

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

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.

**AMENDED Notice of a Constitutional matter
under section 78B of the Judiciary Act 1903**

No. NSD1148 of 2022

Federal Court of Australia
District Registry: New South Wales
Division: Human Rights Division

ROXANNE TICKLE

Applicant

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 AND ANOTHER

Respondents

The Respondents give notice that the proceeding involves a matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act 1903*.

Nature of Constitutional matter

The Respondents apprehend that the matter as framed by the Originating Application filed in the proceedings on 22 December 2022¹, and substantiated by the Amended Statement of Claim filed on 4 May 2023 gives rise to the questions of whether:-a

(a) s 5B and 5C of the Sex Discrimination Act 1984 (Cth) (SDA) are/is beyond the legislative power of the Commonwealth and ultra vires; and or-

(b) Part 4 of the Births, Deaths and Marriages Registration Act 2003 (Qld) (BDMRA) and in particular s 24(1) of the BDMRA, 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.

¹ Annexure A hereto is the Originating Application and Amended Statement of Claim filed in the proceedings on 22 December 2022, and ~~24 March 2023~~ 4 May 2023, respectively

Filed on behalf of (name & role of party) The Respondents
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Facts showing that section 78B Judiciary Act 1903 applies

1. The Applicant is a natal male who asserts a gender identity of a “~~woman~~female” and a personhood protected from being unlawfully discriminated against because of a “perceived gender identity as a transgender person.” [emphasis added]:-
2. The Applicant was born in the state of Queensland and has had been issued with a birth certificate, ~~the Respondents apprehend~~ pursuant to Part ~~3~~4 of the *Births, Deaths and Marriages, Registration Act 2003* (NSWQld) which records the Applicant's sex as “female”.
3. The First Respondent was the provider of a digital application styled “Giggle for Girls” (**Giggle**) which is marketed as a digital platform exclusively for females as a “safe space”. The CEO of the First Respondent is the Second Respondent.
4. Giggle is a special measure intended to achieve equality substantive equality between men and women for the purposes of section 7D of the SDA.
5. Giggle is not a “trading corporation” for the purposes of s 51(xx) of the Constitution.
6. Giggle is no longer operational.
7. At the time when Giggle was operational, to access it, a user was required to provide a self-taken photograph, referred to as a “selfie” and upload it to the application. The purpose of this was to ensure that the proposed user was female. An artificial intelligence feature was used to make this determination in the first instance.
8. The Applicant was originally granted access to the Giggle ~~website~~App based on a selfie uploaded.
9. The Applicant's access was removed following a visual inspection by the Second Respondent for and on behalf of Giggle, on the basis that the Applicant had the characteristics that are pertain generally to persons of the male sex or that are generally imputed to persons of the male sex.
10. The Applicant alleges that this is conduct which amounts to discrimination on the ground of gender identity for the purposes of section 5B of the SDA ~~and or discrimination on the ground of intersex status for the purposes of section 5C of the SDA~~. By reason of the allegation that access to the Giggle App could only be granted to a “cisgendered female” or a person “determined as having cisgendered physical characteristics during the Application Process” this is alleged to be in breach of s 22 of the SDA on the grounds of gender identity because the Applicant was treated less favourably than cisgender women, viz. biological females as opposed to “females” for the purposes of s 24 of the BDMRA, and thereby was discriminated against by the Respondents on the basis of (perceived or real) “gender identity” within the meaning of s 5B of the SDA.

11. Sections 5B and 5C of the SDA are amendments made to the SDA by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).
12. The federal Parliament has very limited constitutional powers to enact laws concerning discrimination. The constitutional basis for the SDA is s 51(xxix) to implement Convention on the Elimination of Discrimination Against Women (**CEDAW**). To be constitutionally valid, the proposed legislation must implement an international obligation or secure a benefit under a treaty in a manner which is appropriate and adapted to implementing the treaty. Discrimination on the basis of gender identity or intersex status is not the subject of a specific treaty like CEDAW and nor could it plausibly be said that by enacting antidiscrimination provisions concerning gender identity or intersex status, the Parliament is in some way giving effect to a Convention or treaty. It is doubtful that the provision could be validly enacted pursuant to the external affairs power by reference to a isolated Articles of the international instruments².
13. Otherwise, Giggle is not a “trading and financial” corporation within the meaning of s 51 (xx). Likewise, the Respondents will contend that section 51(v) of the Constitution is not appropriately engaged.
14. Accordingly, the Respondents will contend that the provisions inserted into the SDA by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity And Intersex Status) Act 2013* are invalid.
15. Further, the Respondents will contend that the legal construct of “female” that emerges from s 24 of the BDMRA 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.

Date: ~~5 April 2023~~ 30 June 2023

A. Rashidi

Signed by Alexander Rashidi
Lawyer for the Respondents

² Explanatory Memorandums to the Sex Discrimination Amendment (Sexual Orientation, Gender Identity And Intersex Status) Bill 2013