnumbered women 3 to 1 in the early days and months of the colony

0 0

Ian_S 5 months ago

Reply to Clare De Mayo

That characterisation of Australia seems very outdated. I vaguely remember that time — it ended around the time of the 1988 bicentenary. Since then, the Australian bourgeoisie has bent over backwards to accommodate every latest affectation of the global elite. The huge immigrant cohort just do their own stuff all under the indulgent eye of the patronising inner-city bien-pensants. The white lower classes are divided between the classic but dwindling beer-drinking suburban strugglers (where you'll find the views you claim are mainstream) and the out-there often feral rural working class who are not easy to define (but absolutely hated lockdowns).

0 0

Brett H 5 months ago

Reply to Clare De Mayo

Just nonsense, Yes I live in Australia. The wider culture, some 50 years ago, was very male orientated. It's hardly like that now. To say the wider culture supports your erasure is ridiculous. As I said, the majority are not happy with this issue at all. The state of Victoria and the ABC might insist men can be women, but to say that Australia is generally for it is nonsense. Like most countries the whole trans/women thing is driven by a minority.

As for the first fleet, you said there were no women, not that they were the minority, but you seem to be playing games there (because you obviously know it's not true) as a way to paint Australia as misogynists.

Why don't you get out a bit more instead of making wild claims about the country you live in?

0 0

Clare De Mayo 5 months ago

Reply to Brett H

Brett, this legislation is in effect in every work place, University, TAFE etc etc etc and you are more than likely to lose your job if you speak out against it. I know of a number of women currently facing court charges for 'misgendering' work colleagues and the like, academics having their classes 'banned' by activists etc etc. In Australia. The majority, 'the pub test' if you like, may think this is a joke, but what power do they hold, what are they willing to do about it? Most will have a drink and a laugh about it and think it will never effect them. As for attitudes towards women, nothing much has changed really, just a bit of window dressing. I think it has gotten worse as third wave feminism unfortunately embraces the whole idea of the 'empowerment' of women through sexuality and appearance, and that plays right back into the mainstream cultural expectations. Some women have themselves to blame for that. I don't know where you hang out, maybe it is the place where all the good men are, and I have just missed it. I have 'gotten out' as you say, but I have seen and experienced the same attitude pretty much everywhere. As for the first fleet, I checked my figures as you queried them and I believe in arguing fairly. 25 women is a small number on the first 3 boats, and as far as I can tell, these women were 90%+ the wives of the military or free settlers and not convicts. The bulk of female convicts came on the Lady Penrhyn.

0 0

Brett H 5 months ago

Reply to Clare De Mayo

So this is Australia to you; university and TAFE, and those that drink at the pub. That's a lot you've left out. These are almost comical in their simplicity: the intellectuals against the plebs. A lot has changed for women, including the female Prime Minister who signed in the ridiculous act you're upset about, and you would surely know of the successful women across Australian society. I'm surprised you've found the same attitudes everywhere. That's a very unusual experience.

0 0

Clare De Mayo 5 months ago

Reply to Brett H

I said 'every work place', is that not all encompassing? You still won't say where your Australian Utopia actually resides.There are successful women in Australia (always have been) but the fundamental culture is little changed really. Women are maybe smarter at playing the game and getting what they want, but the deep down attitudes are still there. I don't think my experience is at all unusual, certainly my circle of friends and associates concur. It is perhaps secret women's business, you would be unlikely to be privy to it. It is the way women travel through the world, the fear of certain places and behaviours, the imbalance of reward for effort, the in club and the outsiders. My feeling from what you have written is that you don't really care about this judgement and you don't think it will actually matter, as Australia is such a fair and equitable place that doesn't go in for such things. I guess it won't effect you, so you don't have to worry about it. I don't share that sentiment

0 0

Brett H 5 months ago

Reply to Clare De Mayo

"My feeling from what you have written is that you don't really care about this judgement "

Well then, there's nothing I can say that would mean anything to you. But that's quite obvious anyway.

0 0

Janet G 5 months ago

Reply to Brett H

It's right through the education system. Relatives who work in schools tell me they are required to use the pronouns demanded by students etc.

0 0

Brett H 5 months ago

Reply to Janet G

That may be the case but it's hardly proof that "the wider culture supports our erasure." Even if teachers use the correct pronouns it doesn't necessarily mean they believe it and nor does it amount to erasing women.

0 0

Daniel Lee 5 months ago

Not a word about the judge who issued this ridiculous decision.

0 0

LindaMB 5 months ago

That isn't a woman. Why don't trans women start their own dating app? Possibly because they're actually men who want power over actual women?

0 0

Thomas Clark 5 months ago

Gender identity is an abstraction.

Biological sex is real.

The ruling elevates the abstract over the real. This is th nature of the sickness.

0 0

Arthur King 5 months ago

Reply to Thomas Clark

Progressivism is a kind of religion but without any grace

0 0

Talia Perkins 5 months ago

Reply to Thomas Clark

"Biological sex is real."

So is biological gender. It is located between the ears in a person, not between the legs as is the sex — and unlike what is between the legs, is supposed to be in charge and take precedence.

0 0

Fafa Fafa 5 months ago

Reply to Talia Perkins

"Biological gender" is as confused an idea as "biological nationality".

0 0

Talia Perkins 5 months ago

Reply to Fafa Fafa

No, it is not. It is unquestioned about 99.8% of the time and when questioned, found accurately but about 0.002% of the time.

You are confused.

0 0

Santiago Excilio 5 months ago

Reply to Talia Perkins

And you are delusional.

Talia Perkins 5 months ago

Reply to Santiago Excilio

No, I am not. You are though.

Despite the facts proving you wrong, you think either that gender is not physcially real, or, you think it is magically identical to the sex of a person.

0 0

Graeme Crosby 5 months ago

Reply to Talia Perkins

Gender isn't physically real. Sex is.

0 0

Talia Perkins 5 months ago

Reply to Graeme Crosby

Of course it is idiot — that is why it associated with particular genetics and imaged anatomy.

0 0

Graeme Crosby 5 months ago

Reply to Talia Perkins

Change "imaged " to imagined and you'll be getting closer, you halfwit.

0 0

Talia Perkins 5 months ago

Reply to Graeme Crosby

No as I have cited before, the imagery of gender is physical reality.

And you are too emotionally immature to deal with that fact rationally.

0 0

Talia Perkins 5 months ago

Reply to Fafa Fafa

No, because there is exclusively evidence for it. That is why your sort never produces any evidence against it.

0 0

S Wilkinson 5 months ago

Reply to Talia Perkins

Excellent Talia. That'll make it easy to detect which men are 'trutrans' and which ones are just misogynist crossdressers, predators and pèrvërts.

If you'll just tell us where we can look for this biological reality...

0 0

Talia Perkins 5 months ago

Reply to S Wilkinson

The WPATH standards of care do just fine and divining it, being only 1 part in 45,000 accurate at worst.

0 0

Ian_S 5 months ago

Reply to Talia Perkins

XX or XY — in every cell of every mammal. That's the immutable reality. Your exaggerated bouffant wigs, garish lipstick and affected sashaying are mere ideology and only have weight in the decadent, confused and highly neurotic West — and even there, only among

the affected, psychologically insecure elite class. Most people in the world know what's what.

0 0

Talia Perkins 5 months ago

Reply to Ian_S

"XX or XY — in every cell of every mammal." <– Which has nothing to do with it. It is the anatomical result which matters.

"Your exaggerated bouffant wigs, garish lipstick and affected sashaying" <– Do not in my case even exist, moron.

"the decadent, confused and highly neurotic West" <– It is Russia with its satrapies of corruption which merits that description. Fortunately, Putin's Russia will stop existing when he does, and his end is nigh.

0 0

UnHerd Reader 5 months ago

Reply to Talia Perkins

"Talia" exists at the intersection of ignorance and motivated, magical thinking.

0 0

Talia Perkins 5 months ago

Reply to UnHerd Reader

Except of course Talia is my actual name and I'm the only person here mention relevant facts, that, you know, real.

The facts you do not have the emotional maturity to deal with sanely.

0 0

Santiago Excilio 5 months ago

Reply to Talia Perkins

What a load of unmitigated bollocks. See if you really believe that "what is between the ears" takes precedence over reality then next time you meet someone with Alzheimer's disease.

0 0

Talia Perkins 5 months ago

Reply to Santiago Excilio

"What a load of unmitigated bollocks." <– Then prove it.

"then next time you meet someone with Alzheimer's disease" <– You mean my mom. Funny, Alzheimer's has nothing to do with it.

0 0

Graeme Crosby 5 months ago

Reply to Talia Perkins

Gender ideology is fact free. Your posts are embarrassingly delusional.

0 0

Talia Perkins 5 months ago

Reply to Graeme Crosby

And yet there is no gender ideology but the gender critical one, and you never seem to be able to point out anything I write which is so little as incorrect.

0 0

Graeme Crosby 5 months ago

Reply to Talia Perkins

Gender ideology is an abstraction of philosophy ergo it is not a physical reality i.e it's made up crap.

Sex is a reality.

I err'd above. You are barely a quarter wit.

0 0

Talia Perkins 5 months ago

Reply to Graeme Crosby

There is no such thing as gender ideology, but that held by you.

The "gender critical" ideology holds that gender has no physical, anatomical existence — or — that it is magickally identical to the sex of a person.

Which delusion do you have?

0 0

Talia Perkins 5 months ago

Reply to Graeme Crosby

Still wondering which delusion possesses you.

0 0

Dougie Undersub 5 months ago

I contributed to Sall's fighting fund and, if she appeals, will do so again.

I hope ardent feminists realise how much they have contributed to this debacle. Once they decided that men should not have their own spaces – Muirfield Golf Club, the Garrick – it was inevitable that men wouldn't be that bothered about defending women's spaces.

0 0

Roz Watkins 5 months ago

Reply to Dougie Undersub

There is a big difference though. Women's spaces are largely for the safety and dignity of women, and are required because of (some) men's bad behaviour. This is not the case with men's spaces, as women rarely pose a threat to them.

Thank you for sticking up for women by contributing to Sall's fighting fund.

0 0

McLovin 5 months ago

Shall we play a little game of "where's Talia"?

0 0

Mark Phillips 5 months ago

Reply to McLovin

Just a bit further up. Still DAD'S. (Dumb as Dog Sh)

And further down.

0 0

Talia Perkins 5 months ago

Reply to Mark Phillips

And if you had any facts to justify you, then you'd have a point of some sort.

0 0

Clare De Mayo 5 months ago

Reply to Talia Perkins

it seems when someone does try to submit some facts and construct an argument with you, suddenly the thread disappears. Funny that

0 0

Talia Perkins 5 months ago

Reply to Clare De Mayo

I'm about the only one here mentioning facts, the Herd here must be protected from them by the management

0 0

Clare De Mayo 5 months ago

Reply to Talia Perkins

where is our conversation about gametes and chromosomes and heart attacks? Did you delete the comment and therefore the replies? If you did, then you've not a fair player

0 0

Talia Perkins 5 months ago

Reply to Clare De Mayo

No fool, I just said The Herd protected itself.

The UnHerd is the unfair player, and for your love of hateful irrelevance and lies, so are you.

0 0

Graeme Crosby 5 months ago

Reply to Talia Perkins

Ok. Eighth wit.

0 0

Talia Perkins 5 months ago

Reply to Graeme Crosby

Still nothing relevant from you, and you think yourself a legend in your time.

You're sad.

0 0

Mark Phillips 5 months ago

Reply to Talia Perkins

'And if you had any facts to justify you'. Excellent use of gibberish.

0 0

Talia Perkins 5 months ago

Reply to Mark Phillips

The meaning is perfectly clear to anyone with English as a first language. You have no facts which justify your opinions expressed here. It is called concision, fewer words of equal meaning are better.

0 0

McLovin 5 months ago

Is anyone else worried about the world when Australia of all places embraces all this kind of thing?

0 0

Clare De Mayo 5 months ago

Reply to McLovin

It happens easily here as Australia is so anti-intellectual. Nothing gets discussed seriously. Once upon a time the ABC would attempt it, SBS (Special Broadcasting Service) might tentatively raise a topic, but it is not considered polite to seriously debate a topic in company. Most people would have no idea about the changes to legislation that Gillard introduced. Most people couldn't care less about politics, and think it's rude to talk about it.

0 0

Brett H 5 months ago

Reply to Clare De Mayo

More nonsense. It is not considered rude to talk about politics. Maybe it is among the people you know but politics is constantly being debated among others. Australia is anti-intellectual in the sense that they have an innate distrust for authority and especially for the progressive left policies and their intellectual posturing. The law does not necessarily represent the people. This decision certainly doesn't represent Australia. You know the progressive left do not represent Australia. It's difficult to know just who you represent.

0 0

Clare De Mayo 5 months ago

Reply to Brett H

Hard to unpick all that, but I'll try. Politics may be debated by some 'others' as you put it, but the public political discourse is appallingly lacking. Point out the discourse to me about trans issues in the press, TV, radio? The SBS article re this Tickle judgement closed comments after 20 mins, not before deleting around 80% of comments. I used to live in inner city Sydney, some 25 yrs or so ago, and it was more vibrant and open then. Maybe it still is there, living in regional Tas now so I don't have first hand experience. I have lived in regional NSW, Vic and Tas, and it is pretty much as I described. There are always enclaves of hopefulness, but overall I would stand by my claim that Australia is deeply anti intellectual. Compare quiz shows UK has Only Connect, University Challenge, Eggheads, Mastermind etc, we have thankfully Mastermind, but then such gems as Guy Mont's Spelling bee and the 100. If the law doesn't represent the people, then we are deeply in trouble. If this decision doesn't represent Australia, where is the wave of push back? I am aware of only one sitting politician Senator Clare Chandler who is publically speaking critically re trans issues. Who do I represent? My own informed opinion. For clarity, I used to be progressive left, but moved away from that position because of issues such as the trans issue, and the fact there was no room for dissent. But I don't see much dissent anywhere else, and I certainly don't think someone like Pauline Hanson provides any sort of a reasoned or intelligent alternative. Who do you represent Brett?

0 0

Brett H 5 months ago

Reply to Clare De Mayo

Skye and The Australian are vigorous in their coverage of trans/women's issues and very much for women's' rights, probably more than any of the media. You may not think much of Pauline Hanson but she most definitely speaks loudly for womens rights.

I represent the people you believe don't exist in large numbers in Australia.

0 0

Clare De Mayo 5 months ago

Reply to Brett H

I take your point about SOME Skye commentators, I find sorting through the dross is quite difficult though. Similar problems with The Australian. Pauline does not speak for me or virtually any woman I know. She is an ignorant virago in my estimation and if that is who you think of as a beacon of intellectualism and women's rights, then we are most certainly doomed. As for who you represent, what a pisstake. At least own your persuasion and be honest. A circular affirmation with no facts is pretty weak really.

0 0

Brett H 5 months ago

Reply to Clare De Mayo

What sort of facts would you like?

0 0

Clare De Mayo 5 months ago

Reply to Brett H

Who are these people for whom you speak? Do they care about this judgement, will they do anything about it? What are your own political leanings and how do you form the opinions that you hold, is it just a via negativa, or are you actually upholding certain principles?

0 0

Brett H 5 months ago

Reply to Clare De Mayo

"Who are these people for whom you speak?"

Kim, Rob, Karen, Marc, Ellen, Casey, Mitch, Josh, Dan, Aiden, Merv, Kev, Julie, Di, Lynn, Bob, Al. Haven't spoken to them all since the announcement but pretty sure they'd be against it. Not sure what they can do except write to local member and change the government. Politically right of centre but once a Labour supporter. How do i form my opinions: by staying informed. Do I uphold certain principles: yes. Particularly not bending the words of others or exaggerating and distorting facts to put down others.

0 0

Clare De Mayo 5 months ago

Reply to Brett H

Listing a whole lot of christian names is pretty meaningless, and it would be great if you could answer without having a dig.

0 0

Brett H 5 months ago

Reply to Clare De Mayo

Well it's a pretty ridiculous question, isn't it?

0 0

Clare De Mayo 5 months ago

Reply to Brett H

Your question first to me 'it is difficult to know just who you represent'

0 0

Brett H 5 months ago

Reply to Clare De Mayo

Yes, the comment was "it's difficult", not who are they? I didn't ask who you represent, just that you seem to be caught between progressive policies and what you might regard as 'the right' who support the rights of women against trans agendas. These people you regard as 'anti-intellectual' and mired in misogyny are the people who support women in this conflict. They do not support the the left and their support of trans people over women. These are the very people who support your position but you are against them. That's the difficulty I have, in understanding who you represent in your comments, the progressives or the right.

0 0

Clare De Mayo 5 months ago

Reply to Brett H

I wish I could comfortable belonging to the 'tribe' as you point out, but the left has abandoned me, not the other way round. I think there are many ex lefties who have had to call time given the trans issues, and yes, it does put us in a difficult place... I think historically I fall close to the left leaning libertarians, if you're really looking for a label. But I'm certainly not going to flip and suddenly embrace all things right wing because I agree with some of them on this issue.

0 0

Brett H 5 months ago

Reply to Clare De Mayo

No, you don't have to flip, just accept that their position on trans women is the same as you and they they represent a lot of Australians.

0 0

Clare De Mayo 5 months ago

Reply to Brett H

Brett, when did I not accept that? I am very appreciative of this space and the ability to converse on this subject. I never said that it was right wingers who were misogynistic or anti intellectual. I said that the Australian culture was. If I hated right wingers or thought I had nothing to learn from them or indeed any different opinion, why would I be reading and contributing on Unherd? I don't know where you're coming from: I agree with commenters here and I don't really care if they are right wingers or not... I don't really think in those terms anymore. I think more in terms of whether someone thinks for themselves and doesn't just stay in their club. I haven't much time for people who stay in the echo chamber and only talk with people the same as them. Do you still read left wing publications? Do you talk to left wingers? I am really bemused as to why you have some issue with my position.

0 0

Clare De Mayo 5 months ago

Reply to Brett H

And you're very wrong if you think that I think all misogynists are right wing and anti intellectual. Many left wing intellectuals are very misogynistic.

0 0

Graeme Crosby 5 months ago

Reply to Clare De Mayo

Your enemy's enemy is your friend.

You can find allies for individual situations and still disagree on other issues. It's ok to do that.

0 0

Janet G 5 months ago

Reply to Clare De Mayo

The ABC actively endorses gender ideology because it goes along to the ACON Australian Workplace Equity Index, for which it pays to belong with money that comes from our taxes. https://www.womenscooee.org/2021/10/23/how-our-abc-is-failing-women/

0 0

Brett H 5 months ago

Reply to Janet G

Maybe just donate to Giggle crowdfunding.

0 0

Janet G 5 months ago

Reply to Brett H

I have done so and I will again.

0 0

Brett H 5 months ago

Reply to Janet G

I wasn't being sarcastic. I just meant that it would have a more immediate benefit.

0 0

Janet G 5 months ago

Reply to Brett H

Thanks for that Brett.

0 0

Brett H 5 months ago

Reply to McLovin

Australia does not embrace this sort of thing.

0 0

Clare De Mayo 5 months ago

Reply to Brett H

So this is your response to the federal court 'embracing this sort of thing'. You either deny it, or say it doesn't matter, noone really believes this, 'Australia is not its laws', . Sure is if you fall foul of them. This HAS happened, it effects ALL women and their right to have separate spaces. This is a highly misogynistic decision. I'll agree with you when I see push back from the majority of Australians you claim to represent. Exactly which Australia do you refer to?

0 0

Brett H 5 months ago

Reply to Clare De Mayo

From what I can see among the comments here most people are aghast at thus decision, I don't know who is and who isn't Australian here, but it's an odd assumption to assume people in Australia don't also feel this way.

I do not believe the people of Australia in general embrace this decision. What are you accusing me of denying? I haven't said it doesn't matter. What I initially said was that I don't agree with your statement "the wider culture supports our erasure."

The people of Australia are not it's laws. They are subject to the laws legislated in parliament. Right now we have a government voted in by 1/3 of voters. Hardly the people of Australia. I said the law does not necessarily represent the people, not, as you quoted "Australia is not its laws".

0 0

Clare De Mayo 5 months ago

Reply to Brett H

But if these majority of Australians are not prepared to do anything about this, then does it matter that they don't agree with it? The old 'She'll be right mate'. And I'm not assuming Australians don't feel the same as these commentators...I have READ the comments on other media outlets and there are hundreds of supportive TWAW commentators from Australia, applauding the decision

0 0

Brett H 5 months ago

Reply to Clare De Mayo

What do you suggest they do?

0 0

Clare De Mayo 5 months ago

Reply to Brett H

Don't be the silent majority

0 0

Brett H 5 months ago

Reply to Clare De Mayo

So you think they are a majority? How should they go about that?

0 0

Clare De Mayo 5 months ago

Reply to Brett H

oh for goodness sake, stop playing games Brett. YOU are the one who has maintained that the vast majority of Australians don't go in for this, not me. And I am not going to fall into your trap of giving a recipe list for activism just for you to shoot me down for doing so. One concession, support Sal's crowd funder gigglecrowdfund.com

0 0

Janet G 5 months ago

Reply to Clare De Mayo

Sign the petition: https://www.womenforwomensrights.org/open-letter-un-women/sign-the-letter/

0 0

Brett H 5 months ago

Reply to Janet G

Maybe just donate to Giggle crowdfunding,

0 0

Talia Perkins 5 months ago

> "Women no longer exist as a separate category in Australia."

What a confabulatory, hysterical imbecile you are!

> "yet the outcome confirms that "gender identity" now takes precedence over sex."

Good! If needs be, it can be defined far more accurately than sex can. 1 in 50 people have some — to the medical eye — variance in their externally visible sexual dimorphism. Fully 1 in 500 can not be nailed down in only one categorization, in one way or another out of chromosomes, alleles, phenotype. Gender identity isn't even in question but in 1 person out of 15,000 — and after clinical evaluation, only 1 in 45,000 has a gender identity which is in any way indeterminate.

You do want to use the most accurate measure, don't you, Smith?

Or, only what measure suits your bigotry?

0 0

Mark Phillips 5 months ago

Reply to Talia Perkins

Dribbler!

0 0

Clare De Mayo 5 months ago

Reply to Talia Perkins

Show me the third gamete Tania and then we can have a discussion. You are just talking about biological variations within the two sexes, not a third sex, or a 'continuum'. I guarantee you, if you have a heart attack and end up in emergency, the doctor will treat you according to your biological sex, not your 'gender identity', as the female body is different to the male body cardiologically. We don't react to the drugs in the same way. But sit there and demand that there is no binary and you identify as whatever while they are trying to treat you, if you want to take risk.

0 0

Talia Perkins 5 months ago

Reply to Clare De Mayo

"Show me the third gamete"

Why do you pretend I have proposed any such thing exists or has relevance? You have already reduced yourself to fighting the strawman you've stuffed.

"I guarantee you, if you have a heart attack and end up in emergency, the doctor will treat you according to your biological sex, not your 'gender identity', as the female body is different to the male body cardiologically."

They damn well better treat me according to my biochemistry, which is quite typically female.

0 0

Clare De Mayo 3 months ago

Reply to Talia Perkins

Because there are only two gametes (sperm or eggs) no matter if there are variations in chromosomes, alleles or phenotypes. Gametes are totally binary, as is biological sex, albeit with some variations. You are either male or female. And you are the one who argued (upthread here "So is biological gender (real). It is located between the ears in a person, not between the legs as is the sex — and unlike what is between the legs, is supposed to be in charge and take precedence") that biological gender (your made up term, certainly not mine) should take precedence over biological sex.

0 0

Talia Perkins 3 months ago

Reply to Clare De Mayo

> you are the one who argued (upthread here "So is biological gender (real). It is located between the ears in a person, not between the legs as is the sex — and unlike what is between the legs, is supposed to be in charge and take precedence") that biological gender (your made up term, certainly not mine) should take precedence over biological sex.

Yes, and what I said there is real and relevant. Gametes are not.

0 0

Clare De Mayo 3 months ago

Reply to Talia Perkins

well good luck with human reproduction if gametes are not real or relevant.

0 0

Talia Perkins 3 months ago

Reply to Clare De Mayo

That has nothing to do with it. Whether someone is a man or a woman (or in far from few cultures, neither alone, or some other) is what we are talking about — and that status or the other (or a third, or fourth) has a very long history of being accorded on the basis of assumption, or preference, or appearance — not gametes. Gametes were never seen, ever, until there was a good microscope, so stop pretending that is what this is about, even in antiquity or the near modern era.

Get this through your thick goddamn skull, human reproduction is not at issue here. Most of human history saw half of all people ostensibly male people never successfully reproducing, and a good 1 in 10 people thought female never reproduced, out of who made it into reproductive years of age.

And here you are stupidly confabulating that something affecting only 1 in 150 is some problem, or even has anything to do with it.

The only thing this has to do with, with respect to youth is, why do you want to force any boys to have breasts and periods, and why do you want to force any girls to have beards and deep voices? That all banning gender affirming care will do, and it will do that to at least 99 for the sake of any 1 saved from experiencing that with any regret.

And at that, why do you expect to have any respect at all, when that is all this boils down to?

0 0

UnHerd Reader 3 months ago

Reply to Talia Perkins

It's not about reproduction in itself, it's about our evolution as a sexually dimorphic species (along with other mammals).

Do you think that sex is a spectrum, and gender identity is specific and determined, in all mammals or only in humans?

0 0

Talia Perkins 5 months ago

Reply to UnHerd Reader

Sex plainly is a spectrum in all mammals. Are you one of the morons who thinks spectrum implies or requires all possible results to occur equally commonly? It is only the recognition that intermediate results occur between the poles of a bimodal distribution, and so for every sexually dimorphic characteristic.

And it is about evolution — evolution does not require what you feel to be perfection in every individual result. It only results from whatever mix of genes is in common circulation in a population, moving to wards an equilibrium of successful maximized reproduction which result it never reaches, because circumstances change.

0 0

Brett H 5 months ago

Reply to Talia Perkins

"why do you want to force any boys to have breasts and periods"

When you say boys, what do you mean?

0 0

Talia Perkins 5 months ago

Reply to Brett H

As is obvious to the honest reading what I have written here, a boy is someone whose gender has developed 50% plus any in a masculine manner.

0 0

Brett H 5 months ago

Reply to Talia Perkins

How is that measured?

0 0

Talia Perkins 5 months ago

Reply to Brett H

Against the criteria for medical transition of apparent gender being recommended, per DSM5/WPATH standards of care.

The success of which demonstrate no matter whether you are an gender critical ideologue because you think gender has no physical existence or is always identical to the sex of a person, you are wrong.

0 0

Brett H 5 months ago

Reply to Talia Perkins

So you're saying it's a scientific based criteria and not the person deciding their identity on how they feel?

0 0

Talia Perkins 5 months ago

Reply to Brett H

It is your delusion the idea that someone must say they are transgender and want to transition for it to be recommended, is a requirement which invalidates the recommendation.

You have no factual excuse to claim what you imply.

0 0

Brett H 5 months ago

Reply to Talia Perkins

I'm not claiming anything, I'm asking for clarification. How is a person's gender decided?

0 0

Talia Perkins 5 months ago

Reply to Brett H

"I'm not claiming anything," <– Oh yes you are, you claim much — no little of which is ridiculous — and never prove any of it.

"How is a person's gender decided?" <– I have already said how.

0 0

Graeme Crosby 5 months ago

Reply to Talia Perkins

When they treat you they'll need to take into account quetiapine 100mg tds.

0 0

Brett H 5 months ago

Reply to Talia Perkins

If you're going to use these figures to bolster your position then you need to supply sources, otherwise no one's going to take your stats seriously. If I said "fully 1 in 50,000 cannot be nailed down..." you would ask me to prove it, which would be reasonable. So why don't you cite your sources?

0 0

Talia Perkins 5 months ago

Reply to Brett H

I already have and you have already ignored them. And in the vein of you deserving no respect, because of what you ignore.

***

You are trying to make this about me personally, and not what the facts are. It is really only about the facts.

The facts are there are no facts justifying what the gender critical say they want. What they say they want is for 99 boys and girls to be forced to grow up with respectively breasts and periods, and, beards and deep voices. That is the consequence of what they say they want — they either want that, or, they are ignorant of reality, or, they are evil, or, they are insane, or, some combination of the three.

It does not really matter which. What matters is that facts prove that consequence, and that that consequence is needless and unacceptable.

No Brett, the problem is that at the best you think all points of view are inherently equivalently justified, and never mind the facts behind them. There are no facts justifying the gender critical ideology.

"But you still haven't explained what those you consider not to be emotionally involved, you know, the less than "most", what their point if view is based on. It can't be emotion, because that's for the "most". This is not sophistry. I'm asking you to look at this logically, not emotionally." <– No sophist, you are not asking me to look at it logically.

"Disgust, fear, shame, simple bigoted hatred", all of those have been reasons why people do awful things to other people for millennia. So is even simply picking a side and enjoying seeing it take power. It is not logical for you to claim or imply otherwise.

Whatever their motivation, what facts do you pretend justifies the gender critical ideology?

0 0

Brett H 5 months ago

Reply to Talia Perkins

I haven't used facts about gender critical ideology, or claimed anything. I asked why you don't cite the source of the stats you use.

0 0

Talia Perkins 5 months ago

Reply to Brett H

You have lied to imply I have not cited my sources. I have over and over.

You are evading the question because you love abusing transgender children and don't dare let yourself be pinned down about any of the stupidities the gender critical believe to justify their child abuse.

0 0

Brett H 5 months ago

Reply to Talia Perkins

What's your source for this:

"1 in 50 people have some — to the medical eye — variance in their externally visible sexual dimorphism."

0 0

Talia Perkins 5 months ago

Reply to Brett H

Sexing the Body, Fausto-Sterling, 2000.

And you are still evading the question.

0 0

Brett H 5 months ago

Reply to Talia Perkins

Is this the question:

"what facts do you pretend justifies the gender critical ideology?"

First of all all define what you mean by "gender critical ideology".

0 0

Brett H 5 months ago

Reply to Talia Perkins

There is something here that you either ignore or fail to understand. Citing a book is not good enough. Anne Fausto-Stirling did not do the research. She took it from its original source. That is what you have to cite. An author like Fausto-Sterling uses research to serve and bolster her theory. That's not uncommon, which is why people insist of all reference in a book being cited i.e. it's origins, it's source.

0 0

Talia Perkins 5 months ago

Reply to Brett H

No I am citing a compilation, which is perfectly fine. Anything I cite you would need to look up, quit dodging. My citing her book is no different from citing an encyclopedia entry which of course has its own sources.

Grow up.

0 0

Brett H 5 months ago

Reply to Talia Perkins

This is my last comment here because it's not the place for long drawn out conversations and it's not the best form for something like this subject.

Clearly there are intersex people. Clearly their physical form may change as they develop. But clearly we know what a male and female are. Anything else is intersex. You have made some fair points in what you've said. But you have also muddled the waters. As I said this is not the place for further discussion.

0 0

Talia Perkins 5 months ago

Reply to Brett H

"But clearly we know what a male and female are." <– Dunning-Kruger on your part. What is clear is that male and female are two differing and not exclusive directions in which a human being may sexually dimorphize for any given sexually dimorphic characteristic.

In as much as a transgender person has some sexually dimorphic anatomy developing in one direction and other in another or quite indeterminately, we are intersex.

And this is a fine place for further discussion, that question you keep ducking.

Do you think gender does not physically exist, or, do you think it is always magickally identical to the sex of a person?

0 0

UnHerd Reader 5 months ago

Reply to Talia Perkins

What about the "gender journey"? Do all these people have a determinate gender identity that morphs over time?

What about detransitioners?

What about all the people who don't have any gender identity?

0 0

Talia Perkins 5 months ago

Reply to UnHerd Reader

"What about the "gender journey"?" <– What about it? It is not for you to set their course.

"Do all these people have a determinate gender identity that morphs over time?" <– Apparently, however long they need to perceive it with assurance.

"What about detransitioners?" <– What about them? They number 1 in 100 or fewer out of whom transitions medically per WPATH standards of care. Show a way to lower their number which does not hurt that 99. Go ahead.

"What about all the people who don't have any gender identity?" <– Everyone has a gender identity, insofar as no one has been found with the involved anatomy being absent. It does not matter if you don't like that.

0 0

Brett H 5 months ago

Reply to Talia Perkins

"They number 1 in 100 or fewer out of whom transitions medically per WPATH standards of care."

Cite the source or we'll assume you're making it up.

0 0

Talia Perkins 5 months ago

Reply to Brett H

I already have cited it from multiple sources, you have already ignored it.

Here is one.

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8751773/

0 0

Brett H 5 months ago

Reply to Talia Perkins

"The extremely low rates are based on studies with flaws which compromise the reliability of their reported rates, or refer to a population with very different characteristics from the large numbers of young people contemplating or undergoing medical intervention today."

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10322769/

0 0

Talia Perkins 5 months ago

Reply to Brett H

So some claim, however, they produce no evidence of it in the statement you cite. Essentially, they throw up a lot of crap and hope some sticks.

Only evidence counts and they have none.

0 0

Brett H 5 months ago

Reply to Talia Perkins

Some reading for you.

Cohn J. The Detransition Rate Is Unknown. Arch Sex Behav. 2023 Jul;52(5):1937-1952. doi: 10.1007/s10508-023-02623-5. Epub 2023 Jun 12. PMID: 37308601; PMCID: PMC10322769.

0 0

Talia Perkins 5 months ago

Reply to Brett H

I am well aware Cohn never manages to actually find any reason to suspect the detranstion rate is higher than now thought — and they take the tack of throwing as much at the wall as they can without ever producing anything that sticks. Concern with no basis in measurement is not really concerning.

0 0

Brett H 5 months ago

Reply to Talia Perkins

From your cited ref.

"However, there is high subjectivity in the assessment of regret and lack of standardized questionnaires, which highlight the importance of developing validated questionnaires in this population."

0 0

Talia Perkins 5 months ago

Reply to Brett H

Which in no way changes the numbers or their significance. Asked if they regret the transition, less than 1% say they do. That it would be preferable for all 7900+ to have been asked the identical question does not move the needle.

0 0

Brett H 5 months ago

Reply to Talia Perkins

The figures may suggest a low regret rate, but no one is as adamant as you are that they are reliable.

0 0

Talia Perkins 5 months ago

Reply to Brett H

On the contrary, nearly everyone in the field is adamant they are reliable — it is only you "gender critical" ideologues who claim otherwise on the basis of nothing but that you prefer the number be far higher.

For that matter, the quite paltry number of people who choose to sue over recommended medical transition, sayinng it was wrongly recommended, is so small that it by itself works to very well to confirm the <1% figure.

0 0

Brett H 5 months ago

Reply to Talia Perkins

The concern about the reliability of figures comes from your own reference. You said this "in no way changes the numbers or their significance." It certainly changes the significance if the researchers themselves made such a statement as I cited.

0 0

Talia Perkins 5 months ago

Reply to Brett H

No, it does not. There is no actual concern expressed there, the statistics do not support any such concern. What you are claiming is concern is usual scietific boilerplate which. And of course, reality with respect to lawsuits files confirms the conclusions quite nicely as being an upper bound — and also the utter inability of your side of this argument to develop contrary numbers leads to laughter from statisticians.

0 0

Kristy R 5 months ago

Reply to Talia Perkins

na

0 0

Ardath Blauvelt 5 months ago

When is someone going to ask the obvious question: what exactly does someone identify as, when identifying as a woman?

You're only a woman if you identify as one, yet there is no acceptable definition for that identification. Why did that work?

How does that work?

0 0

Michael Clarke 5 months ago

Truly shocking. How courts can act in this way, going against millennia of common sense, biology and legal jurisprudence, is beyond belief.

0 0

Punksta . 5 months ago

Reply to Michael Clarke

Welcome to wokery.

0 0

Jonathan A Gallant 5 months ago

I look forward to a progressive Australian judge ruling that species is not a biological concept, but is just a formality which is changeable at any time. I personally was assigned at birth to H. sapiens, but feel inwardly to be a Himalayan snow leopard, except on weekends when I identify as a rhododendron.

0 0

Clare De Mayo 5 months ago

Reply to Jonathan A Gallant

Apparently there is a child in northern Tasmania who identifies as a cat and the teachers have been directed to affirm this child's choice: toileting in kitty litter, wearing a tail, going on all fours. I have been told this by a member of the local council... I kid you not

0 0

Arkadian Arkadian 5 months ago

I listened to the judgment live. That line stood out for me too, but also when the judge said that terms like "cisgender" are useful, even though Grover refuses to use them. I am sure the judge applied the law as it stands correctly, but he (?) could have made a bit of an effort not to look captured.

Seemingly, Grover expected to lose (or maybe she is putting on a brave face) and the real battle starts now trying to get the law changed.

0 0

S Wilkinson 5 months ago

Reply to Arkadian Arkadian

Sall always expected to lose at this stage because the legislation is the problem. It will now be subjected to more rigourous scrutiny in the High Court which may ultimately lead to legislative amendment.

0 0

UnHerd Reader 5 months ago

Well, Miss Tickle is certainly a lovely woman. I wonder if she can share her skincare and hair products?

0 0

Ian_S 5 months ago

Reply to UnHerd Reader

Yeah "her" photo above shows she's a stunner, alright. Not at all like a middle-aged, prematurely greying square-faced heavy-set trucker bloke who has made a desultory attempt at femininity by growing his hair long.

0 0

UnHerd Reader 5 months ago

What does a man mean when he says he identifies as a woman or he feels like a woman, as I have heard said? I am a woman and I know how I feel but I cannot possibly know how other women feel. Maybe if I felt like my sister I would think I was a giraffe. It is not possible to discern other people's subjective feelings and therefore it is meaningless if not mendacious to claim to feel like another, let alone to try to base one's identity on such a matchup of feelings.

I know there is a school of jurisprudence, famously expressed here in the US by Mr. Justice Oliver Wendell Holmes, Jr., which holds that the law is what the judge says it is. Apparently this has now morphed to the facts are what the judge says they are. Of course this is disastrous for the rule of law and therefore all our freedoms.This is only the result of the decades long war on objective science and objective morality. If I get to decide my own reality, then all social cohesion disintegrates. That is what we are seeing.

0 0

Clare De Mayo 5 months ago

Reply to UnHerd Reader

yes, Philosophically, it is a nonsense to say you feel like someone or something else, as it is impossible to step into their being and know how they feel.

0 0

Janet G 5 months ago

Reply to UnHerd Reader

An expert on the Australian constitution unpacks the law. Complicated indeed.

div > p:nth-of-type(2) > a">https://www.youtube.com/watch?v=tuwHtX6rAj8&t=2s

0 0

UnHerd Reader 5 months ago

Reply to UnHerd Reader

Delusional obsessions are not amenable to the sort rational process you are employing.

0 0

Punksta . 5 months ago

A free / liberal society includes freedom of association. Which also means disassocation. Anyone should be free to associate or disassociate with whoever they please, for whatever reason they choose.

The denial of this right is (woke) fascism.

0 0

Ian_S 5 months ago

A truly Raygun-level mix of incompetence and pompous self-regard that only the Australian version of the professional-managerial middle class can achieve.

0 0

Santiago Excilio 5 months ago

The world has gone mad, but one day sanity will return.

There is saying from somewhere (I cannot remember where) that goes: "There are some people who cannot be persuaded by any argument, only reality will prove them wrong."

0 0

Obadiah B Long 5 months ago

The Commissioner's statement refers to "trans people." Fine. Trans is a thing now; just don't say they are men or women! And therefore, don't admit them to spaces reserved for men, or women.

0 0

Talia Perkins 5 months ago

Reply to Obadiah B Long

They are men and women who are transgender, and the judge said nothing other.

"Fine. Trans is a thing now" <– Only for a few hundred thousand years at least.

I realize you are slow. I should be more generous.

0 0

Janet G 5 months ago

Reply to Talia Perkins

When I was young we called men who presented like women "transsexuals" or "transvestites". No-one, including the men, believed they were women. The notion that they are women is very new.

0 0

Talia Perkins 5 months ago

Reply to Janet G

"When I was young we called men who presented like women "transsexuals" or "transvestites""

Stupidly so, you did so, yes.

"No-one, including the men, believed they were women."

Bullshit. That has been a constant in human history in all cultures in all societies throughout millenia — the question is whether or how people who felt so were abused or suppressed or not, or given a place in society.

0 0

Janet G 5 months ago

Reply to Talia Perkins

If I was stupid so were the men who used those terms to describe themselves.

0 0

Talia Perkins 5 months ago

Reply to Janet G

Not at all — you have the obligation to manage 20/20 hindsight. They have no more benefit of facts now known, then you have any excuse for ignoring them.

0 0

Janet G 5 months ago

Reply to Talia Perkins

Seems this millenia-long phenomenon was hidden from everyone . . . When did you discover it Talia?

0 0

Talia Perkins 5 months ago

Reply to Janet G

It has not been hidden at all. You have no excuse to claim it has been.

0 0

UnHerd Reader 5 months ago

Reply to Talia Perkins

Did you know that "lady boys" in Thailand laugh at they idea that they should identify as women? According to Amanda Kovattana, a Thai lesbian and "Tom", Thai culture hasn't had the same imposition of gender roles as we've had in the west and hasn't the same notion of gender identity that grew partly out of the strictly imposed gender roles over the decades.

In Thailand, gender nonconforming people have been able to express their nonconformity. They have a different way to explain the situation, not gender identity, but through past lives : e.g. a girl who acted like a boy was a boy in her past life. And she's allowed to be a tomboy in her current life. You can look up Amanda Kovattana's video interviews on youtube.

The "trans women are women" and "sex is a spectrum" are very Western ideas stemming from Judith Butler's theories in the 1990s.

Gender diversity in nonwestern contexts can't be crammed into this framework. Doing that is a new form of colonialism.

0 0

UnHerd Reader 5 months ago

Reply to Talia Perkins

Seems like my comment got deleted.

Did you know that "lady boys" in Thailand laugh at they idea that they should identify as women? According to Amanda Kovattana, a Thai lesbian and "Tom", Thailand hasn't had the issues of strictly imposed gender roles that we've had in the west over decades, which contributed to the idea of a gender identity that doesn't match a person's biological sex.

In Thailand, they have a different way of explaining gender nonconformity: through past lives rather than the gendered soul that we now have in the west. As a third gender person Amanda was accepted by her family as a girl who had been a boy in her past life.

You can see her interviewed in several videos on youtube.

The "trans women are women" and "sex is a spectrum" are very Western ideas stemming from Judith Butler in the 1990s. Gender diversity in nonwestern contexts can't be crammed into this framework. Doing that is a new form of colonialism.

Talia Perkins 5 months ago

Reply to UnHerd Reader

"Did you know that "lady boys" in Thailand laugh at they idea that they should identify as women?" <– Did you know those who say that do not speak for all the "ladyboys" in Thailand, and, it does not matter how they say they feel per the nuances of their language and culture?

It does not matter what cultural differences there are in accommodating biology, the biology is the same.

Your post does point out you are obsessed with feelings, where I care about relevant facts.

0 0

UnHerd Reader 5 months ago

Reply to Talia Perkins

That is the funniest bit of trolling yet.

0 0

Talia Perkins 5 months ago

Reply to UnHerd Reader

Why no, you still can't make a substantive counterargument to the plain truth.

0 0

UnHerd Reader 5 months ago

Reply to Talia Perkins

Talia is an entertaining troll.

0 0

Talia Perkins 5 months ago

Reply to UnHerd Reader

You are unable to a make a substantive counterargument.

0 0

2 plus 2 equals 4 5 months ago

It is a revolting judgement but not surprising because destruction of women's rights is the only logical outcome of the law as it stands.

If you cannot define "woman" in such a way that it excludes men then all women's rights are meaningless.

0 0

UnHerd Reader 5 months ago

Reply to 2 plus 2 equals 4

That is actually profound. Thank you.

0 0

Adrian Smith 5 months ago

In all these things it is worth reading the actual judgment and not what various commentators say about it (especially if it is the BBC).

Here it is:
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0960

This is the important part which absolutely does not say what this article (judge rules sex is changeable) and other articles say – shame on you unherd for not doing a better job of fact checking.

(a) Ms Tickle's claim of direct discrimination fails, which was not really the case that she brought;

(b) Ms Tickle's claim of indirect discrimination succeeds, being the substance of the case that she did bring based on a condition being imposed for the use of the Giggle App that she was required by that condition to have the appearance of a cisgender woman;

(c) Ms Tickle is entitled to a declaration of contravention for indirect identity discrimination;

(d) Ms Tickle's claim for general damages succeeds, but her claim for separate and additional aggravated damages fails;

(e) the respondents must pay Ms Tickle compensation in the sum of $10,000;

(f) Ms Tickle's claim for an apology fails because it is futile and inappropriate to require an inevitably insincere apology to be made; and

(g) the respondents must pay Ms Tickle's costs;

(h) the costs in respect of the constitutional validity and statutory construction issues is limited to $50,000, being the cap imposed in respect of those issues by order 3 made on 1 June 2023,

In short Tickle has been directly discriminated against because he is a man – that is ok, but has also been indirectly discriminated (disadvantaged) because he does not look like a woman ie someone who passed better would not have been kicked out. It is notable that the Judge has not ordered Giggle to accept him, they don't even need to apologise.

0 0

Janet G 5 months ago

Reply to Adrian Smith

"required by that condition to have the appearance of a cisgender woman". Sall Grover would never have used the term "cisgender". The requirement was that members be female and screening was done by photograph. Why didn't the judge order Giggle to accept Tickle? Giggle is no longer operating. Tickle's suing killed the site.

0 0

Katalin Kish 5 months ago

One of the outcomes of this judgement means some **Muslim women in Australia will miss out on medical care, because no one can guarantee medical practitioners being biological females.** The consequences of this will be taboo, like the consequences of forced marriage, child-rape, FGM & polygamy already are. In the name of Diversity, Inclusivity & Equity!

0 0

Talia Perkins 5 months ago

Reply to Katalin Kish

Their own bigotries are their responsibility, not cover for yours.

0 0

UnHerd Reader 5 months ago

The anti-scientific clownshow distraction of gender insanity has allowed the emerging Western police state to emerge and degrade our culture and make us all prisoners.

0 0

Talia Perkins 5 months ago

Reply to UnHerd Reader

The unscientific are you gender critical sorts. Which delusion is yours? That gender has no physical existence? Or that it is magickally identical always to the sex of a person?

0 0

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

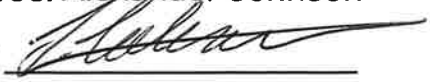
(Respondent)

ANNEXURE SHEET

The following 11 pages comprise the document referred to as Annexure KD-31 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

Tickle v Giggle and the principle of legality

September 1, 2024September 2, 2024 8 Minutes

Some questionable claims have been made recently about gender, sex, what it means to be a woman, and women's rights. But one statement from Justice Bromwich in the Tickle v Giggle case really takes the biscuit.

Set aside, if you can, Justice Bromwich's declaration (https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0960) in the Federal Court that "on its ordinary meaning, sex is changeable" and consider here his claims around the "overt and deliberate" intention of the Australian Federal Parliament in 2013 to amend the *Sex Discrimination Act 1984* to redefine sex. The logical consequence of this apparent intention is that women in Australia must now accept transgender women into their specifically female spaces and services.

But the evidence in Hansard and other contemporary records just isn't there.

Read our full text with detailed footnotes (https://womensactionall.org/wp-content/uploads/2024/09/tickle-v-giggle-opinion-piece-02-sep-24-sda.pdf)

Nothing was said in the relevant Parliamentary debates about redefining 'sex' or 'woman' or about women's rights, while the now famous Explanatory Memorandum (EM) to the Act notably excluded "special measures" – that is measures that previously allowed for female services and spaces – from the 2013 changes.

It is well worth remembering that the Australian High Court has upheld the 'principle of legality' that courts must not interpret legislation as diminishing rights, imposing new burdens, or altering the common law unless the legislation does so expressly in "unmistakable and unambiguous language." As the High Court has previously (https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2004/40.html) explained: this presumption is not merely "a commonsense guide to what a Parliament in a liberal democracy is likely to have intended," but "an aspect of the rule of law."

These are complex matters but not beyond the capacity of the Federal Court, and the Australian Human Rights Commission (AHRC), which advised (https://www.fedcourt.gov.au/__data/assets/pdf_file/0006/112299/Submission-of-the-Australian-Human-Rights-Commission.pdf) the Court, to understand. Nor should it be beyond their comprehension that the Actallows for both the protection of transgender people from discrimination *and* the maintenance of female only spaces – including in cyberspace, where the Tickle v Giggle matter was centred.

Had he and the AHRC examined the historical context more carefully, the Court would not have come to this egregious ruling that, left unchallenged, will have far reaching consequences for Australian women.

The Australian Parliament enacted the *Sex Discrimination Act* (https://www.legislation.gov.au/C2004A02868/latest/versions) in 1984 to give meaning to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Its purpose was both to prohibit discrimination against women in defined areas such as employment and education, and to authorise 'special measures' to promote gender equality. The Act included in its interpretation section a definition of woman as "member of the female sex, irrespective of age."

Parliament has since amended the Act, including in 1995 to clarify and encourage the use of 'special measures.' This has specific implications for Tickle v Giggle. As then Attorney General Michael Lavarch explained (https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1995-06-28/toc_pdf/H%201995-06-28.pdf;fileType=application/pdf#search=%22chamber/hansardr/1995-06-28/0013%22) at the time, the 1995 amendments were to ensure that 'special measures' were "not to be treated as a form of discrimination, but to be understood as an expression of equality."

In 1996, the Human Rights and Equal Opportunities Commissions (HREOC), the precursor to the AHRC, noted (https://humanrights.gov.au/our-work/legal/1996-guidelines-special-measures-under-sex-discrimination-act-1984-0#intro) that these amendments were specifically designed to "to save initiatives to promote equality from attack on the ground of discrimination." Its policy guidelines on special measures initiatives included examples of health and legal services run by women, for women – services to meet women's unmet needs, including physiological needs. The Federal Court has also upheld (http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2011/861.html) the legality of permissible special measures, such as single-sex exercise classes for women.

The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5026) was introduced to Parliament in early 2013. The House of Representatives considered it in March and May and the Senate twice in June before the text passed both houses with minor amendments. The Senate Legal and Constitutional Affairs Committee received 90 submissions on the Bill, including one from the AHRC. It did not hold public hearings but sought to clarify (https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/sexdiscrimsexualorientation/submissions) some issues in writing with the Attorney General's Department.

Attorney General Dreyfus and all those who spoke to the Bill in Parliament focussed their remarks on the Bill's purpose in introducing new grounds for discrimination – on the basis of sexual orientation, gender identity, and intersex status – in the areas defined in the Act. No one mentioned the pre-existing rights of women – including special measures. And for that matter, no one discussed a possible new definition of woman.

Was this an oversight or a sleight of hand? Neither. Why? Because the Explanatory Memorandum to the Act makes clear that the introduction of the new grounds for protection against discrimination were to apply *subject to* the existing provisions in the Act for "special measures" to achieve gender equality. In fact, the EM makes this point repeatedly (https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5026_ems_1fcd9245-33ff-4b3a-81b9-7fdc7eb91b9b/upload_pdf/378454%20.pdf;fileType=application/pdf#search=%22legislation/ems/r5026_ems_1fcd9245-33ff-4b3a-81b9-7fdc7eb91b9b%22).

Asked to clarify certain aspects of the operation of the Bill by the Senate Committee, Department officials repeatedly ruled out any broader policy changes intended by the amendments beyond introducing the new grounds for protection from discrimination. The AHRC's own submission (https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Aff

airs/Completed_inquiries/2010-13/sexdiscrimsexualorientation/submissions) (Submission 9) to the Committee noted the original purpose of the Act to eliminate discrimination *and* promote substantive gender equality but noted the proposed amendments impacted the former but not the latter.

And what of the 'definition of woman'? Both Justice Bromwich's Statement of Reasons in Tickle v Giggle and the AHRC amicus brief to the court make much of the fact that the Amendment Act repealed the definition of woman from Section 4 (interpretations) of the Sex Discrimination Act and elsewhere changed references from "opposite sex" to "different sex." Both quote paragraph 18 of the Explanatory Memorandum:

> *These definitions [of man and woman] are repealed in order to ensure that man and woman are not interpreted so narrowly as to exclude for example a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA.*

According to Justice Bromwich (https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0960), the introduction of the new discrimination provisions, the change of all references to the "opposite sex" to "different sex" and the repeal of the definitions of men and women "all point forcibly to an understanding of sex, as it is deployed in the SDA, that is changeable and not necessarily binary."

But the Explanatory Memorandum's comments on repealing the definition of 'woman' must be considered in conjunction with its repeated emphasis that the introduction of the new grounds for discrimination remained subject to the Act's provisions for special measures aimed at achieving equality. This caveat was also clearly noted in the document's explanation of the new operative provisions, including where the Bill amended the Act to refer to "different sex" rather than "opposite sex."

As for pointing forcefully to an understanding that sex is changeable – there is no evidence of that in Hansard. And the notion that sex is not necessarily binary arose in the context of new provisions concerning "intersex status" but not elsewhere.

The Explanatory Memorandum also notes in the context of the repeal of the definition of man and woman, that "to the extent that these terms [man and woman] appear in the Act (and they do repeatedly) "they will take their ordinary meaning."

So what was Parliament to understand as the "ordinary meaning" of woman? In the context of certain permanent exemptions in the Act, such as for sport, the ordinary meaning of woman still clearly carried the sense of biological difference. In the context of "special measures," there is Commonwealth legislation addressing this concept, notably the *Equal Opportunities (Commonwealth Authorities) Act 1987* (https://www.legislation.gov.au/C2004A03429/latest/text) and the *Workplace Gender Equality Act 2012* (https://www.legislation.gov.au/Details/C2023C00095)both of which define 'woman' as a "member of the female sex."

Was it an oversight by officials from the Attorney General's Department not to propose amending these Acts to reflect a fluid definition of woman, especially since the 2013 Bill amended four other Acts, including the *Fair Work Act 2009* and the *Migration Act 1958*? It's possible. But a far more plausible explanation is that Parliament intended its 2013 amendments to apply solely to discrimination matters as defined in the Act and not to special measures. To assume otherwise is to suggest that Parliament had been deliberately untrue to the 1995 amendments that special measures are not to be considered a form of discrimination but rather an expression of equality.

Let's revisit Justice Bromwich's statement of reasons in Tickle v Giggle. Because he feels the 2013 changes to the Sex Discrimination Act were "overt and deliberate" and "point forcefully to an understanding of sex, as deployed by the SDA, that is changeable and not necessarily binary," he

concludes any interpretation that 'special measures' aimed at advancing substantive equality between men and women provides a "shield from gender identity discrimination" is "untenable, unworkable, and nonsensical."

Seriously? If these changes were so clearly intended to alter the application of special measures, why did the AHRC state in its submission to the Senate Committee that special measures would be unaffected? If these changes were so "overt and deliberate," why was there no commentary at the time – or even some objections – given the amendments would modify the pre-existing rights women enjoyed regarding 'special measures'?

Yet, this seemingly overt and deliberate interpretation did not occur to anyone, including many human rights lawyers – who tend to be on the ball – who made submissions on the Bill. Only two submissions noted a potential risk to women's rights: the Equality Rights Alliance cautioned (https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/sexdiscrimsexualorientation/submissions) (Submission 21) that the amendments should not diminish protections based on sex, but then concluded that "in our view, the current Bill does not decrease that protection". Women's Legal Services NSW made a similar observation (https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/sexdiscrimsexualorientation/submissions) (Submission 78).

If this were an overt and deliberate intention, where was the Office of the Status of Women within the Department of Prime Minister and Cabinet, the government's key agency responsible for advising on policies impacting women? Surely they would have understood the potential impact of the Amendments on 'special measures' aimed at achieving equality – regardless of their views on expanding the Act's discrimination prohibitions to cover sexual orientation, gender identity, and intersex status. But no. An FOI inquiry revealed the Office provided no written advice to the Prime Minister on the Bill, nor did it correspond with officials from the Attorney General's Department about it.

So what can we expect next?

At the time of writing, it's not known if the High Court will consider the case of Tickle v Giggle. If it does, here's hoping it upholds the principle of legality and rejects the notion that Parliament redefined 'sex' as a concept that is "changeable and not necessarily binary" in all circumstances. Most importantly, it must also recognise that Parliament did not intend to diminish the rights that Australian women previously enjoyed to female spaces and services, and certainly did not do so in "unmistakable and unambiguous language."

Parliament must also now revisit the Sex Discrimination Act to remove any possible ambiguity surrounding the rights of Australian women to special measures. It may be necessary to recognise the circumstances under which women are entitled to 'special measures' – in other words where discrimination is lawful to ensure equality.

The starting point must be those circumstances where women and girls are vulnerable or disadvantaged – where their human rights are at risk – because of their sex, such as in rape crisis services and prisons. It is also imperative to ensure the safety of women and girls in other circumstances – such as toilets and change rooms, and in health care. The law must also protect the freedom of association of lesbians who are vulnerable to the predations of some men who may claim a lesbian identity to gain access to lesbian spaces. It should also extend to allow women to seek safety and privacy in cyberspace.

It is more than likely some commentators will characterise this call as 'anti-trans.' It is no such thing. Laws and policies that lessen stigma and expand protections against discrimination on the basis of gender identity are welcome – including the 2013 amendments as they were intended and understood at the time.

A rational and compassionate society – and its representatives in Parliament – should be able to grasp the distinction between discrimination in areas defined by the Sex Discrimination Act and the rights afforded by the Act to women through special measures, maximising protections against the former while respecting the latter.

Read our text with detailed footnotes, below.

Tickle v Giggle, opinion piece, 02 Sep 24, SDA (https://womensactionall.org/wp-content/uploads/2024/09/tickle-v-giggle-opinion-piece-02-sep-24-sda.pdf) Download (https://womensactionall.org/wp-content/uploads/2024/09/tickle-v-giggle-opinion-piece-02-sep-24-sda.pdf)

Tickle v Giggle and the principle of legality

Some questionable claims have been made recently about gender, sex, what it means to be a woman, and women's rights. But one statement from Justice Bromwich in the Tickle v Giggle case really takes the biscuit.

Set aside, if you can, Justice Bromwich's declaration in the Federal Court that "on its ordinary meaning, sex is changeable" and consider here his claims around the "overt and deliberate" intention[1] of the Australian Federal Parliament in 2013 to amend the Sex Discrimination Act *1984* to redefine sex. The logical consequence of this apparent intention is that women in Australia must now accept transgender women into their specifically female spaces and services.

But the evidence in Hansard and other contemporary records just isn't there.

Nothing was said in the relevant Parliamentary debates about redefining 'sex' or 'woman' or about women's rights, while the now famous Explanatory Memorandum (EM) to the Act notably excluded "special measures" – that is measures that previously allowed for female services and spaces – from the 2013 changes.

It is well worth remembering that the Australian High Court has upheld the 'principle of legality' that courts must not interpret legislation as diminishing rights, imposing new burdens, or altering the common law unless the legislation does so expressly in "unmistakable and unambiguous language." As the High Court has previously explained: this presumption is not merely "a commonsense guide to what a Parliament in a liberal democracy is likely to have intended," but "an aspect of the rule of law."[2]

These are complex matters but not beyond the capacity of the Federal Court, and the Australian Human Rights Commission (AHRC), which advised the Court, to understand.[3] Nor should it be beyond their comprehension that the Act allows for both the protection of transgender people from discrimination *and* the maintenance of female only spaces – including in cyberspace, where the Tickle v Giggle matter was centred.

Had he and the AHRC examined the historical context more carefully, the Court would not have come to this egregious ruling that, left unchallenged, will have far reaching consequences for Australian women.

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[1] Federal Court of Australia, Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960, 24 August 2024, paragraph 59.

[2] Gleeson et al. in Electrolux, HCA 40; 221 CLR 309; 209 ALR 116; 78 ALJR 1231, 2 September 2004.

[3] Submissions of the Sex Discrimination Commissioner in Tickle v Giggle, 10 August 2023.

The Australian Parliament enacted the Sex Discrimination Act in 1984 to give meaning to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[4] Its purpose was both to prohibit discrimination against women in defined areas such as employment and education, and to authorise 'special measures' to promote gender equality. The Act included in its interpretation section a definition of woman as "member of the female sex, irrespective of age."

Parliament has since amended the Act, including in 1995 to clarify and encourage the use of 'special measures.' This has specific implications for Tickle v Giggle. As then Attorney General Michael Lavarch explained at the time, the 1995 amendments were to ensure that 'special measures' were "not to be treated as a form of discrimination, but to be understood as an expression of equality."[5]

In 1996, the Human Rights and Equal Opportunities Commissions (HREOC), the precursor to the AHRC, noted that these amendments were specifically designed to "to save initiatives to promote equality from attack on the ground of discrimination."[6] Its policy guidelines on special measures initiatives included examples of health and legal services run by women, for women – services to meet women's unmet needs, including physiological needs. The Federal Court has also upheld the legality of permissible special measures, such as single-sex exercise classes for women.[7]

The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 was introduced to Parliament in early 2013. The House of Representatives considered it in March and May and the Senate twice in June before the text passed both houses with minor amendments.[8] The Senate Legal and Constitutional Affairs Committee received 90 submissions on the Bill, including one from the AHRC. It did not hold public hearings but sought to clarify some issues in writing with the Attorney General's Department.[9]

Attorney General Dreyfus and all those who spoke to the Bill in Parliament focussed their remarks on the Bill's purpose in introducing new grounds for discrimination – on the basis of sexual orientation, gender identity, and intersex status – in the areas defined in the Act. No one mentioned the pre-existing rights of women – including

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[4] *Sex Discrimination Act 1984*.

[5] House of Representatives, Official Hansard, 28 June 1995, pp. 2457ff.

[6] 1996 Guidelines for special measures under the Sex Discrimination Act 1984.

[7] Walker v Cormack [2011] FCA 861, 3 August 2011.

[8] Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

[9] Senate Standing Committee on Legal and Constitutional Affairs, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Submissions Received by the Committee.

special measures. And for that matter, no one discussed a possible new definition of woman.[10]

Was this an oversight or a sleight of hand? Neither. Why? Because the Explanatory Memorandum to the Act makes clear that the introduction of the new grounds for protection against discrimination were to apply *subject to* the existing provisions in the Act for "special measures" to achieve gender equality. In fact, the EM makes this point repeatedly.[11]

Asked to clarify certain aspects of the operation of the Bill by the Senate Committee, Department officials repeatedly ruled out any broader policy changes intended by the amendments beyond introducing the new grounds for protection from discrimination. The AHRC's own submission to the Committee noted the original purpose of the Act to eliminate discrimination *and* promote substantive gender equality but noted the proposed amendments impacted the former but not the latter.[12]

And what of the 'definition of woman'? Both Justice Bromwich's Statement of Reasons in Tickle v Giggle and the AHRC amicus brief to the court make much of the fact that the Amendment Act repealed the definition of woman from Section 4 (interpretations) of the *Sex Discrimination Act* and elsewhere changed references from "opposite sex" to "different sex." Both quote paragraph 18 of the Explanatory Memorandum:

> These definitions [of man and woman] are repealed in order to ensure that man and woman are not interpreted so narrowly as to exclude for example a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA.

According to Justice Bromwich, the introduction of the new discrimination provisions, the change of all references to the "opposite sex" to "different sex" and the repeal of the definitions of men and women "all point forcibly to an understanding of sex, as it is deployed in the SDA, that is changeable and not necessarily binary."[13]

But the Explanatory Memorandum's comments on repealing the definition of 'woman' must be considered in conjunction with its repeated emphasis that the introduction of the new grounds for discrimination remained subject to the Act's provisions for

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[10] Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

[11] See, for example 32, 36, and 40.

[12] Senate Standing Committee on Legal and Constitutional Affairs, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Submissions Received by the Committee, AHRC Submission (Submission 9), April 2013.

[13] Federal Court of Australia, Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960, 24 August 2024, paragraphs 59 and 86.

special measures aimed at achieving equality. This caveat was also clearly noted in the document's explanation of the new operative provisions, including where the Bill amended the Act to refer to "different sex" rather than "opposite sex."

As for pointing forcefully to an understanding that sex is changeable – there is no evidence of that in Hansard. And the notion that sex is not necessarily binary arose in the context of new provisions concerning "intersex status" but not elsewhere.

The Explanatory Memorandum also notes in the context of the repeal of the definition of man and woman, that "to the extent that these terms [man and woman] appear in the Act (and they do repeatedly) "they will take their ordinary meaning."

So what was Parliament to understand as the "ordinary meaning" of woman? In the context of certain permanent exemptions in the Act, such as for sport, the ordinary meaning of woman still clearly carried the sense of biological difference. In the context of "special measures," there is Commonwealth legislation addressing this concept, notably the *Equal Opportunities (Commonwealth Authorities) Act 1987*[14] and the *Workplace Gender Equality Act 2012*[15] both of which define 'woman' as a "member of the female sex."

Was it an oversight by officials from the Attorney General's Department not to propose amending these Acts to reflect a fluid definition of woman, especially since the 2013 Bill amended four other Acts, including the *Fair Work Act 2009* and the *Migration Act 1958*? It's possible. But a far more plausible explanation is that Parliament intended its 2013 amendments to apply solely to discrimination matters as defined in the Act and not to special measures. To assume otherwise is to suggest that Parliament had been deliberately untrue to the 1995 amendments that special measures are not to be considered a form of discrimination but rather an expression of equality.

Let's revisit Justice Bromwich's statement of reasons in Tickle v Giggle. Because he feels the 2013 changes to the *Sex Discrimination Act* were "overt and deliberate" and "point forcefully to an understanding of sex, as deployed by the SDA, that is changeable and not necessarily binary," he concludes any interpretation that 'special measures' aimed at advancing substantive equality between men and women provides a "shield from gender identity discrimination" is "untenable, unworkable, and nonsensical."

Seriously? If these changes were so clearly intended to alter the application of special measures, why did the AHRC state in its submission to the Senate Committee that special measures would be unaffected? If these changes were so "overt and deliberate," why was there no commentary at the time – or even some

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[14] *Equal Employment Opportunity (Commonwealth Authorities) Act 1987*.

[15] *Workplace Gender Equality Act 2012*.

objections -- given the amendments would modify the pre-existing rights women enjoyed regarding 'special measures'?

Yet, this seemingly overt and deliberate interpretation did not occur to anyone, including many human rights lawyers – who tend to be on the ball – who made submissions on the Bill. Only two submissions noted a potential risk to women's rights: the Equality Rights Alliance cautioned that the amendments should not diminish protections based on sex, but then concluded that "in our view, the current Bill does not decrease that protection".[16] Women's Legal Services NSW made a similar observation.[17]

If this were an overt and deliberate intention, where was the Office of the Status of Women within the Department of Prime Minister and Cabinet, the government's key agency responsible for advising on policies impacting women? Surely they would have understood the potential impact of the Amendments on 'special measures' aimed at achieving equality – regardless of their views on expanding the Act's discrimination prohibitions to cover sexual orientation, gender identity, and intersex status. But no. The Office provided no written advice to the Prime Minister on the Bill, nor did it correspond with officials from the Attorney General's Department about it.[18]

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At the time of writing, it's not known if the High Court will consider the case of Tickle v Giggle. If it does, here's hoping it upholds the principle of legality and rejects the notion that Parliament redefined 'sex' as a concept that is "changeable and not necessarily non-binary" in all circumstances. Most importantly, it must also recognise that Parliament did not intend to diminish the rights that Australian women previously enjoyed to female spaces and services, and certainly did not do so in "unmistakable and unambiguous language."

Parliament must also now revisit the *Sex Discrimination Act* to remove any possible ambiguity surrounding the rights of Australian women to special measures. It may be necessary to recognise the circumstances under which women are entitled to 'special measures' – in other words where discrimination is lawful to ensure equality.

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[16] Senate Standing Committee on Legal and Constitutional Affairs, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Submissions Received by the Committee, Equality Rights Alliance Submission (Submission 21), April 2013.

[17] Senate Standing Committee on Legal and Constitutional Affairs, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Submissions Received by the Committee), Women's Legal Services NSW (Submission 78), April 2013.

[18] PM&C FOI inquiry FOI/2023/137 sought documents that the Office for the Status of Women provided to the Prime Minister (Gillard), the AG and the AGD, as well as to parliamentary committees and individual MPs and Senators regarding the SDA Amendment Bill 2013. The request was refused on the grounds that, "having taken all reasonable steps to find the document/s, no document could be found."

The starting point must be those circumstances where women and girls are vulnerable or disadvantaged – where their human rights are at risk – because of their sex, such as in rape crisis services and prisons. It is also imperative to ensure the safety of women and girls in other circumstances – such as toilets and change rooms, and in health care. The law must also protect the freedom of association of lesbians who are vulnerable to the predations of some men who may claim a lesbian identity to gain access to lesbian spaces. It should also extend to allow women to seek safety and privacy in cyberspace.

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A rational and compassionate society – and its representatives in Parliament – should be able to grasp the distinction between discrimination in areas defined by the *Sex Discrimination Act* and the rights afforded by the Act to women through special measures, maximising protections against the former while respecting the latter.

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

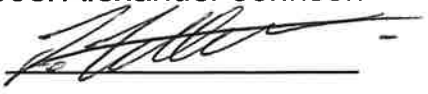
(Respondent)

ANNEXURE SHEET

The following 8 pages comprise the document referred to as Annexure KD-32 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

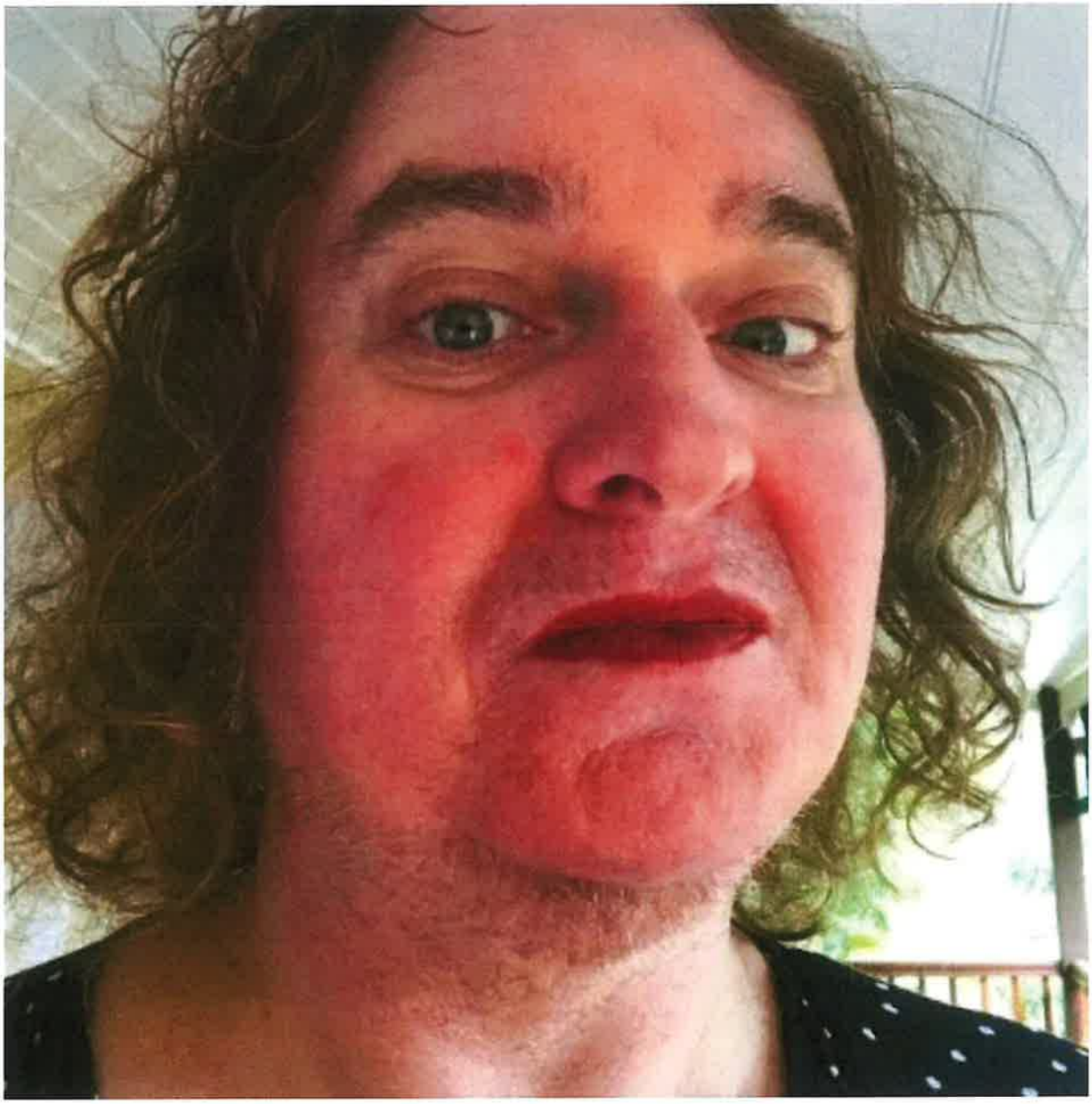
Signed: 

A Betrayal Of Gay Rights

At the time of writing, 'Tickle v Giggle' is the highest profile court case in the world that has onerous implications for gay rights. Giggle was an online women-only platform in Australia, which was widely used as a lesbian dating service. The service excluded males for obvious reasons. Lesbians have the same human right to the freedom of association as the rest of us, and if someone is attracted only to female bodies then they have no obligation to include male bodies within their dating pool.

Giggle was widely used as a lesbian dating app

The 'Tickle v Giggle' case involves the Giggle app being sued by 'Roxy Tickle', who is a natal male that now identifies as a transgender woman and expresses an interest in lesbian dating. However, 'Roxy Tickle' has not been permitted to use the Giggle app and is now suing the owner of the app on this basis.



'Roxy Tickle'

This seems to be a pretty easy case. 'Roxy Tickle' has exactly the same rights as the rest of us, and should be treated with compassion and respect at all times. However, lesbians also have the right to restrict their groups only to those within their own protected category. Lesbians should not be forced to include male-bodied people within their category, when the very definition of this group is that they are attracted only to female bodies. This is a fundamental issue of human rights for gay people.

Unfortunately, some people who like to think of themselves as supporters of gay rights, have utterly betrayed this cause and taken precisely the opposite position. Whereas lesbian groups are campaigning on the Giggle side of this court case, some who believe themselves to be progressive will promote only the arguments advanced by the Tickle side.

The argument that lesbians campaigning for human rights are bigots

The short video clip above includes the claim that many people who seek to exclude male-bodied people from lesbian groups are *"bigots"*. That is a total betrayal of gay rights, and of the fundamental human rights of lesbians. This video clip also includes the following quote:

> *"Trans women are women, and if that woman likes another woman then she is a lesbian. Simple as that."*
>
> Quote from the video clip promoting the same arguments as 'Roxy Tickle'

The video clip above is a response to an article that I had written, arguing that positions like those offered by 'Roxy Tickle' rely on supernatural Cartesian Dualism. That is, the argument advanced by 'Roxy Tickle' depends on there being a gendered soul that is independent from the physical body. In fact, 'Roxy Tickle' has made this argument very explicitly.

Cartesian Dualism with an independent body and soul

The idea here is that transgender people have an immaterial ethereal spirit or soul, which is a different gender from that of their physical body. The central problem with this idea is that it is at odds with the laws of physics, and is easily demonstrable to be absolutely false. René Descartes was obviously not an idiot, but he was obviously just plain flat wrong when he insisted that the pineal gland within the brain functions as the interface between the body and the soul. Nevertheless, in supporting the same position as 'Roxy Tickle', some people who consider themselves to be rationalists will strenuously object to the idea that Cartesian Dualism is false.

Objections to criticism of Cartesian Dualism, with support for mind-over-matter and out-of-body experiences

Rationalists have traditionally considered themselves to be opposed to supernatural religious ideas about spirits and souls, and in favour of progressive causes like fundamental human rights for gay people. However, some of those who have considered themselves to be rationalists are now keen to defend the idea that a person can be *"born in the wrong body"*, and are willing to sacrifice

gay rights to do so. They will promote supernatural concepts like *"mind-over-matter"* and *"out-of-body experiences"*, as they throw gay rights under the bus. What does it mean to continue saying *"Happy Pride"*, while adopting the opposing position when lesbian groups are campaigning for their fundamental human rights?

John Hamill @JHamillHimself · 14h

"Trans women are women. If a trans woman likes another woman, she's a lesbian. Many who exclude trans women from lesbian categories are bigots."

This is the view of @Maanyaaz and @GoblinQChesh. I bet they'll refuse to say if Tickle should be allowed to join Giggle though.

Well?

John Hamill @JHamillHimself · 1h

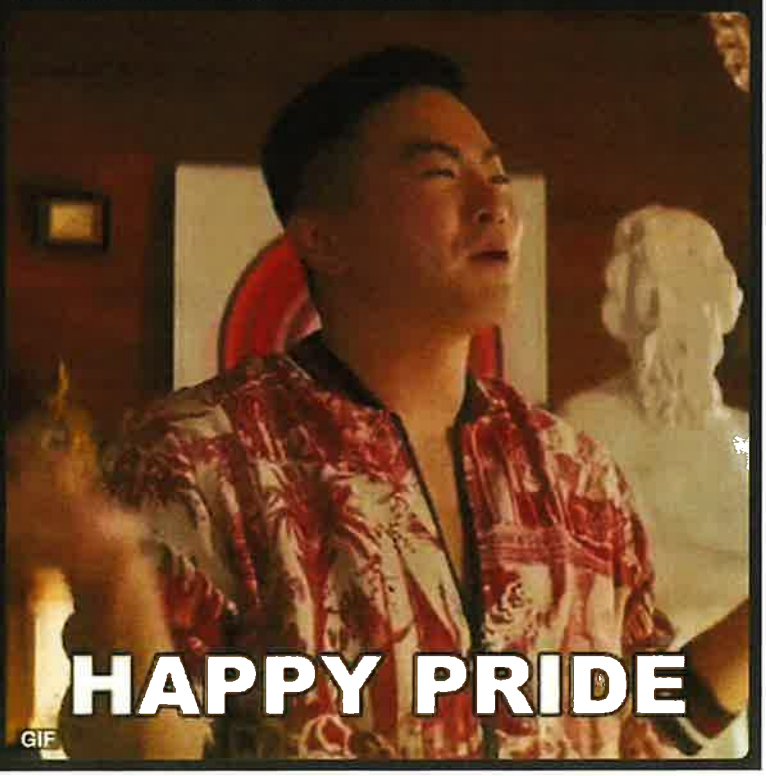
Looks like I was right. You can't answer a basic question like "should Giggle be forced to admit Tickle"?

Lesbians are campaigning for their basic human rights and you won't support them because your puerile slogans argue the other side.

Your 'Happy Pride' gifs are worthless.

~ Queen Chesh ~ @GoblinQChesh · 1h

Youre fking gross dude. But just because you're nasty AF doesn't mean that anyone has to put up with it. Get a grip.



This *"Happy Pride"* message excludes the lesbians who are campaigning for their fundamental human rights in the world's most high profile court case where gay rights are at stake. It is a shameful betrayal of human rights for gay people, in service of the supernatural dualist idea that a person can have a male body and female soul or spirit. So great is their need to scream *"bigot"* at others, that some people will sacrifice almost anything and anyone towards this end.

June 3, 2024 John Hamill Science

Cartesian Dualism, Freedom Of Association, Gay Rights, Human Rights, Tickle v Giggle, Transgender

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Adlington43

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 2 pages comprise the document referred to as Annexure KD-33 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed:

THE ROXY EPOCH
The diary of a regional transition

AUGUST 23, 2024 BY ROXANNE

Tickle v Giggle: The Federal Court finds it is unlawful to discriminate against a woman because she is trans

Did you know the collective noun for reporters is 'gaggle'? That felt viscerally appropriate this morning. I delivered this statement to the reporters waiting outside the Federal Court after the judgement was delivered.

"Mostly I get to just live my life and be who I am. But a small group of people have taken it upon themselves to declare that I am not who I know I am and they have set about making my life miserable.

"This case and the unlawful and discriminatory exclusion from the Giggle app has stolen the last three years of my life.

"I have been targeted by hateful online commentary and degrading merchandise designed to ridicule and mock me.

"There is so much hate and bile cast on trans and gender diverse people, simply because of who we are. Sometimes it's difficult to remember that not all people think like that. When I walked into the courtroom for the hearing in April I felt safe because I was treated with courtesy and respect and allowed to tell my story.

"The hate has not just affected me, it's hurt so many trans and gender diverse people.

"Since I found out this week that the decision is finally coming I've been bursting into tears at different moments because I know that soon this will be over.

"I'm pleased by the outcome of my case, and I hope it is healing for trans and gender diverse people. The ruling shows that all women are protected from discrimination. I brought my case to show trans people that you can be brave, and you can stand up for yourself. I know that I can now get on with the rest of my life and have a coffee down the road with my friends, play hockey with my team and put this horribleness behind me. "

And here is a link to the the full media statement issued on my behalf by Grata Fund ... an incredibly important not-for-profit that builds a fairer world by harnessing the power of high impact strategic litigation to create structural change.

WRITTEN BY ROXANNE

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

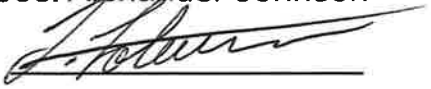
(Respondent)

ANNEXURE SHEET

The following 1 page comprises the document referred to as Annexure KD-34 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: 

THE ROXY EPOCH
The diary of a regional transition

OCTOBER 7, 2024 BY ROXANNE

Tickle v Giggle: Appeal lodged by Giggle for Girls Pty Ltd & Ms Grover

"I'm very disappointed that Ms Grover has decided to appeal the judge's ruling that she discriminated against me because I'm a trans woman. Post-gender transition should be the most joyous years of my life. I had my new life ahead of me, and now I am being dragged back to court for who knows how long. All because of a very small group of people who are committed to making the lives of people they've never met very difficult.

"Trans and gender diverse people exist. Our legal system recognises this. Society at large recognises this. I shouldn't have to spend years of my life in court to either prove I exist or to have my existing legal rights upheld.

"Marginalised communities have always had to fight to be treated with respect and dignity, and I will continue on, strengthened by the support of the trans and gender diverse community, the feminist movement and friends and allies across the community, until trans people can live our lives true to who we are."

A link to the full press release from Grata Fund is available here.

WRITTEN BY OTHERS, WRITTEN BY ROXANNE

IN THE FEDERAL COURT OF AUSTRALIA

District Registry: New South Wales

Division: Appeals and Related (Human Rights)

FILE NO: NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

(Appellants)

AND

ROXANNE TICKLE

(Respondent)

ANNEXURE SHEET

The following 2 pages comprise the document referred to as Annexure KD-35 in the affidavit of Katherine Deves sworn on 7 February 2025 before me.

Justice of the Peace in and for the State of New South Wales
Reg. No. 256003

Name: Joel Alexander Johnson

Signed: _____

PRYOR TZANNES & WALLIS
SOLICITORS & NOTARIES

Our ref: TS:KD:JJ:24560
Your ref: CLD:TBM:144178-68

5 February 2025

Barry Nilsson Lawyers
Level 6, 600 Bourke Street
Melbourne VIC 3000

Email: Tinashe.Makamure@bnlaw.com.au; Corrina.Dowling@bnlaw.com.au; Kylie.Stone@bnlaw.com.au

Dear Colleagues,

Costs in Giggle for Girls Pty Ltd & Anor v Tickle (NSD1386/2024)

We write in respect of the appeal proceedings in the above matter in which we act for the appellants.

As you are aware, the appeal is confined to the issues of constitutional and statutory construction, and it does not engage with findings of fact made by the primary judge. In contrast, the cross-appeal—if leave is granted—will substantially increase the scope and cost of the proceedings by seeking to challenge multiple factual determinations.

It is apparent that all parties face financial constraints. As was adduced in evidence in the trial proceedings, your client does not have financial resources to meet an adverse costs order and has relied upon pro bono legal representation throughout. Giggle for Girls Pty Ltd and Ms Grover are similarly without financial means, with no revenue having been generated by the company, and Ms Grover being a single mother on a pension. In these circumstances, any adverse costs order would be practically unenforceable and would serve no legitimate purpose.

Given the complexity of the legal issues and the number of interveners seeking to be heard in the appeal, there is also a real risk that litigation costs will escalate beyond what is

proportionate. The previous costs cap of $50,000 imposed by the primary judge in respect of constitutional and statutory construction arguments remains a relevant precedent, but in circumstances where neither party has financial resources to meet such an order, we propose a more efficient and equitable solution.

Accordingly, we invite your client to agree to a nil costs order for both the appeal and the cross-appeal. If this agreement is reached, we will consent to the cross-appeal being filed. This would allow the issues to be properly ventilated without the risk of oppressive cost burdens being imposed on either side. If agreement cannot be reached, we will proceed to file an interlocutory application pursuant to rule 40.51 of the Federal Court Rules seeking a nil costs order or, alternatively, a capped costs order of $50,000 per party, with the intention of raising the issue at the next case management hearing.

Given the direction made today by Abrahams J that parties provide proposes minutes of order by Monday next, there is some urgency in this issue being resolved. Please confirm by no later than **5pm tomorrow, 6 February 2025** whether your client agrees to this proposal. If further discussion is required, we are happy to engage in direct discussions to reach a practical resolution.

We look forward to your response.

Yours faithfully
Pryor Tzannes & Wallis

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Contact: Katherine Deves
katherine.deves@ptwlaw.com.au