

NOTICE OF FILING

Details of Filing

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File Title: ROXANNE TICKLE v GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 &
ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

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. NSD 1148 of 2022

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

Roxanne Tickle

Applicant

Giggle for Girls Pty Ltd ACN 632 152 017 and another
First Respondent

Affidavit of: **Julie Catherine O'Brien**
Address: Level 3, 175 Pitt Street, Sydney NSW 2000
Occupation: General Counsel, Australian Human Rights Commission
Date: 19 April 2023

I Julie Catherine O'Brien affirm:

1. I am the General Counsel of the Australian Human Rights Commission and I am authorised to make this affidavit on behalf of the Sex Discrimination Commissioner.
2. The Sex Discrimination Commissioner seeks leave to appear as *amicus curiae* in this proceeding.
3. The form of the appearance sought is limited to the filing of written submissions and the making of oral submissions, on the following issues:
 - (a) the constitutional validity of the amendments to the *Sex Discrimination Act 1984* (Cth) (**SDA**) made by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth)
 - (b) the meaning and scope of provisions of the SDA dealing with discrimination on the grounds of sex, gender identity and intersex status

Filed on behalf of	Sex Discrimination Commissioner
Prepared by	Graeme Edgerton
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(c) the meaning and scope of provisions of the SDA dealing with special measures
 (d) any further matters in relation to which the Court wishes to hear from the Commissioner.

4. The Sex Discrimination Commissioner does not intend to make submissions about whether the conduct of the Respondents constituted unlawful discrimination.
5. The statements in paragraphs 8, 9 and 16 below are true to the best of my knowledge, information and belief based on my inquiries of relevant persons. The other statements in this affidavit are true based on my own knowledge.

Functions of the Sex Discrimination Commissioner

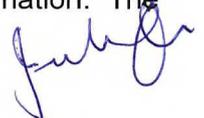
6. The office of the Sex Discrimination Commissioner is established by s 96 of the SDA.
7. The Sex Discrimination Commissioner has the function, pursuant to s 46PV of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) of assisting the Federal Court as *amicus curiae* in proceedings of a kind described in paragraphs (a) to (c) of s 46PV(1), with the leave of the court hearing the proceeding.
8. I am informed by the Sex Discrimination Commissioner, and believe, that:
 - (a) the Commissioner is of the opinion that this proceeding has significant implications for the administration of the SDA
 - (b) the Commissioner is satisfied that the proceeding involves special circumstances such that it would be in the public interest for her to assist the Court as *amicus curiae*.
9. I have caused lawyers working for the Commission to conduct searches using the online case citator CaseBase published by LexisNexis, the online legislation citator LawNow Plus published by LexisNexis and an online legislation citator available from the website www.jade.io for decided cases in federal courts where the reasons for decision involve a consideration of s 5B of the SDA. As a result of those searches, I understand that there have been no previous cases in federal courts that have made findings about whether conduct amounts to discrimination on the ground of gender identity, as described in s 5B of the SDA. Based on my review of the pleadings and affidavit material in this proceeding, I believe this proceeding is likely to require the Court to consider the interaction between discrimination on the ground of sex and discrimination on the ground of gender identity. The resolution of that question is likely to have significant implications for the administration of the SDA. For example, it will have implications for the Commission's functions of: inquiring into, and attempting to conciliate, complaints of unlawful discrimination (AHRC Act, s 11(1)(aa)); promoting an understanding and acceptance of, and compliance with, the SDA (SDA, s 48(1)(c)); undertaking educational

programs for the purpose of promoting the objects of the SDA (SDA, s 48(1)(e)); and publishing guidelines for the avoidance of discrimination on the grounds of sex and gender identity (SDA, s 48(1)(ga)).

10. At paragraph 5 of their Defence, the Respondents allege that ‘the platform was a special measure intended to achieve equality’ (presumably between men and women) for the purposes of s 7D of the SDA. This proceeding may require the Court to consider the meaning of the words “men” and “women” in s 7D, as well as the interaction between a purported special measure in those terms and the prohibition against discrimination on the ground of gender identity in s 5B. For example, the Respondents may contend that a special measure falling within s 7D(1)(a) does not constitute discrimination under s 5B, whereas an alternative construction is that a special measure properly falling within s 7D(1)(a) would only avoid breaching the prohibition against sex discrimination under s 5. The resolution of these questions is also likely to have significant implications for the administration of the SDA for the reasons identified in the previous paragraph.
11. At paragraph 37 of their Defence, the Respondents allege that ss 5B and 5C, which define discrimination on the grounds of gender identity and intersex status respectively, are constitutionally invalid. That raises a significant matter of public interest, given the impact that this would have, if established, on the ability of people who are discriminated against on these grounds to obtain redress for that discrimination.

Experience and expertise

12. The Commission is recognised by the United Nations as a national human rights institution which complies with the Principles relating to the Status of National Institutions (the ‘Paris Principles’) adopted by General Assembly resolution 48/134 of 20 December 1993.
13. At the request of the Court, the Commission has intervened in a number of proceedings in the then Family Court of Australia dealing with the procedural steps that trans children are required to adhere to in order to obtain access to gender affirming hormonal treatment. In the course of participating in those proceedings, the Commission has obtained substantial knowledge of the issues faced by young trans people, including their experiences of discrimination. Those proceedings have included:
 - (a) *Re Jamie* [2013] FamCAFC 110
 - (b) *Re Kelvin* [2017] FamCAFC 258
 - (c) *Re Imogen (No 6)* [2020] FamCA 761.
14. The Commission has published a number of reports dealing with the experiences of gender diverse and intersex people, including their experiences of discrimination. The

preparation of those reports has involved substantial consultation with affected individuals and representative organisations. Those reports have included:

- (a) *Addressing sexual orientation and sex and/or gender identity discrimination: Consultation Report* (2011)
- (b) *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights* (2015)
- (c) *Guidelines for the inclusion of transgender and gender diverse people in sport* (2019)
- (d) *Ensuring health and bodily integrity: towards a human rights approach for people born with variations in sex characteristics* (2021).

15. The Sex Discrimination Commissioner has been granted leave to appear as *amicus curiae* pursuant to s 46PV of the AHRC Act in a number of proceedings in this Court and the then Federal Magistrates Court involving the interpretation of provisions of the SDA, including proceedings dealing with:
- (a) special measures (*Jacomb v Australian Municipal, Administrative, Clerical and Services Union* (2004) 140 FCR 149)
 - (b) discrimination on the ground of pregnancy (*Gardner v AANA Ltd* [2003] FMCA 81)
 - (c) discrimination on the ground of family responsibilities (*Howe v Qantas Airways Limited* [2004] FMCA 242)
 - (d) discrimination on the ground of marital status (*AB v Registrar of Births, Deaths and Marriages* [2006] FCA 1071)
 - (e) the 'competitive sporting activity' exemption (*Ferneley v The Boxing Authority of New South Wales* (2001) 115 FCR 306).

The Sex Discrimination Commissioner's proposed role as intervener

16. I am informed by the Sex Discrimination Commissioner and believe that she is mindful that her contribution to the proceeding should be useful and different from the contribution of the parties.
17. As a result, and given the confined issues which the Sex Discrimination Commissioner seeks to address, if the Commissioner is granted leave in my opinion her involvement in the proceeding should not significantly lengthen the proceeding, nor unreasonably interfere with the ability of the parties to conduct the proceeding as they wish.

18. In the circumstances, the Sex Discrimination Commissioner seeks an order that she have leave to appear as *amicus curiae*.

Affirmed by the deponent
at Sydney
in New South Wales
on 19 April 2023
Before me:

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Signature of deponent



Signature of witness
Graeme Edgerton
Solicitor

Schedule

No. NSD 1148 of 2022

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

Second Respondent: Sally Grover