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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.

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Federal Court of Australia
District Registry: New South Wales

No. NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) and another
Appellants

ROXANNE TICKLE
Respondent

On appeal from the Federal Court

APPELLANTS' OUTLINE OF SUBMISSIONS

Part A – Introduction and Background Findings

1. The Respondent is a biologically male person (J[3]) who, the primary Judge found is a "transgender woman": J[46(d)], [54], [115], [126], [131], [135], [235(b)], [277(b)].

2. In the Amended Statement of Claim, the Respondent asserted a physical presentation and a gender identity, described variously as "female", "woman" and "transgender woman": AB A, Tab 3, p. 18 [7(a)] and [10(a)]. The Respondent described living as a "female" (AB B, Tab 23 [4]), undergoing surgery "to affirm … gender as a woman" (AB B, Tab 23, [6]), and participating in activities such as name change, using cross-sex hormones, shopping in the women's section, joining a women's hockey team, and facial hair removal (J[87]). The primary Judge found the Respondent's "gender identity" to be that of "transgender woman": J [135].

3. The Respondent gained access to the Giggle App in or about February 2021 after uploading a "selfie" photograph (AB B, Tab 3, [70]; and J[17], [46(b)], [110], [111], [127]) that passed an automated facial screening feature (the Kairos feature) that had been set at 94% accuracy: J[18], [91], [101], [102], [111], [127]. Access was maintained for several months at a limited level of engagement: J[19]. In or around September 2021, the Respondent asserted a loss of functionality on the Giggle App and was ultimately blocked: J[19], [115], [128(b)], [131].

4. The primary Judge concluded that Respondent's access was most likely revoked by the Second Appellant following manual visual inspection of the "selfie" photograph on the on the "quick or reflexive decision" that the Respondent appeared to the Second Appellant to be male: J[24], [125], [126], [129], [131], [225], AB B, Tab 3, [49], [51].

5. The primary Judge also found the Second Appellant did not know and was not informed of the Respondent's "gender identity" and the evidence established only that the exclusion was likely a byproduct of excluding those perceived as "men", based on visual criteria that did not "distinguish between cisgender men and transgender women": J[125], [129]–[130].

6. The App operated on the basis that users "must be female" (AB B, Tab 23, [10] – [11] and RT-4, J[99], [102]). This was assessed either through artificial intelligence (J[18], [101], [102])) or, in some cases, manual inspection (J[23], [98], [103]). The Second Appellant's unchallenged evidence was that visual cues apparent on the selfie photograph inconsistent with the decision maker's perception of a female appearance were grounds for exclusion from the App: J[103]–[105]; AB B, Tab 3 [54] – [56].

Part B – Ground 1: No indirect discrimination was made out under ss 22 and 5B(2)

7. The primary Judge identified the relevant condition for the purposes of s 5B(2) as "needing to appear to be a cisgendered female in photos submitted to the Giggle App" (J[134], [225]) (the **Condition**). The Condition is not supported by the factual findings made.[1] The Second Appellant's unchallenged evidence was that the App was open to transgender men[2] and non-binary females[3], and that many applicants with presentations non-conforming to stereotypes of "femaleness" were allowed to remain.[4]

8. On the primary Judge's own findings, the operative criterion for access to the Giggle App was the "quick" and "reflexive" perception by the decision maker based on visual cues in a "selfie" that the applicant appear female (J[125]–[127], [130]–[131]). The reference to "cisgendered" in the Condition introduced a term not used or applied by the Appellants and not grounded in any evidence.

9. The Appellants did not assess applicants to the Giggle App by reference to "gender identity". The primary Judge accepted that the Respondent's "gender identity" was neither known to the Second Appellant nor considered at the time of exclusion (J[129]–[130], [132]). Nor could an applicant's "gender identity" be discerned from a "quick and reflexive decision" based solely on perceived visual cues of femaleness. The Respondent's exclusion was made on the basis of perceived maleness. On that basis, the claim of direct discrimination failed.

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[1] The condition imposed is a question of fact, and the condition must be formulated with precision: *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 185; *Waters v Public Transport Corp* (1991) 173 CLR 349 at 393–4, 405. In doing so, the Court is not bound by the parties' characterisation of the condition; the Court must "ascertain the actual position": *New South Wales v Amery* (2006) 230 CLR 174 at [208].
[2] Females identifying as "men"
[3] Females as identifying as neither a "woman" nor a "man"
[4] AB B Tab 3 [54] – [56]

10. The Respondent's claim under s 5B(2) was approached differently. The primary Judge concluded that the condition imposed had the effect of disadvantaging persons with the same gender identity as the Respondent (J[135]). That conclusion was said to follow without the need for detailed analysis, because the exclusion was based on perceived maleness and the Appellants did not contest that outcome (J[136]). On that view, the Condition's discriminatory effect was inferred from the fact of the Respondent's exclusion and the assumption that the Condition would similarly exclude others perceived as male with the "gender identity" of "transgender woman".

11. That reasoning misapplies s 5B(2) and the evidence. Indirect discrimination requires more than an undisputed individual exclusion. Section 5B(2), read with s 22, asks whether a condition imposed in the course of providing a service has, or is likely to have, the effect of disadvantaging persons who possess a particular protected attribute—here, "gender identity"—*because* they possess that protected attribute. It is not enough that a person has the protected attribute and is disadvantaged, the condition must produce a differential impact on persons who have that protected attribute (**the protected group**). That requires a factual inquiry which identifies the protected group; and evidence that the Condition has, or is likely[5] to have, the effect of disadvantaging persons within that protected group because of their "gender identity".[6]

12. The reasoning at J[135] – [136] proceeds on a series of unstated premises—principally, that "transgender women", as the protected group, will be or are likely to be perceived as male. That assumption is not supported by evidence, nor is it a matter for judicial notice. Section 5B(2) requires that the condition *has* (as a matter of definition) or *is likely to*, (which on its true construction, is on the balance of probabilities) have the effect of disadvantaging the protected group. While a "real chance" of disadvantage may support an inference of potential impact, unless the threshold of "more probable than not" is met, the statutory standard is not satisfied. To treat the existence of any real chance or possibility as sufficient would render s 5B(2) a mechanism of inevitable liability, requiring every condition to be justified under s 7B—a result that could not have been intended.

13. The primary Judge did not undertake the inquiry required by s 5B(2). The finding of group-based disadvantage rested on the fact of the Respondent's exclusion and the Appellants'

[5] The word "likely" in s 5B(2) refers not to a future possibility but to the present effect of the condition, and imports a standard of probability—namely, that the condition has, or is more probable than not to have, the effect of disadvantaging persons with the relevant attribute: see *ACCC v Pacific National Pty Ltd* (2020) 277 FCR 49 at [222]; and *Tillmanns Butcheries Pty Ltd v AMIEU* (1979) 42 FLR 331 at 339, 346.

[6] It does not follow from the exclusion of one transgender woman based on perceived maleness that it is more likely than not that transgender women share that appearance or would be similarly excluded.

acceptance that persons perceived as "men" would be excluded. That reasoning elides the distinction between visual perception of sex and the protected attribute. It assumes that the visual impression of maleness is equivalent to membership of the protected group.

14. The conclusion is strained by two findings the primary Judge made elsewhere. The first is that the primary Judge's acceptance of the premise that identifying as a "transgender woman" is the intention to present as a person of the female gender: J[4]. The second is that the Respondent passed the Kairos screening tool—set at a 94% threshold—placing the Respondent within the majority of applicants assessed as appearing female.

15. The primary Judge's conclusion is further undermined by the finding at J[23]: His Honour accepted that the Second Appellant's classification of "men" may have included "transgender women", but the implications of that belief were neither explored nor tested in cross examination. The primary Judge's finding at J[130], incorporating the blog post at J[92], does not supply what the evidence lacked.[7]

16. The primary Judge did not identify a protected group disadvantaged by reason of the Condition, nor establish the causal link required by s 5B(2). The reasoning impermissibly inferred group-based discrimination from an individual outcome, without evidence that the Condition disadvantaged or was more probable than not to disadvantage persons within the protected group. The primary Judge's conclusion as to indirect discrimination rests on assumed correlations between identity and appearance that were neither pleaded nor proved. On the proper construction and application of s 5B(2), the claim of indirect discrimination could not succeed.

Part C – Section 7D: Special Measures Provision (Grounds 2 – 3)

17. Section 7D operates as a threshold exclusion from the concept of discrimination. It performs a structurally distinct function from s 7B. Whereas s 7B operates *within* the definition of indirect discrimination to excuse conduct that would otherwise be discriminatory, s 7D prevents the inquiry from arising. If the impugned conduct constitutes a "special measure" within the meaning of s 7D(1), then by operation of s 7D(2), it "does not discriminate" for the purposes of any provision listed therein and the measure is protected from scrutiny under the SDA.

[7] See J[92]. The blog post reflects a retrospective personal account, marked by internal inconsistency and ambiguity as to the operative policy. It records both support for and rejection of access for transgender users, without identifying a settled position at the relevant time. As such, it does not supply probative evidence of a group-based exclusion capable of supporting the inference drawn at J[130].

18. Section 7D is historically rooted in Article 4(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).[8] That Article recognises that States Parties may adopt temporary special measures "aimed at accelerating de facto equality between men and women" and expressly provides that such measures "shall not be considered discrimination." The operative function of s 7D is to implement a similar mandate in relation to a broader class of activities: to identify conduct taken for the purpose of achieving substantive equality between men and women, and other protected classes, and to deem that conduct non-discriminatory at law. It follows that s 7D does not operate as a defence or excuse engaged after a finding of contravention. Rather, it is anterior to that inquiry. A measure that meets the criteria in s 7D(1) is, by force of s 7D(2), excluded from the scope of ss 5–7A.

19. The text of s 7D supports this construction. Subsection (1) sets out the positive criteria for what constitutes a "special measure" — that it must be taken "for the purpose of achieving substantive equality" and be "reasonably intended to achieve that purpose." Subsection (2) then deems such conduct not to be discriminatory: "A person does not discriminate under section 5, 5A, 5B, 5C, 6, 7, 7AA or 7A by taking special measures authorised by subsection (1)." The language is operative and exclusionary. It does not depend on the satisfaction of a defence, nor does it require the respondent to discharge a legal or evidentiary onus once discrimination is made out. Each of ss 5, 5A, 5B, 5C, 6, 7, 7AA and 7A is expressed to be subject to s 7D. Where a measure is taken to achieve substantive equality, and the court is satisfied that it qualifies as a special measure under s 7D(1), that measure is excluded from the operation of those provisions by force of s 7D(2).

20. The placement of s 7D within Part I confirms this reading. The legislative history confirms that design. Section 7D was inserted by the *Sex Discrimination Amendment Act 1995* (Cth), replacing s 33, which had treated special measures as discriminatory but exempt. The intent of the amendment was to reverse that formulation and to recognise special measures as positive contributions to substantive equality. As the Explanatory Memorandum to the 1995 Amending Act stated, the new provision was to ensure that such measures were "understood to be non-discriminatory," not merely excused.[9] That intent is further confirmed by Crennan J in ***Jacomb***[10] at [47], where her Honour described s 7D as characterising conduct as "non-discriminatory" where the criteria in subs (1) are met.

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[8] Senate Legal and Constitutional Legislation Committee, *Report on the Sex Discrimination Amendment Bill 1995* (Parliament of the Commonwealth of Australia, August 1995) (**1995 Senate Report**), at pp. 25 – 29. See ***Jacomb*** *v AMACSU* (2004) 140 FCR 149 at [40]–[44]. As Crennan J observed in *Jacomb* at [44] ff, a "special measure" under s 7D is to be understood not merely by reference to domestic legal categories, but by reference to the context, object and purpose of Article 4 of CEDAW, from which the provision is drawn.

[9] Explanatory Memorandum of *Sex Discrimination Amendment Bill 1995* at pp. 7 – 8, [33] – [37], Replacement Explanatory Memorandum of *Sex Discrimination Amendment Bill 1995* at pp. 9, [36] – [40], and Second Reading Speech, Mr Lavarch, Attorney General, Hansard, p. 2456 ff, 28 June 1995.

[10] See fn. 8

21. On its proper construction, s 7D applies irrespective of the attribute under which a claim is brought. The primary Judge below adopted a "distributive" construction, that is, that a measure taken to achieve equality between men and women under s 7D(1)(a) cannot protect the actor from liability under s 5B, unless the measure also falls under s 7D(1)(ab). That construction is incorrect: limitations and qualifications are not to be read into a statutory definition (of which s 7D is one component) unless clearly required by its terms or context.[11]

22. The use of "or" in s 7D(1) does not require each paragraph to operate in isolation. It introduces alternative statutory purposes, any one of which suffices to engage the deeming effect in s 7D(2). It does not confine the application of s 7D(2) to claims involving the same protected attribute. To treat the provision distributively is to misread the logic of the scheme. It would convert a list of valid equality objectives into siloed exceptions, thereby collapsing the protective mechanism into a rigid attribute-match model that finds no support in the text.

23. Section 7D(2) contains no such constraint. It provides that a person does not discriminate "under section 5, 5A, 5B, 5C, 6, 7, 7AA or 7A" by taking a special measure under s 7D(1). Its focus is on the act of taking a measure for a legitimate equality purpose—not on whether the asserted discrimination and the statutory purpose match one-to-one by attribute. Had Parliament intended such a limitation, it would have said so. It did not.

24. The construction adopted by the primary Judge (J[85]–[86]) produces an arbitrary result. On that reading, a special measure taken to promote equality for women would be protected if challenged under s 5 by a man, but not if challenged under s 5B by a person identifying as a woman. That is not how s 7D operates. The focus is on purpose and effect, not formal symmetry based on the attribute of the complainant.

Definition and Scope of "Special Measure" under s 7D

25. The primary Judge did not determine the Appellants' case (AB A, Tab 2, p.11, [5]) that is whether the Giggle App was a special measure to achieve substantive equality between "men" and "women". The Giggle App applied an access rule based on perceived femaleness. Its purpose was to create an online space exclusively for women, designed to provide a digital refuge from male-patterned behaviour and facilitate access to peer support, advice, and community. It was intended to promote women's safety, inclusion, and full participation in online social environments by removing structural barriers to equal engagement: J[95]. That

[11] *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* (2024) 98 ALJR 1273 at [32]

objective constitutes a special measure under s 7D(1), such that s 7D(2) deems the conduct not to be discriminatory.

26. A special measure under s 7D does not require general application. It may be directed to a defined subgroup, provided its purpose is to advance substantive equality. The statutory question is not whether all members of the protected class benefit, but whether the measure is reasonably intended to promote the advancement of the sub-group or group to which it is directed.

27. In *Jacomb*, Crennan J upheld a rule reserving internal union positions for women. The measure applied only to a confined segment of the workforce and was nonetheless valid under s 7D. In ***Proudfoot***, a special measure providing sex-specific health services to women was upheld on the basis that it need not benefit all persons within the broader protected class; it was sufficient that the measure advanced a physiologically or socially defined subset within that class.[12] Similarly, in ***Gerhardy*** *v Brown*[13] the High Court accepted that land access rights conferred solely on the Pitjantjatjara people constituted a special measure under international law, despite excluding other Aboriginal persons. And in *Western Australia v Commonwealth*[14], the High Court confirmed that special measures directed to a particular Indigenous community may validly serve the broader purpose of advancing equality for Aboriginal people.

28. These authorities support the proposition that a special measure may be directed to a defined subgroup within a broader protected class. They confirm that a special measure's validity turns on purpose, not breadth of application.[15] It follows that a measure taken for the purpose of achieving equality between "men and women" may be directed to a defined subset—such as females or those with physical attributes that gives rise to a perception that they are female—and remain agnostic as to the internal boundaries of the broader category of "womanhood."[16]

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[12] *Proudfoot v ACT Board of Health* [1992] EOC 92-417, see at 78,984 per Sir Ronald Wilson, citing *Gerhardy*, 161-162. See also *Jacomb* at [34].

[13] (1985) 159 CLR 70 at 88–89 (Gibbs CJ), 104 (Mason J) and 135–137 (Brennan J)

[14] (1995) 183 CLR 373 at 483 - 484

[15] *Gerhardy*, 138-139 per Brennan J; *Proudfoot*, 78,984 per Sir Ronald Wilson; and see also *Colyer v State of Victoria* (1998) 3 VR 759, 774 per Kenny JA (Brooking and Callaway JJA agreeing); and *Richardson v ACT Health and Community Care Service* (2000) 100 FCR 1, [26] per Finkelstein J (Miles and Heerey JJ agreeing). See also 1995 Senate Report at p. 28

[16] That is if the terms "man*"* and "woman" (and their plural forms "men" and "women") in the SDA were to be construed inconsistently with their use in CEDAW, the treaty to which the SDA partially gives effect: SDA, s 3(a), *Jacomb* at [43]–[44]; *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 at [11] – [16] per Kenny J. See CEDAW Committee, *General Recommendation No. 28: Core Obligations of States Parties under Article 2*, UN Doc CEDAW/C/GC/28 (16 December 2010), [5]. See also Human Rights Committee, *General Comment No 18: Non-discrimination*, UN Doc CCPR/C/21/Rev.1/Add.1 (10 November 1989) [6], [12], where the Human Rights Committee has confirmed that "sex" is a distinct ground of discrimination and that Article 26 operates autonomously to prohibit discrimination in any area regulated by law, without altering the content of the listed grounds. Note also, that although the 2013 amendments to the SDA repealed the definitions of "man" and "woman" in s 4 this had no material effect. The stated rationale in Explanatory Memorandum to the *Sex*

Even if the term "woman" is construed broadly, that does not alter the measure's validity. A special measure remains lawful so long as it is directed to advancing the group of women for whom it was intended; it need not advance every person falling within a broader or contested definition of that group.

The Giggle App as a special measure taken for the purpose of achieving substantive equality between men and women

29. The Giggle App was developed and supplied to meet a demonstrable and ongoing "specific goal"[17]: the provision of a digital refuge exclusively for women, designed to offer connection, support, and safety from male-pattern online harms (J[95]).[18] That purpose remains unrealised, satisfying s 7D(4). Its origin lay in the Second Appellant's experience of sexual abuse and trauma recovery, during which the importance of female-only support environments was made clear: J[90]. Her unchallenged evidence[19], supported by the unchallenged evidence of fourteen lay witnesses[20], confirmed that the purpose of the App was to reduce structural barriers to women's safe and equal participation in digital public life.

30. That evidence identified a coherent and recurring pattern of disadvantage faced by women in mixed-sex digital environments. These included the intrusion of males, including those identifying as female, into lesbian dating spaces[21]; the erasure of same-sex attracted women's ability to define and control the terms of female social interaction[22]; culturally specific barriers faced by women of faith or conservative backgrounds in the presence of men[23]; the risk of re-traumatisation for survivors of male violence and abuse (including racism)[24]; the need for protected spaces in which females could discuss sexed realities—such as menstruation, menopause, gynaecological health, women's health (including mental health) and

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Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) (at [18]–[19]) for repealing the definitions of "man" and "woman" was to avoid excluding transgender women from protection under other attributes. That concern was unfounded. The repeal did not alter the operation of any substantive provision. The terms "man" and "woman" continue to appear throughout the SDA in a biological context: see ss 7(1), 7AA, 4B, 25(4), and 31. The Schedule to the SDA, which incorporates the text of CEDAW, likewise uses "men" and "women" in a manner that presupposes biological sex. Section 7D remains the only provision that uses "man" and "woman", but does so, so as to characterise conduct as non-discriminatory, not to provide protection from discrimination by reason of or because of a protected attribute.

[17] *Automotive Invest Pty Ltd v Commissioner of Taxation* [2024] HCA 36; (2024) 98 ALJR 1245 at [110]

[18] *Jacomb* at [60]; *Purvis v New South Wales* (2003) 217 CLR 92 at [202]

[19] AB B, Tab 3

[20] AB B, Tabs 5 – 15, 17 – 18, 21

[21] AB B, Tabs 3, 3.1-3.8, 7, 7.1, 14, 14.1-14.3, 17

[22] AB B, Tabs 3, 3.1-3.8, 7, 7.1, 8, 14, 14.1-14.3, 17

[23] AB B, Tabs 3, 3.1-3.8, 11, 11.1, 12

[24] AB B, Tabs 3, 3.1-3.8, 8, 9, 13, 15, 17, 18, 21

motherhood—without the surveillance or participation of males[25]; and the need for a male-free space for respite from male harassment and the male gaze.[26]

31. These are not abstract concerns. The evidence demonstrated that they represent real, lived disadvantage occasioned by female biological or physiological differences. The Giggle App was designed and implemented to address them. Its female-only policy was not ad hoc; it was a deliberate and proportionate response to material sex-based inequality in the digital sphere. The Respondent led no evidence to challenge the legitimacy of the App's purpose, nor the reality or persistence of the harms it sought to address.

32. It was implemented for the benefit of women, defined as females, and the need it sought to address remains ongoing. The primary Judge's failure to evaluate that evidence in light of the statutory purpose and framework was a material error.

33. This Court is in a position to determine whether, on the facts, the App constituted a special measure under the SDA.[27] The relevant facts are not in dispute. Each of the purpose, the need for the special measure and the continuing disadvantage was established on the uncontested evidence before the primary Judge.

Section 7B – Reasonableness, in the alternative

34. If the Court finds that the Giggle App imposed a condition within the meaning of s 5B(2), the Appellants submit in the alternative that the condition was reasonable in the circumstances, and therefore not discriminatory under s 7B.

35. Although s 7B was not expressly pleaded, the Respondents made clear that this was because the claim was framed as one of direct discrimination under s 5B(1), not indirect discrimination under s 5B(2).[28])] On that footing, it was understood that the imposed condition formed part of the direct discrimination claim and that s 7B was not engaged. The claim of direct discrimination was effectively abandoned at trial: J[46(d)][29]. However, if the claim was in substance one of indirect discrimination—as the primary Judge ultimately found—then the reasonableness of the condition was squarely in issue.[30] That issue was not resolved. The primary Judge erred in failing to address s 7B, notwithstanding that the evidence relevant to reasonableness was before the Court. Each element of s 7B(2) is satisfied on the evidence:

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[25] AB B, Tabs 3, 3.1-3.8, 5, 6, 7, 7.1, 8, 9, 11, 11.1, 12, 13, 15, 17, 21
[26] AB B, Tabs 3.1-3.8, 5, 6, 7, 8, 9, 10, 11, 11.1, 12, 13, 14, 14.1-14.3, 15, 17, 18, 21
[27] *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at [13] – [19]; *Fox v Percy* (2003) 214 CLR 118 at [25].
[28] T270:33 – 272 :27
[29] T231 – 234:19; and 257:1 - 2
[30] T308:28 – 309:3

36. *Nature and extent of disadvantage* (s 7B(2)(a)): The disadvantage to the protected group was limited and largely symbolic. The group was excluded from a single-purpose digital platform designed to provide a defined user experience. On the evidence, the Respondent did not meaningfully engage with the platform prior to exclusion.[31] No evidence was led of material deprivation, disruption to access, or broader exclusion from digital participation. The impact was isolated and incidental.

37. *Feasibility of mitigation* (s 7B(2)(b)): The evidence did not support that members of the protected group were prevented from accessing other digital spaces offering similar functionality.[32] For example, the Respondent maintained active participation in public online discourse, including on Twitter (now "X").[33] The condition did not impose a general barrier to online presence or expression, and no less discriminatory alternative would have achieved the App's stated objective without undermining its purpose.

38. *Proportionality* (s 7B(2)(c)): The App's sex-based access criterion was a proportionate response to persistent sex-based disadvantage in digital environments.[34] The measure addressed a legitimate and pressing need—female users' desire for privacy, safety, and social connection without male intrusion. The exclusion of persons perceived as male was rationally connected to the App's protective purpose. The condition operated as a narrowly tailored safeguard, not a generalised exclusion, and aligned with the evidence of lived disadvantage for the class of females for whom the App was created.

39. *Other relevant matters* (s 7B(2), chapeau): The purpose of the Condition[35] was legitimate; it sought to mitigate structural and interpersonal harms disproportionately experienced by female users.[36] The effect on the protected group was not inherent or inevitable, but contingent on individual perception. No evidence established that the Condition was imposed arbitrarily, or that its application resulted in systematic denial of access to the protected group. The Condition was not only proportionate but necessary to achieving the App's stated objective.

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[31] AB B, Tab 23, [14]
[32] AB B, Tab 3 [83], and see also, Tab 5 [2]; Tab 6 [3]–[5], [9]–[10]; Tab 7 [8]–[9]; Tab 8 [11], [19]; Tab 9 [5]–[6]; Tab 10 [3], [5]; Tab 12 [4]–[5]; Tab 13 [6]; Tab 14 [6]–[7], [9]–[10], [12]; Tab 17 [6], [8].
[33] AB B, Tab 3 [81], [85], [89] – [94]
[34] See paragraph 30 herein and also see, e.g., AB B Tab 5 [3]–[5]; Tab 6 [3]–[5], [10], [16]; Tab 7 [8]–[9]; Tab 8 [19]; Tab 9 [5]–[6], [8], [10]; Tab 10 [3], [5]; Tab 11 [9]–[10], Annexure AFS1; Tab 12 [4]–[5]; Tab 13 [5], [24]–[26]; Tab 14 [7], [10]; Tab 15 [9], [12]; Tab 17 [8]; Tab 18 [3], [5]–[7].
[35] AB B Tab 3, [16] – [17]
[36] See paragraph 30 herein

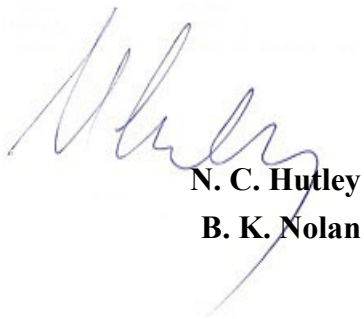
40. The evidence established the App's rationale, purpose, and continuing necessity. That evidence was not displaced. On the facts found, the Condition—if imposed—was reasonable and on that footing, the Appellants were entitled to a finding that they did not contravene s 5B(2).

Conclusion

41. The primary Judge erred in three respects. First, in mischaracterising the condition imposed by the Appellants as one requiring applicants to the Giggle App appear as "cis-gender women". Second, while the primary Judge identified "transgender women" as the relevant group for s 5B(2), his Honour failed to identify any characteristic by reference to which the Condition disadvantaged that group. The reasoning proceeded on the unexamined premise that "transgender women" are, as a protected group, likely to be perceived as male. That assumption renders the protected group definition conceptually unstable and elides the distinction between gender identity and perceived sex. The statutory test—whether the Condition has, or is likely on the balance of probabilities to have, the effect of disadvantaging persons with the protected attribute—was not met. Third, in misconstruing s 7D and failing to apply it, or alternatively, in omitting to consider s 7B where the evidence bore on its application. Properly applied, the statutory scheme and evidence before the primary Judge did not permit the finding of indirect discrimination or the relief granted in consequence.

42. The appeal should be allowed.

DATE: 23 June 2025



N. C. Hutley
B. K. Nolan

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Important Information

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Submissions of the Lesbian Action Group[1]

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

No. NSD1386 of 2024

Giggle for Girls Pty Ltd (ACN 632 152 071) and another
Appellants

Roxanne Tickle
Respondent

Sex Discrimination Commissioner
Intervener

Lesbian Action Group
Intervener

A. The issue

1. Does the *Sex Discrimination Act 1984* (Cth) (**SD Act**) confer dedicated protection on members of the female sex? In words more pertinent to the provision at hand, s 7D(1)(a): do the words "men" and "women" in that provision refer to biological sex, or to persons who identify with a gender that corresponds to a biological sex? This appeal must resolve that issue, because the Appellants contend that the Giggle App is a special measure "between … men and women" under s 7D(1)(a).

2. The trial judge found below that the concept of "sex" in the SD Act is not confined to its biological meaning: **TJ[55]-[61]**. This finding was then used to refute the Appellants' contention that the Giggle App was a special measure intended to achieve "substantive equality … between men and women": **TJ[85]-[86]**.

3. The issue is to be resolved in this way: under the SD Act, the words "sex", "men" and "women" is language that is used to confer protection on the biological sexes. The SD Act has established other, equivalent, protections for those who have a "gender identity," such that "equal protection and equal benefit of the law"[2] is afforded to both the sex and the gender identity classes. The trial judge failed to apply this distinction. The Appellants' appeal must proceed on the premise that the Giggle App is capable of being classified as a special measure pursuant to s 7D(1)(a), as it was a service dedicated to the female sex class.

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1 Information about the Lesbian Action Group, its objects of association, and the basis for its intervention in this proceeding, can be found in the affidavit of Katherine Dennis affirmed 3 April 2025.

2 SD Act, preamble.

Filed on behalf of	Lesbian Action Group Inc, Intervener
Prepared by	Leigh Howard and Dr Megan Blake of Counsel
Firm	Sladen Legal
Tel	(03) 9611 0151
Email	kdennis@sladen.com.au
Address for service	Level 22, 727 Collins Street, Melbourne VIC 3000

4. If the above proposition is not right, then women cannot establish special measures for their exclusive benefit, to the exclusion of men who identify as women. That cannot be so. And, as will be explained, the practical ramifications to the operation of the SD Act are far broader, and far more unreasonable.

B. The approach to resolving the issue

5. There is no common law, top-down starting point, as the trial judge has uncritically accepted: **TJ[55]-[56]**. The actual starting point is that, in statutory law, legislation is gender neutral.[3] The next step is to observe (as the High Court has) that gendered language falls to be interpreted within its own statutory setting.[4] The meaning of "woman" in one statute does not inform the meaning of "woman" in another statute: cf. **TJ[56]**.

6. What must be observed next is the importance of what is being interpreted here: the SD Act. It is not legislation concerning a mere singular issue, such as marriage or social security legislation. It is legislation that regulates the most important facets of the Australian way of life in pursuit of formal and substantial equality between its participants. It does not do so at all costs, as the many reservations and exemptions within it demonstrate. Since the 2013 amendments, the SD Act has extended its pursuit from equality of the sexes, into the pursuit of equality for those who have a sexual orientation, a gender identity, or an intersex status.

7. The pursuit of equality for and between these groups generates conflict between differing interests, as this proceeding ably demonstrates. When this occurs, Gleeson CJ's dicta in *Carr v Western Australia* applies.[5] The conventional, purposive approach to construction is of limited assistance. It is the text of the SD Act, according to such principles of interpretation that are able to provide rational assistance in the circumstances, that controls the outcome of construction. That outcome must bring about a reasonable and coherent operation of the SD Act,[6] and, given its breadth, should also bring about one capable of being applied by the various stakeholders of differing sophistication who come into contact with it. Construction must proceed according to the presumption that the same meaning is given to the same words appearing in different parts of a statute, such that all provisions of the SD Act are consistent with one another.[7]

8. An appeal to the SD Act's beneficial purpose, if made, must be treated with caution. The focus here is on the specific meaning of words, and a beneficial label obscures the task of finding the

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3 *Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ). For the federal statutory presumption of gender neutrality, see *Acts Interpretation Act* 1901 (Cth), s 23(a).

4 *AB v Western Australia* (2011) 244 CLR 390, [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

5 (2007) 232 CLR 138, [5]-[7] (Gleeson CJ); applied in *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, [40] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

6 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan and McHugh J), 58 (Kirby J).

7 *The King v Jacobs Group (Australia) Pty Ltd* (2023) 97 ALJR 595, [23], [25] (Kiefel CJ, Gageler, Gordon, Steward, Gleeson and Jagot JJ).

meaning of those words.[8] Such an approach is also antagonistic to achieving equality that is envisaged by the SD Act itself: it is one thing to say that the SD Act is beneficial legislation; it is another to use that observation as a device to construe the SD Act so that it prefers one protected class over another, and in a way that undermines the protections afforded to members of the female sex.

C. The text of the SD Act

9. An examination of the whole of the text of the SD Act confirms that dedicated protection to members of the female sex exists when the language "sex", "men" and "women" are used. The special measure in s 7D(1)(a) relied upon by the Appellants falls to be interpreted accordingly.

10. ***Definitions and legislative machinery.*** The classes of protected persons under the SD Act are denoted by reference to a sex, identity, orientation, status, or by gender-neutral nomenclature.[9] The differing language used to define each of these classes, in and of itself, suggests that there are different classes of persons singled out for protection. The different choices in language for each device also suggests that there are different interests between these classes.

11. There are two 'statuses': "intersex status" and "marital or relationship status."[10] Designating intersex persons as having a "status" conforms to the ordinary understanding that the intersex community does not comprise a third sex. The definition of "intersex status", itself, relies upon the binary biological meaning of a sex: by defining it by reference to "male" and "female" "physical, hormonal or genetic features."[11] This definition, in turn, suggests that there remains a sex class for the purposes of the SD Act, and this class comprises males and females.

12. The definition of "sexual orientation," too, relies on the word "sex."[12] The definition conforms to the ordinary understanding that sexual attraction is oriented towards a biological sex.[13] "Sexual orientation" is not oriented towards an "identity" or a "status". As the UK Supreme Court in *For Women Scotland* observed: "a person with same sex orientation as a lesbian must be a female who is sexually oriented towards (or attracted to) females, and lesbians as a group are females who share the characteristic of being sexually oriented to females."[14] As people are not sexually oriented towards "identity" or a "status", "[p]eople are not sexually attracted towards those in

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8 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, [32]-[33] (French CJ, Kiefel, Bell and Keane JJ).

9 "Person" and "employee" are the primary methods of the lattermost device. See for e.g. SD Act, ss 4A, 7A (discrimination on the grounds of family responsibilities), s 6 (discrimination on the ground of marital or relationship status).

10 SD Act, s 4 (meaning of "intersex status" and "marital or relationship status").

11 SD Act, s 4 (meaning of "intersex status").

12 SD Act, s 4 (meaning of "sexual orientation").

13 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 483 (Lockart J): "[h]omosexuals are persons who are sexually attracted to persons whom they know are of the same biological sex of themselves." See too *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [205]-[207] (the Court).

14 *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [206] (the Court).

possession of a certificate."[15]

13. "Gender identity" is a composite phrase. It eschews the language of "sex" and also "status". Its definition all but confirms that it is concerned with the outward identity of a person, and that no binary biological concept is intended to be conveyed by it. It also confirms the corollary: that "sex" under the SD Act *is* binary and biological. A person's gender identity relates to appearance, mannerism or other characteristic, and that is so regardless of the person's designated sex at birth.[16] "Sex" must therefore be different from "identity." The legislature could have defined this class as having a "sex identity", but it did not.

14. ***The discrimination protection definitions*.** With the protected classes so defined, the SD Act goes on to define discrimination on the ground of sex (s 5), sexual orientation (s 5A), gender identity (s 5B), intersex status (s 5C) and marital or relationship status (s 6). Each of these provisions is crafted in near exact terms, and no class is afforded lesser protection.

15. Importantly, s 7 (pregnancy discrimination) and s 7AA (breastfeeding discrimination) confer protections on a "woman" who is pregnant or who is breastfeeding. The use of "woman" in these sections makes it abundantly clear that a sex class subsists, and that a "woman" under the SD Act has its biological meaning. Women, not men, give birth. Women, not men, breastfeed. A transman – that is, a member of the female sex who has a male gender identity – is capable of giving birth and capable of breastfeeding, and is protected by these provisions. They are protected by these provisions by virtue of their female sex. Holding otherwise would result in a troubling lacuna, and an objectively unintended one given the reliance on a woman's biological sex in both provisions.

16. ***Special measures to achieve substantive equality*.** The structure of s 7D (special measures) must be noted next. Akin to ss 7A and 7AA, subsections (c), (d) and (e), use the word "women" when addressing special measures relating to pregnancy, potential pregnancy and breastfeeding. Section 7D then separately addresses special measures with respect to gender identity, intersex status and sexual orientation, in (aa), (ab), and (ac). Given that setting, the special measure provision in (a) concerning "men and women" cannot be interpreted differently from the special measures in (c), (d), and (e) so as to result in there being different types of women for different types of special measures. The presumption against that interpretation is strong.[17]

17. ***The application of the discrimination protections to areas of public life.*** Divisions 1 and 2 of Part II of the SD Act pick up and apply the above concepts of discrimination to various fields of public life: work, education, goods and services, accommodation, land dealings, clubs, the administration of commonwealth law and programs, and requests for information.[18] These provisions afford an equal protection to the defined classes by using a common textual formula.

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15 *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [204] (the Court).

16 SD Act, s 4 (meaning of "gender identity").

17 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21, [25] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ).

18 SD Act, ss 14-27.

Discrimination is prohibited "on the ground of … sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities." This textual device ensures that each protected class is afforded no lesser protection. This device, in turn, confirms the futility of diluting the distinction between the sex and gender identity classes.

18. Reservations to this textual device exist in particular situations where the legislature has considered it warranted. The majority of these reservations are reserved for the "sex" class, and appear in:

    (a) Section 21(3) (education): educational institutions can discriminate by conducting education for the single "sex". This allows, for example, the ability of a parent to send their daughter to an all-girl school.

    (b) Section 23(3)(c) (accommodation): charitable accommodation providers can discriminate by providing accommodation for persons of one "sex". This allows, for example, for the operation of domestic violence shelters and rape crisis centres that are dedicated to women.

    (c) Section 25(3) and (4) (clubs): clubs can discriminate by offering membership to the one "sex", or limit benefits to a single "sex" if such benefits cannot be enjoyed simultaneously by "both men and women". This allows, for example, the opportunity for lesbians to gather together to share in their culture and to find partners.[19]

    (d) Section 27(2) (requests for information): requestors of information have a defence if their request is for medical information that concerns a medical condition experienced "by persons of that sex only." This allows, for example, medical practitioners to obtain information from female patients in the screening or diagnosing cervical cancer.

19. The nature of these sex-based reservations to the prohibition against discrimination not only confirms the SD Act's continuation of dedicated protections for the sex class, but also the importance of maintaining the distinction.

20. ***The prohibition on sexual harassment*.** Division 3 of Part II prohibits sexual harassment across the same fields of public life, using two definitional devices: "sexual harassment" and "harassment on the ground of sex."[20] Both definitions, in turn, depend upon a non-exhaustive consideration of circumstances that can include the victim's sex, sexual orientation, gender identity, or intersex status. The definitions are then used to prohibit harassment in most of the same fields of public life in a similar fashion to Div 2.[21] The structure of both definitions again confirms the SD Act's equal protection to each class, and, in turn, the futility of confusing the boundaries drawn between the

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[19] Albeit a haphazard and highly limited opportunity, because the definition of "club" only extends to an association of less than 30 persons, who also sell or supply liquor, that also have gathered for specified purposes: see s 4 (definition of "club").

[20] SD Act, ss 28A and 28AA.

[21] SD Act, ss 28B-28L.

sex and gender identity classes.[22]

21. ***Exemptions*.** It is the exemptions in Div 4 of Part II where the distinction between sex and gender identity becomes most prominent, and where it becomes most important.

    (a) Section 30 permits "sex" discrimination in the form of genuine occupational requirements where they relate to the fitting of clothing, the entry into spaces whilst people are in a state of undress, body searches, entry into lavatories, the provision of accommodation, artistic performance, or the physical attributes possessed by a sex.

    (b) Section 31 permits discrimination against a "man" on the ground of "his sex" that necessarily arises from privileges that are given to a "woman" in connection with her pregnancy, childbirth or breastfeeding.

    (c) Section 32 permits discrimination in the provision of services the nature of which can only be provided to members of "one sex".

    (d) Section 34(2) permits discrimination engaged in by an educational institution in the form of providing accommodation to students of "one sex".

    (e) Section 35(1) permits discrimination on the basis of "sex" in residential care facilities that involve the care of children.

    (f) Sections 41 to 41B permit discrimination on the basis of "sex" in insurance and superannuation products that is drawn from actuarial and statistical data.

    (g) Section 42 permits discrimination on the grounds of "sex, gender identity or intersex status" from competitive sporting activity where strength, stamina or physique is relevant.

22. These exemptions can be compared to others which do not depend on "sex" for their definition, concerning charitable bodies, religion, religious educational institutions, voluntary bodies, and acts done with statutory authority.[23] As none of these exemptions necessarily turns on the female condition, none of them is defined by reference to the concept of "sex".

D. The trial judge has erred

23. The reasoning below, however, practically means that there is no longer a distinction between the sex and gender identity classes.

24. The conclusion that a biological man who identifies as a woman is a "woman" under the SD Act has innumerable unintended consequences. Schools are to admit biological boys into all-girl

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[22] It is only the protection against hostile work environments that is sex specific: see s 28M. The provision does not expressly refer to sexual orientation, gender identity or intersex status in its terms. This does not deny the potential for sexual orientation, gender identity or intersex status to become relevant in any given case of a hostile working environment, noting the breadth of the protection in s 28M and the potentiality for any relevant circumstances that might bring about such hostility.

[23] SD Act, ss 36-40.

schools (s 21(3)). Charitable accommodation providers are to admit biological men into domestic violence shelters and rape crisis centres (s 23(3)(c)). Lesbians are to admit biological men into their clubs (s 25(3)). Employers are to allocate the duties of clothing fitting, body searches, and entering into a women's lavatory to biological men (s 30). The artistic performance of a woman is to be depicted by a biological man (s 30). Biological men are to be afforded privileges in connection with their pregnancy, childbirth and breastfeeding (s 31). Biological boys are to reside in the girl's dormitory at school (s 34(2)). Vulnerable or disabled girls residing in residential care are to be cared for by biological men (s 35(1)). Actuarial data applied favourably to women in insurance or superannuation policies are to be applied to biological men (ss 41-41B). "Sex only" medical conditions are unable to be identified, and both men and women are affected by cervical cancer (s 27(2)). Each of these propositions varies in impossibility, irrationality or unreasonableness. None of them can be said to be the product of a reasonable interpretation of the words of the SD Act.

25. The chain of reasoning relied upon by the trial judge at **TJ[55]-[62]** is wrong, at every turn. Contrary to **TJ[55]**, there is no single, uniform meaning of the word "woman" that encompasses a transwoman.[24] Dictionary definitions are against that proposition.[25]

26. State and territory birth registration legislation does not alter matters: cf. **TJ[55]**. This legislation, as the High Court observed in *Norrie*, effects a legal deeming.[26] An altered birth certificate issued to a transgender person deems that person to be a member of the certified sex "for the purposes of" but "subject to" the legislation of the state or territory in question. This is an almost uniform stipulation.[27] None of this legislation effects a legal deeming that is capable of being applied to the SD Act (and such an attempt would be ineffective in any event). Deeming provisions, by their nature, are interpreted strictly, and only for the purpose for which they are created.[28] The only purpose in s 58(1) of the *Births, Deaths and Marriages Registration Act 2023* (Qld) is to deem Ms Tickle's sex "for the purposes of, but subject to, a law of the State" of Queensland. This deeming provision does not permit the conclusion drawn at **TJ[62]**.

27. Contrary to **TJ[56]**, this Court in *SRA* did not find that "sex can refer to a person being male, female, or another non-binary status"; nor did it find that that phrase "encompasses the idea that a person's sex can be changed". The Court in *SRA* concluded that the words "woman" and "female"

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[24] *Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 469 (Black CJ), 485 (Lockart J).

[25] Macquarie Dictionary Online (Pan MacMillan Australia, 2025), definition of "woman"; Oxford English Dictionary (online, 2025) definition of "woman".

[26] *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [19] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[27] *Births, Deaths and Marriages Registration Act 1995* (NSW), ss 32I; *Births, Deaths and Marriages Registration Act 1996* (Vic), s 30G(3); *Births, Deaths and Marriages Registration Act 2023* (Qld), s 58(1); *Births, Deaths and Marriages Registration Act 1988* (WA), s 36S; *Births, Deaths and Marriages Registration Act 1999* (Tas), s 28D(1); *Births, Deaths and Marriages Registration Act 1996* (NT), s 28H; *Births, Deaths and Marriages Registration Act 1997* (ACT), s 29D(1). The deeming is cast in different language in South Australian legislation: *Births, Deaths and Marriages Act 1996* (SA), s 29U.

[28] *FCT v Comber* (1986) 10 FCR 88, 96 (Fisher J); *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, [55] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

in the *Social Security Act 1947* (Cth) included a reference to a post-operative transwoman, but did not go as far as extending to a pre-operative transwoman.[29] Black CJ stressed (as the High Court would later also find[30]) that his conclusion was one of construction of the statutory text before him.[31] He did not have benefit of the "gender identity" definition that is now usefully supplied in the SD Act. Nor did his Honour have the benefit of the "gender identity" definition when he would later observe in *AB* that: "*there being no contrary intention*, the applicant [a post operative transwoman] is a woman within the meaning of the [SD Act] (our emphasis)."[32]

28. Contrary to **TJ[57]**, the determination of sex under the SD Act does not "take into account a range of factors, including biological and physical characteristics, legal recognition and how they present themselves and are recognised socially". Nowhere in the SD Act can one find support for this sweeping statement. In truth, it is the definition of "gender identity", not the phrases "sex" and "woman", that brings into account the matters that are referred to by his Honour in this paragraph. "Gender identity", it is to be recalled, is primarily defined by reference to three matters: identity, mannerisms and characteristics.[33]

29. The principle expressed in the *Commissioner of Stamps* has the opposite effect from that described in **TJ[58]-[59]**. The addition of sexual orientation, gender identity and intersex protections by the 2013 Amendments produced clearly identified classes for protection, each of which can now be devised according to the terms of the SD Act as amended. The amendments avoided the need to strain for meaning in the initial limited text, and, as the judgments in *SRA* and *AB* exemplified, a straining of meaning was liable to produce incomplete results. With the 2013 Amendments so enacted, the classes of those protected are clear, there are equal and distributive protections, and no piecemeal result of the kind wrought by *SRA* and *AB* is possible. There is thus no need to read sex-based protections in the way his Honour did.

30. The removal of the definitions of "man" and "woman" in s 4 by the 2013 Amendments is suggests a change in meaning (**TJ[59]**), but this places far too much reliance on what a definition in a statute does. Definitions are drafting devices, not substantive enactments of law. Definitions are read into substantive enactments for the purpose of construing the substantive enactment.[34] As has been demonstrated in Part C above, the 2013 Amendments did nothing to change the substantive enactments that protected members of the female sex.

31. The passage of the explanatory memorandum relied upon at **TJ[60]** is wrong. As has been explained above, gender identity discrimination is provided on the same terms as sex

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29 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 474 (Black CJ), 493-494 (Lockart J), 496 (Heerey J).

30 *AB v Western Australia* (2011) 244 CLR 390, [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

31 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 473-474 (Black CJ).

32 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, [4] (Black CJ).

33 SD Act, s 4 (meaning of "gender identity"). The words "identity", "mannerisms" and "characteristics" are not further circumscribed by definition in the SD Act.

34 *Qantas Airways Limited v Transport Workers Union of Australia* (2023) 278 CLR 571, [80] (Gordon and Edelman JJ); *Kelly v The Queen* (2004) 218 CLR 216, [103] (McHugh J).

discrimination under the SD Act. No "protections" are capable of being denied to a transwoman on a distributive reading of the protections in the SD Act. This is not the first time the explanatory memorandum misrepresented the law.[35] Nor is it the first time such a misrepresentation has been made by the department responsible for administering a discrimination statute.[36] The words of an explanatory memorandum do not displace the meaning of the statutory text, nor are they a substitute for the text.[37] **TJ[60]** offers no clarity as to precisely how the explanatory memorandum was capable of assisting construction for the purposes of s 15AB(1)(a) or (b) of the *Acts Interpretation Act 1901* (Cth).[38] In any event, its weight diminishes given the competition of interests and the resulting importance of the text, as s 15AB(3)(a) recognises.

E. The Lesbian Action Group's interpretation of the SD Act conforms to CEDAW

32. An interpretation of the SD Act that retains dedicated protection for members of the female sex is consistent with the treaty which it seeks to enact, the *Convention for the Elimination of All Forms of Discrimination Against Women* (**CEDAW**).[39] CEDAW is scheduled to the SD Act, and a stated object of the SD Act is to give effect to certain provisions of it.[40] Thus, the Court's task is to endeavour to adopt a construction of the SD Act that conforms to CEDAW.[41]

33. As was noted by this Court in *AB*, CEDAW is a convention that is concerned to eliminate discrimination *against women*; it is not concerned with discrimination per se.[42] Most relevantly, Art 4(1) of CEDAW provides that the "[a]doption by States Parties of temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention…". Article 4(1) has been statutorily enacted in s 7D(1)(a), and both are referring to the male and female sex classes.

34. CEDAW is not concerned with transwomen: its terms unmistakably deal with the discrimination experienced by the female sex. Stipulations concern the female biological condition: reproduction (Art 11(f)), pregnancy and confinement (Arts 4(2), 11(2a), 11(2d), 12(2)), family planning (Arts 10(h), 12(1), 14(2b)), and the spacing of children (Art 16(1)(e)). Other stipulations concern the female social condition as experienced internationally: sex trafficking and prostitution (Art 6), equal

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35 *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, [72] (Gageler J).

36 *Purvis v New South Wales* (2003) 217 CLR 92, [90]-[92] (McHugh and Kirby JJ).

37 *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, [70] (Gageler J); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).

38 Cf. *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, [68]-[72] (Gageler J).

39 Opened for signature on 1 March 1980, 1249 UNTS 13 (entered into force on 3 September 1981).

40 SD Act, s 3(a).

41 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ).

42 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, [14] (Black CJ), [81], [88] (Kenny J), [121] (Gyles J). At TJ[162]-[180], the trial judge records a series of troubling arguments advanced below about the effect of CEDAW Committee guidance and reports have on the force of *AB*. These arguments are misguided. None of this material is relevant to the construction of the SD Act, nor CEDAW, in this Court: *Maloney v The Queen* (2013) 252 CLR 168, [24] (French CJ), [134] (Crennan J), [173]-[176] (Kiefel J), [235] (Bell J). In any event, the CEDAW Committee has confirmed that CEDAW's reference to sex is biological: 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), paragraph 5.

remuneration (Art 11(1d)), maternity leave and child-care (Art 11(2), forced marriage (Art 16(1)(b)), child marriage (Art 16(2)), franchise and participation in public life (Art 7), and equal legal capacity (Art 15(2)-(4)). Nowhere can one find the parties to CEDAW contemplating and accommodating the unique needs and interests of transwomen.

35. The SD Act must remain reasonably capable of being considered appropriate and adapted to implementing CEDAW, and must avoid being characterised as substantially deficient in its implementation.[43] A construction that undermines sex-based protections that are afforded to women conflicts with the objects and the terms of CEDAW, whilst one that maintains a sex distinction does not.

F. Conclusion

36. Sex-based protections are critical to a sensible and equal operation of the SD Act. For lesbians in particular, undermining them denies autonomy, dignity and safety. There remains "dangers in a male capable, or giving the appearance of being capable, of procreation being classified by the law as a female,"[44] despite the best intentions of gender ideology. It is the lived experience of lesbians to be confronted by autogynephilic[45] men seeking lesbian attention, as a means of generating sexual gratification for themselves. It is now commonplace for lesbians to be pressured into having sex with transwomen, and to face risk of social isolation if they do not agree with that very concept.[46] This is unacceptable.

37. Returning to s 71D(1)(a), the appeal must proceed on the basis that the Giggle App is intended to be used by women (members of the female sex) to the exclusion of Ms Tickle (a member of the male sex). A text-driven, consistent and coherent construction of the SD Act produces this result. Construing the SD Act in this way properly accommodates the needs of members of the female sex, and does not diminish any protection afforded to Ms Tickle and the broader transgender community by the SD Act. This community, like members of the female sex, can establish their own special measures: s 7D(1)(ab).

7 JULY 2025

LEIGH HOWARD
DR MEGAN BLAKE

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[43] *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 487, 489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Acts Interpretation Act* 1901 (Cth), s 15A.

[44] *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 495 (Lockart J).

[45] Autogynephilia is the condition of a man becoming sexually aroused by the idea or image of himself as a woman: Diagnostic and Statistical Manual of Mental Disorders (5th ed, 2013) 702-704.

[46] C Lowbridge, "The lesbians who feel pressured to have sex and relationships with trans women", BBC Online, 26 October 2021 <https://www.bbc.com/news/uk-england-57853385> (accessed 4 July 2025). The Court in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 at [207] notes evidence of the "chilling effect" on lesbians who are no longer using lesbian-only spaces because of the presence of transwomen.

NOTICE OF FILING

Details of Filing

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Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
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IN THE FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: New South Wales Registry

DIVISION: General

NSD 1386 of 2024

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

and

ROXANNE TICKLE
Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS IN RESPONSE TO THE APPELLANTS' NOTICE OF APPEAL[1]

[1] Orders of Perry J dated 23 May 2025 at [3(a)]; Orders of Perry, Abraham & Kennett JJ dated 25 June 2025 at [3]; Orders of Abraham J dated 4 July 2025 at [1].

Filed on behalf of: The respondent

Prepared by: Counsel for the Respondent: Georgina Costello KC, Christopher McDermott, Briana Goding, Elodie Nadon and Lawyers for the Respondent: Clayton Utz

Law firm: Clayton Utz

Address for service:
Level 15
1 Bligh Street
Sydney NSW 2000

Contact details:
Tel: (02) 9353 4000
Fax: (02) 8220 6700
Contact: Kym Fraser
Email: kfraser@claytonutz.com
Ref: 11475/21269/81047928

INTRODUCTION

1 The Primary Judge (**PJ**[2]) was correct to find that the Appellants discriminated against the Respondent (**Ms Tickle**), a woman, by blocking her access to the "female only online space",[3] the Giggle App, because they perceived her to be male.[4] The Appellants' defence to the discrimination claim (that they did not know Ms Tickle was a transgender woman and blocked her access to the Giggle App because they perceived her to be a man) is inextricable from their nihilistic and legally "false distinction"[5] that a person who had the designated male sex at birth could never be a woman. The PJ correctly found that the Appellants did not deny that the basis for the exclusion of Ms Tickle was that she was perceived to have a male appearance.[6] The PJ also correctly found that the Appellants' "ignorance of [her] gender identity [was] no defence to the indirect discrimination claim" and that their "imposed condition of needing to appear to be a cisgender female in photos submitted to the Giggle App" had a disadvantageous effect on transgender women, including Ms Tickle.[7]

2 Ms Tickle claimed the "mutually exclusive"[8] alternative bases of direct discrimination in s 5B(1), or indirect discrimination in s 5B(2), arising from denial of access to a service for the purposes of s 22 of the *Sex Discrimination Act 1984* (Cth) (**SDA**).[9] The PJ correctly found in favour of her indirect discrimination claim. Ms Tickle has cross-appealed on the basis that the PJ should have awarded higher damages and aggravated damages and should have found direct discrimination, including by refusing to re-admit Ms Tickle to the Giggle App. Ms Tickle makes separate written submissions in support of her Notice of Cross-Appeal (**NCA**[10]).

3 The Appellants have abandoned grounds 4, 5 and 6 of their Notice of Appeal (**NOA**[11]), and do not substantively address ground 2 in their submissions (which Ms Tickle assumes is therefore abandoned along with their arguments in their Notice of a Constitutional Matter (**NCM**[12])).

4 The appeal is by way of rehearing. The Court is to conduct a "real review" of the evidence at trial to determine if there has been an error of fact or law.[13] Material error in a finding of fact is necessary, not

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2 The PJ is Bromwich J and the Judgment (**J**) is *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960; 333 IR 296; Appeal Book Part A (**AB A**) Tab 11 pp 122-191.
3 J[191(a)].
4 J[135].
5 J[76].
6 J[135].
7 J[134]. See *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460 at [194]-[195] (Mortimer J).
8 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; (2017) 256 FCR 247 at [13]-[14] (Bromberg J).
9 Amended Statement of Claim (**ASOC**) filed 14 April 2023 at [34]-[39]; AB A Tab 03 pp 21-22; J[5].
10 An extension of time was granted on 12 February 2025: Orders of Abraham J dated 12 February 2025 at [2].
11 The NOA is AB A Tab 15 pp 196-201.
12 The NCM is AB A Tab 16 pp 202-205.
13 ***Robinson Helicopter*** *Co Inc v McDermott* (2016) 90 ALJR 679 at [43] (French CJ, Bell, Keane, Nettle & Gordon JJ); ***Aldi*** *Foods Pty Ltd & Anor v Moroccanoil Israel Ltd* (2018) 261 FCR 301 at [2] (Allsop CJ) & [54] (Perram J) & [169] (Markovic J); *Lee v Lee* (2019) 266 CLR 129 at [55] (Bell, Gageler, Nettle & Edelman JJ.

mere disagreement with it.[14] Having regard to these principles, each of the Appellants' grounds of appeal are without merit.

LEGISLATIVE CONTEXT

5 A core object in s 3(b) of the SDA is to eliminate, as far as possible, discrimination against persons on the ground of their "gender identity". The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (**2013 Amendment Act**) amended the SDA to specifically protect against discrimination based on "gender identity" and to protect the attribute of "gender identity": ss 3(b), 5B and 22 of the SDA . "Gender identity" is defined in s 4(1)[15] of the SDA, which states:

> ***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.

6 The definition was intended to provide "maximum protection for gender diverse people", acknowledging that "the discord between a person's gender presentation and their identity…is the cause of the discrimination".[16] The definitions of "man" and "woman" in s 4(1) of the SDA were repealed, to ensure that those terms were not subsequently "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".[17] The 2013 Amendment Act acknowledges the practical reality that "the sex of a person is not, and a person's gender characteristics are not, in every case unequivocally male or female",[18] reflecting the potential overlap, and not an exclusive or binary distinction, between sex and gender.

7 The protected attribute of gender identity is expressed in the direct and indirect discrimination prohibitions in s 5B.[19] Like other protected attributes, s 5B is subject to the: reasonableness test for indirect discrimination in s 7B, for which a respondent bears the burden of proof in s 7C; and any special measures intended to achieve equality in s 7D: s 5B(3).[20] The PJ unexceptionally and correctly found that Ms Tickle could maintain her claim of discrimination under s 5B of the SDA, rather than only being

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14 *Robinson Helicopter* at [43] (French CJ, Bell, Keane, Nettle & Gordon JJ); *Aldi* at [2] (Allsop CJ), [49]-[54] (Perram J), [169] (Markovic J).

15 PJ [32], [74]. The Explanatory Memorandum to the 2013 Amendment Act identified the distinction between gender and sex at [13] p 12 "'Gender' is used in this definition rather than 'sex' as it is a different concept, understood to be part of a person's social identity (rather than biological characteristics). Gender refers to the way a person presents and is recognised within the community. A person's gender might include outward social markers, including their name, outward appearance, mannerisms and dress. It also recognises that a person's sex and gender may not necessarily be the same. Some people may identify as a different gender to their birth sex and some people may identify as neither male nor female".

16 Explanatory Memorandum to the 2013 Amendment Act at [11] p 12. See, J[74].

17 Explanatory Memorandum to the 2013 Amendment Act at [18] p 13. See, J[59]-[60], [65]-[73].

18 *AB v Western Australia* (2011) 244 CLR 390 at [23] (French CJ, Gummow, Hayne, Kiefel & Bell JJ). See, too, at [2], citing *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 at 325 (Lockhart J); see J [56].

19 See, too, Explanatory Memorandum to the 2013 Amendment Act at [33]-[36].

20 See, the protected attributes which are subject to s 7B and s 7D: s 5(3) (sex), s 5A(3) (sexual orientation), s 5C(3) (intersex), s 6(3) (marital or relationship status), s 7(3) (pregnancy or potential pregnancy), s 7AA(5) (breastfeeding).

limited to a claim under s 5 of SDA ("sex discrimination") as the Appellants had contended based on Ms Tickle's (perceived) designated sex at birth.[21]

GROUND 1: THE PJ CORRECTLY FOUND INDIRECT DISCRIMINATION

8 By ***ground 1*** the Appellants assert that the PJ erred in finding that the impugned conduct constituted indirect discrimination for the purposes of s 5B(2) of the SDA.[22] The ground must fail as, on the facts found, the claim was correctly made out.[23]

9 Under s 5B(2) of the SDA, Ms Tickle proved, on the balance of probabilities, discrimination on the basis of her gender identity in that the Appellants imposed a condition, requirement or practice that had, or was likely to have, the effect of disadvantaging persons who had the same gender identity as Ms Tickle (here, transgender women). Ms Tickle was excluded from the Giggle App because she did not appear to Ms Grover to be a (cisgender) woman. Ms Grover determined Ms Tickle's gender-related appearance was as a (cisgender) male.[24] The PJ correctly found that Ms Tickle experienced disadvantageous treatment by reason of her gender identity through the imposition of the condition of having the appearance of a cisgender woman, which she could not meet in the circumstances.[25]

10 As the PJ correctly observed at J[75], the Appellants "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 considered to be synonymous with her assigned sex at birth". Further, the Appellants did not deny that the effect of the condition was that it would exclude not just males who were assigned male sex at birth, but transgender women too, including those legally regarded as female: J[136]; NCM[7];[26] AS[9].[27] Squarely, this excluded Ms Tickle on this basis.

11 The PJ found that Ms Grover did not know that Ms Tickle was a transgender woman when she reviewed her "selfie" and excluded her from the Giggle App "on the quick or reflexive decision that she appeared to Ms Grover to be a male", while also finding that Ms Grover's conduct "certainly would have been the same had she been aware of Ms Tickle's gender identity".[28] Ms Grover's knowledge of Ms Tickle's gender identity therefore would have made no difference. The evidence established Ms Grover believed

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21 See, J [75]-[76], [142].
22 Appellants' submissions (**AS**) in support of the NOA at [7]-[16].
23 Ms Tickle's submissions in response to ***ground 1*** are necessarily made in the alternative to her submissions in support of the NCA.
24 Transcript (**TS**) p 117 ll6-19, 32-33.
25 See J[12(b)], [134]; Ms Tickle's opening submissions dated 13 September 2023 at [8]-[11]; AB A Tab 07 pp 68-69.
26 "[Ms Tickle's] access was removed, most likely, following a visual inspection by [Ms Grover] for and on behalf of Giggle, on the basis that the [Ms Tickle] had the characteristics that pertain generally to persons of the male sex or that are generally imputed to persons of the male sex"; AB A Tab 17, [7]. See, too, Amended Notice of a Constitutional Matter filed 3 July 2023 at [9] to the same effect; AB A Tab 16, [7].
27 See, too, the Appellants' opening submissions dated 25 October 2023 at [1]-[2], [25]; AB A Tab 08 p 72 & p 80.
28 J[131].

there is no "legitimate distinction between transgender women and cisgender men".[29] The PJ correctly found that the Appellants had a policy of "excluding all people who were male sex at birth at the time Ms Tickle was removed…including transgender women";[30] this central factual finding is unchallenged.

12 Ms Grover's perception that Ms Tickle was male actuated the Appellants' conduct. The PJ correctly concluded that Ms Grover's actual knowledge of Ms Tickle's gender identity was irrelevant to establishing under s 5B(2) of the SDA whether the impugned condition was imposed, and that the impugned condition had the requisite effect of disadvantaging Ms Tickle as a transgender woman *vis-à-vis* the comparator of a cisgender woman.[31] The central and dispositive question for the PJ was why Ms Tickle was treated as she was, **not** what motive or intention Ms Grover had when she engaged in the impugned treatment.[32]

13 The Appellants do not recognise the validity of the protected attribute of "gender identity" in s 5B of the SDA and deny any distinction between cisgender men and transgender women.[33] The appeal fails to confront the futility of the Appellants' nihilistic denial of the protected attribute as a defence to gender identity discrimination. As the PJ correctly stated "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".[34] The SDA would be significantly undermined if a discriminator could avoid liability on the bare refusal to accept, as a matter of personal belief, the validity of, and the practical need to protect, a statutory attribute.[35]

14 Ms Grover's openness to including "females identifying as men" (transgender men) or "females identifying as neither a 'woman' nor a 'man'"[36] on the Giggle App is no answer to her exclusion of transgender women because she perceives them to be cisgender men, regardless of any actual knowledge as to what their gender identity so expressed was. The Appellants' submission that they do not use the terms "cisgender" and "transgender" and that these terms were not grounded in evidence does not advance any of their grounds of appeal;[37] these are mere semantic complaints. It was open to the PJ to recognise

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29 J[131].

30 J[130], see, too, J[92], [100], [125]-[126], [129].

31 J [134]-[135], noting the identified condition in J[46(b)]

32 J[77]. See, *Waters and Ors v Public Transport Corporation* (1991) 173 CLR 349 at 359 (Mason CJ & Gaudron J); *Purvis v New South Wales* (2003) 217 CLR 92 at [158], [160], [236] (Gummow, Hayne & Heydon JJ); *State of New South Wales Sydney Trains v Annovazzi* [2024] FCAFC 120 at [104]-[107] (Bromwich, Raper & Shariff JJ).

33 J[4], and especially at J[93]; TS p 115, l20–30, TS p 116, l 1–6, TS p 133 l25-26.

34 J[76]. See, too, J[79].

35 As Mortimer J observed in *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460 at [195]: "At base, distinctions between protected attributes and real or perceived characteristics associated with those attributes permits the kind of stereotyping which anti-discrimination laws are designed to prevent".

36 AS[8] and fn#2 & fn #3.

37 AS[8].

these terms as commonly used in the community. By contrast, as the PJ noted, the Appellants' terminology disregarded the language in the SDA.[38]

15 Ms Grover's fervent reluctance to recognise any "legitimate distinction between transgender women and cisgender men"[39] reinforces rather than excuses the discriminatory exclusion of a transgender woman she does not visually detect to be a woman.[40] The process involved to review uploaded "selfies" to the Giggle App, including "ambiguous" photographs,[41] was an exclusionary practice based on visual perception. If a transgender man or non-binary female did not have what Ms Grover considered to be a cisgender female appearance they would not be permitted to join, or would be excluded from, the Giggle App. Ms Grover's affidavit evidence included her account of becoming aware of Ms Tickle joining the App when she received texts and emails to the effect that the member had been removed from the App.[42] Those communications were from Roxy Tickle, a female named person. Ms Grover deposes that she looked at the onboarding photograph "and saw a male person", and included the photograph Ms Grover saw in her affidavit, as though that excused the Appellants' conduct. Ms Grover states she 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".[43] The correct conclusion on the evidence is that Ms Tickle (and transgender women) was (and were) disadvantaged compared to a cisgender woman because of her (and their) transgender identity in circumstances where the condition imposed was the need to look like what Ms Grover considered to be a cisgender woman. While the PJ did not go so far as to find the refusal to let Ms Tickle back on the Giggle App was discriminatory,[44] the evidence before the Court in respect of this matter buttresses the PJ's correct finding of discrimination in this case.

16 Contrary to AS[12], how people perceive a transgender woman, and engage in discriminatory conduct based on their perception of a potential discordance with that person's sex assigned at birth, is clearly the intended basis for the definition of gender identity and the protected attribute in s 5B of the SDA. A discriminator's perception of a person's gender-related identity, appearance or mannerisms or other gender-related characteristics, **regardless** of whether that person has had medical intervention or assigned sex at birth, is the lynchpin of the statutory protection. The Appellants' posited construction is anathema to the broad and beneficial construction to be afforded to a remedial statutory protection of this kind, especially viewed with the objects of the SDA in s 3(b).[45]

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38 J[44].
39 J[131].
40 AS [8], [11] [13]-[14].
41 J[101]-[104].
42 Appeal Book Part B (**AB B**) Tab 03 at [69].
43 J[121].
44 J[134].
45 Compare, *AB v Western Australia* (2011) 244 CLR 390 at [23] (French CJ, Gummow, Hayne, Kiefel & Bell JJ, citing *IW v City of Perth* (1997) 191 CLR 1 at 12 (Brennan CJ & McHugh J), and 39 (Gummow J); see too, 22 (Gaudron & Dawson JJ)).

17 The PJ's finding at J[134] that ignorance of Ms Tickle's gender identity is not a defence to indirect discrimination is sound as a matter of factual inference generally, and specifically for Ms Tickle. This is especially so given the PJ's correct findings that: the Giggle App was created exclusively for women;[46] the terms of use for the Giggle App required that a user "must be a female";[47] Ms Grover had specifically used and implemented the Artificial Intelligence (**AI**) setting for the Kairos screening tool to detect whether a person was female;[48] Ms Grover (primarily, and with others on behalf of Giggle) could and did manually review users of the Giggle App by reference to their uploading of "selfies", with removal of users who appeared to be male.[49] These facts sufficiently establish the existence of the comparator groups (cisgender women and transgender women) and the disadvantaging effect on transgender women; there being no disadvantaging effect on a person perceived to be a cisgender women, but a disadvantaging effect on those perceived to be male.[50]

18 It is specious to submit that Ms Grover's blog post circa 19 July 2020 is incapable as a matter of probative inference of supporting the PJ's factual conclusion that by June 2020 Giggle had adopted a "view that no transgender women should be given access [to the] Giggle App".[51] In any event, the finding at J[130] is not solely reliant on the PJ's view of the blog post nor made on the basis of inference.[52] The 2020 blog post forms one part of a larger body of surrounding evidence that was admitted during the trial. For example, annexed to Ms Grover's affidavit dated 23 October 2022 is a series of exchanges between Ms Grover and others, including an exchange dated 20 February 2021 where Ms Grover states: "There are many other apps for trans women. Giggle is not one of them…"[53]. Ms Grover's language demonstrates her intent to actively exclude transgender women from the Giggle App.

19 Finally, the Appellants' reliance on the absence of discriminating conduct by the AI setting for the Kairos screening tool against Ms Tickle[54] is no answer to the Appellants' subsequent conduct of excluding Ms Tickle from the Giggle App and not letting her back in, which was the subject of Ms Tickle's claims. It is also entirely unclear how the PJ's anodyne descriptions of "cisgender and "transgender" at J[4] in any way undermines the conclusions the PJ reached overall.[55]

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46 J[90], [94], [98].
47 J[99], [136].
48 J[101]-[102].
49 J[104], [128], [133].
50 As to the phrase "has, or is likely to have the effect" in s 5B(2) of the SDA, compare, *Save Our Strathbogie Forest Inc v Secretary to the Department of Energy, Environment and Climate Action* (2024) 306 FCR 316 at [348] (Horan J); *cf* AS[11] and fn #5.
51 J[92], [100]; AS[15].
52 AS[15].
53 AB B Tab 3.4, Annexure SG-4.
54 AS[14].
55 AS[14].

20 On the evidence, it was plainly open to the PJ, in "[ascertaining] the actual position",[56] to make a finding of indirect discrimination. The evidence disclosed that the Appellants' intent was to exclude transgender women from the Giggle App, and that, to meet this end, the Appellants had "truly sought to impose … a requirement of a condition which is discriminatory, and not reasonable within the meaning of the [SDA]".[57]

GROUND 3(A): THE GIGGLE APP WAS NOT A "SPECIAL MEASURE"

21 The PJ correctly found that the Giggle App was not immune from sanction as discrimination under s 5B as a "special measure" pursuant to s 7D of the SDA for the purpose of achieving substantive equality between men and women.

22 Section 5B of the SDA is subject to s 7D: s 5B(3). Section 7D(1) provides that a person may take special measures for the purpose of achieving substantive equality between *inter alia*: (a) men and women; or (ab) people who have different gender identities. Section 7D(2) provides that a person does not discriminate against another person under s 5B by taking special measures authorised by s 7D(1). Section 7D(4) provides that the provision does not authorise the taking, or further taking, of special measures for a purpose referred to in s 7D(1) that is achieved.

23 At trial, the Appellants eschewed reliance on the Giggle App constituting a special measure for the purpose of s 7D(1)(ab) of the SDA (gender identity).[58] That concession is fatal to the success of this appeal ground. The evidence or additional submissions relied upon by the Appellants in support of their s 7D contention below was summarised in their opening submissions[59] and was correctly considered and discounted by the PJ.[60] Central to the PJ's correct treatment of the evidence was that the evidence rested on an assumption that biological sex was a limitation for the purposes of the statutory concepts of male / female / man / woman in the SDA. The PJ did not accept that limitation applied under the SDA (see J[62]-[64], [141] ("this case [involved] wider issues than biology")). Further, many of the Appellants' witnesses at trial gave no evidence as to the purposes of the Giggle App.[61]

24 The Giggle App was not a special measure for the purpose of achieving substantive equality between cisgender women and transgender women for the purposes of s 7D(1)(ab).[62] The PJ correctly rejected the contention that any special measure found to exist for the purpose of s 7D(1)(a) of the SDA (for women)

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56 *State of New South Wales v Amery* (2006) 230 CLR 174 at [208] (Callinan J).
57 *State of New South Wales v Amery* (2006) 230 CLR 174 at [208] (Callinan J).
58 Outline of opening submissions dated 23 October 2023 AB A Tab 08 at [2] p 72; Joint Defence AB A Tab 02 at [5] p 11. In closing oral submissions, the Appellants' Counsel confirmed "there's not a special measure taken for that purpose": TS p 303 l 1, in response to the Court's question at TS p 302 l 37-47.
59 AB A Tab 08 at [57]-[59] p 91.
60 For the reasons given at J[137]-[148].
61 J[148].
62 J[81]-[85].

rendered it immune from discrimination against transgender women under s 5B.[63] Specifically, the Court found this contention "plainly untenable" and "unworkable and nonsensical".[64] The PJ's construction is orthodox and unassailably correct, having regard to the text of s 7D, viewed in the context the SDA and its objects.[65] The word "or" in s 7D(1) and s 7D(2) clearly reflects the possibility of different special measures intended for different posited groups of people with the protected attribute. The phrase "special measures" includes affirmative action measures which confer a benefit on a group for the purpose of achieving substantive equality.[66] The word "or" reflects alternatives consistently with the contextual use of "or" in other key provisions: see s 7B(1) and s 8. It also aligns with each of the protected attributes being "subject to" s 7B or s 7D.[67] The PJ's construction aligns with the objects in s 3(b) of the SDA.

25 The Appellants attempt to side-step their concession as to s 7D(1)(ab) by identifying error in the manner in which the PJ interpreted s 7D.[68] The high point of their submission is that a measure that meets the criteria in s 7D(1) is, by force of s 7D(2), excluded from the scope of ss 5–7A.[69] To accept that interpretation would be to undermine the clear intent of the 2013 Amendment Act as it would condone blatant discrimination against a group of people where that discrimination otherwise achieves substantive equality between a different group of people with a protected attribute identified under s 7D(1). There are no textual indications, nor explanatory materials,[70] to support that contention. Had the Legislature intended otherwise, it would have been sufficient for s 7D(2) to mirror language found in Div 4 of Pt II (e.g., ss 34 (Accommodation provided for employees or students), 36 (Charities), 39 (Voluntary bodies)). The Legislature also would not have used the disjunctive "or" in s 7D(2) and instead would have used the conjunctive "and"; and "or" cannot sensibly be read as disjunctive in s 7D(1) and conjunctive in s 7D(2). None of this is "a strange incident of legislative drafting".[71] The Appellants' contention would render otiose s 44 of the SDA,[72] which provision enables a person to apply for an exemption from the operation of a provision of Div 1 (i.e., from the provisions identifying the attributes in ss 5 to 7A).

26 Finally, the Appellants' submission that Crennan J's decision in *Jacomb*[73] supports their non-distributive construction is misconceived and devoid of necessary context (the absence of any reference to ss 5A-5C

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63 J[50], [85].

64 J[86].

65 See, generally, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan & Kiefel JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle & Gordon JJ).

66 ***Jacomb*** *v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 at [60] (Crennan J).

67 See, s 5(3) (sex), s 5A(3) (sexual orientation), s 5C(3) (intersex), s 6(3) (marital or relationship status), s 7(3) (pregnancy or potential pregnancy), s 7AA(5) (breastfeeding).

68 AS[19]-[29].

69 AS[19]. See also J[85].

70 Explanatory Memorandum to the 2013 Amendment Act at [47] p 17.

71 Contrary to the Appellants' closing submissions at trial: TS p 305 l 1-6.

72 See *Commonwealth v Baum* (1905) 2 CLR 405 at 414 (Griffith CJ); *Ross v R* (1979) 141 CLR 432 at 440 (Gibbs J); *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 (Gummow J).

73 *Jacomb* , see especially at [47].

of the SDA **before** the 2013 Amendment Act). Crennan J did not describe "s 7D as characterising conduct as 'non-discriminatory' where the criteria in subs (1) are met".[74] Rather, in the singular context of "race", Crennan J observed that "special measures" may be "ostensibly discriminatory" but that a person "taking a special measure is not discriminating against others because such measures are designed to ensure genuine equality".[75] The only other protected attributes that were included in s 7D(1) at the time of *Jacomb* were "people of different marital status", "women who are pregnant and people who are not pregnant" and "women who are potentially pregnant and people who are not potentially pregnant".[76]

GROUND 3(B): LEAVE SHOULD BE REFUSED FOR A NEW ARGUMENT AS TO "REASONABLENESS"

27 Under s 7C, the burden of proving that an act does not constitute discrimination because of s 7B lies on the person who did the act. Section 7B(1) provides that a person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in s 5B(2) if the condition, requirement or practice is reasonable in the circumstances. The inclusive matters to be taken into account for the purposes of s 7B(1) are those identified in s 7B(2)(a)-(c).

28 By this new ground,[77] the Appellants introduce a matter not pleaded below, not contained in written submissions below and not argued below.[78] In oral closing submissions below, the Appellants' Counsel endeavoured to explain away the absence of any pleading on the point by reference to the (purported) "allision between direct and indirect discrimination" in Ms Tickle's pleaded case.[79] The PJ correctly challenged the Appellants' submission on this point.[80] Ms Tickle's pleading also did not cause any confusion for the Sex Discrimination Commissioner.[81] Nor did it cause confusion at the time of the Appellants' Defence, where they simply denied the allegation of unlawful indirect discrimination.[82]

29 The PJ correctly observed that the Appellants' defence did not rely on s 7B and was unsatisfied how, if at all, they could seek to deploy it as a statutory defence.[83] Save for in exceptional circumstances, an

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74 AS[20].
75 *Jacomb* at [47] (Crennan J).
76 *Jacomb* at [12] (Crennan J).
77 AS[34]-[40].
78 TS p 238 l 33–45, where the primary judge said, "I didn't think 7B is being relied upon" and "[a]ll of your 5B pleading is just simply denied". See also TS p 307 l 10-15, where Counsel for the Appellants said: "I have to say I didn't rely on 7B".
79 TS p 270 l 26, p 271 l 20-26.
80 TS p 271 l 3-14 (see especially at l13-14: "There's plainly a case of direct discrimination and plainly a case of indirect discrimination").
81 AB A Tab 05 at [7] p 33.
82 AB A Tab 02 at [34] p 40.
83 J[37]. As to the importance of the trial judge's reasons in considering whether a point was taken at trial, see: ***Whisprun*** *Pty Ltd v Dixon* (2003) 77 ALJR 1598 at [50] (Gleeson CJ, McHugh and Gummow JJ).

appellant will be confined to the case they ran at trial.[84] No exceptional circumstance arises here.[85] Moreover, had the Appellants raised this positive defence at trial, Ms Tickle would have met that defence with her own evidence and argument. Raised now for the first time on appeal, she is deprived of that opportunity.[86] This Court should not permit the Appellants to pursue this ground of appeal; to so do, absent exceptional circumstances, would be "inimical to the due administration of justice",[87] including that it would undermine the finality of the litigation and would cause significant injustice / procedural unfairness to Ms Tickle.[88] Under cover of objection to the new ground being run, Ms Tickle now addresses the s 7B point.

30 ***First***, in relation to s 7B(2)(a),[89] the Appellants state that "[n]o evidence was led of material deprivation, disruption to access, or broader exclusion from digital participation". This is a gloss on the fact that Ms Tickle was not required to meet this point by way of evidence at trial.

31 ***Secondly***, in relation to s 7B(2)(b),[90] the Appellants refer to the possibility of Ms Tickle (and others in the "protected group") accessing other digital spaces and, by way of sole example, rely on Ms Tickle participating in online discourse through Twitter (now "X"). That is not determinative of the question posed by s 7B(2)(b), which concerns the steps taken by the discriminator to overcome the disadvantage caused by the Imposed Condition.[91] In any event, the Appellants provided no evidence that such other digital spaces would serve the same function and purpose as the Giggle App for Ms Tickle. The one example relied upon by the Appellants is not analogous or equivalent with the Giggle App at all and is not a fair equivalent. As a transgender woman, Ms Tickle (like other transgender women) also deserve a "refuge" where they can seek access to peer support, advice and a female community and are not deprived of accessing spaces of relevance to them. Ms Tickle is recognised under the *Births, Deaths and Marriages Registration Act 2003* (Qld) as being female.[92]

32 ***Thirdly***, in relation to s 7B(2)(c),[93] the Appellants did not lead evidence of a "persistent sex-based disadvantage in digital environments";[94] the evidence sought to be relied upon rises no higher than a collection of self–serving affidavits of some women who gave evidence in vague and overly generalised

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84 *University of Wollongong v Metwally (No. 2)* (1985) 59 ALJR 481 at 483 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ). See also *Coulton v Holcombe* (1986) 162 CLR 1 at 7–8 (Gibbs CJ, Wilson, Brennan and Dawson JJ); ***Water Board v Moustakas*** (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ).

85 *Water Board* (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ) (i.e., where the point sought to be raised is one of construction or of law).

86 Noting especially that ordinarily further evidence is not permitted on appeal: r 36.57 of the *Federal Court Rules 2011* (Cth).

87 *Whisprun* (2003) 77 ALJR 1598 [51] (Gleeson CJ, McHugh and Gummow JJ).

88 As to which, see *Whisprun* (2003) 77 ALJR 1598 [51] (Gleeson CJ, McHugh and Gummow JJ).

89 AS[36].

90 AS[37].

91 See, e.g., *Mayer v Australian Nuclear Science & Technology Organisation* (2003) EOC 93–285 at [63] (Driver FM).

92 J[3].

93 AS[38].

94 *cf Walker v Cormack* (2011) 196 FCR 574 at [28]-[36] (Gray J).

terms of their varied online experiences, many of which bear no relation to the Giggle App or transgender women.[95] Had it been clear at trial that the Appellants' intention was to rely upon this evidence in support of an argument geared towards s 7B, responsive forensic decisions might have been made (e.g., taking additional objections, making specific submissions as to weight, leading responsive evidence); the "other relevant matters"[96] relied upon are unstable inferences to be drawn on the evidence, too.

33 In any event, the Court cannot be satisfied that the Appellants have discharged their burden of proof in showing the Imposed Condition was reasonable.

DISPOSITION

34 The appeal should be dismissed, with costs.

7 July 2025

Georgina Costello KC
Christopher McDermott
Briana Goding
Elodie Nadon
Counsel for the Respondent

Clayton Utz
Lawyers for the Respondent

95 See e.g., AB B Tab 07, Tab 08, Tab 09, Tab 21.
96 AS[39].

NOTICE OF FILING

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Important Information

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Full Court of the Federal Court of Australia
Registry: New South Wales
Division: General

No. NSD1386/2024

Giggle for Girls Pty Ltd (ACN 632 152 017) & Anor
Appellants

Roxanne Tickle
Respondent

Submissions of the Sex Discrimination Commissioner

Introduction

1. By orders made on 12 February 2025, the Sex Discrimination Commissioner (**Commissioner**) was granted leave to appear as amicus curiae in these proceedings pursuant to s 46PV of the *Australian Human Rights Commission Act 1986* (Cth) to make submissions in relation to the topics set out in the primary judge's reasons (**PJ**) at [13].[1] Consistent with her position at trial (**PJ [14]**), the Commissioner advances submissions on construction issues only, and not on the ultimate question of whether the Appellants discriminated against the Respondent as alleged.

2. Given that the Appellants do not press Grounds 5 and 6 of their Notice of Appeal (**NoA**), the constitutional validity of the relevant provisions of the SDA is no longer in issue.[2] Of the other topics set out in **PJ [13]**, it remains necessary to address:

   (a) the construction, meaning and scope of provisions of the *Sex Discrimination Act 1984* (Cth) (**SDA**) dealing with discrimination on the ground of (relevantly) gender identity; and

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

3. Ground 3(b) of the NoA contends that the primary judge erred in failing to find that the Giggle App was "reasonable" within the meaning of s 7B of the SDA. At trial, the Commissioner made no submissions on the proper construction of s 7B, because she did not apprehend that the Appellants relied on that provision (see **T172.1-15**). If the Court grants leave to raise this ground,[3] or determines that no leave is required, the Commissioner respectfully requests a variation to the topics upon which she is entitled to make submissions, to the extent this is necessary, so as to include "the construction, meaning and scope of the 'reasonableness test' in s 7B of the SDA".

4. The Commissioner advances four arguments in this appeal. These are as follows:

   (a) *First,* the gender related appearance of a person is an aspect of that person's "gender identity" as that term is used in s 5B of the SDA ([5]-[17] below).

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

2 The Appellants also confirmed that they no longer press Ground 4, which concerns the failure to admit an affidavit. The Appellants' primary written submissions did not appear to address Ground 2. However, in correspondence dated 9 July 2025, the Appellants said that they had not abandoned Ground 2 and that their submissions on this ground were contained in footnote 16. This issue is addressed in [49] below.

3 The Commissioner notes that the Respondent submits that this is a new ground, and that leave should be refused to raise it (**RS-NOA [28]-[29]**).

(b) *Second,* to the extent that it is necessary to decide, the word "likely" in s 5B(2) is properly construed to mean that there is a real and not fanciful or remote chance of the relevant effect, rather than "probably" ([18]-[24] below).

(c) *Third,* even if the Giggle App were a "special measure" within s 7D(1)(a), it could still constitute discrimination within s 5B ([26]-[49] below).

(d) *Fourth,* the reasonableness of the condition (a matter on which the alleged discriminator bears the burden of proof) must be assessed objectively having regard to all of the relevant circumstances ([51]-[66] below).

NoA Ground 1 / Cross-Appeal Ground 1: Discrimination on the ground of gender identity

The relevance of gender-related appearance (Commissioner's first argument)

5. The Appellants submit that "an applicant's 'gender identity' [could not] be discerned from a 'quick and reflexive decision' based solely on perceived visual cues of femaleness" (**AS [9]**). They also contend that the primary judge's reasoning "elides the distinction between visual perception of sex and the protected attribute", and "assumes that the visual impression of maleness is equivalent to membership of the protected group" (**AS [13]**).

6. In summary, the Commissioner's response at the level of construction is as follows. On a proper interpretation, the gender-related appearance of a person *itself forms part of* that person's "gender identity" as that term is used in s 5B. Treating a person differently on the basis of "perceived visual cues of [their] femaleness" or "maleness" can ground gender-identity discrimination because these cues are the central means available to an outsider to judge whether the person identifies as (eg) a woman or a man, and thus a key catalyst for their adverse differential treatment on gender identity grounds (as not "really" being a woman or a man). In this way, that conduct is treatment on the basis of the person's "gender identity", or of an "imputed characteristic" of the person's gender identity, within s 5B(1). Alternatively, imposing a condition founded on such visual cues may satisfy s 5B(2). To take a conceptually similar example from the racial discrimination context: skin colour is commonly used as an indicator of race (as reflected by the inclusion of "colour" within s 9(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**)), and so an act whereby a person's skin colour forms the basis for adverse treatment will constitute racial discrimination.[4] It would not usually be a compelling answer to say that this analysis conflates visual perception of brownness or whiteness with a racial judgement about the person.

[4] See, eg, *Eatock v Bolt* [2011] FCA 1103 at [316].

7. ***Links between appearance and gender identity:*** *First,* the inextricable connection between gender-related appearance and gender identity is clear from the express terms of the definition of "gender identity" in s 4(1) of the SDA: "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" (emphasis added).

8. "Gender" is not defined in the Act. It bears its ordinary meaning. It is a different concept from "sex", which is used in s 5. "Gender" is not determined by biological or physical factors, but instead refers to the way a person identifies as well as the way they present and are recognised within the community.[5] This is confirmed by the words "with or without regard to the person's designated sex at birth" in the definition of "gender identity": s 4. That is, some people may identify as "a different gender to their birth sex".[6] Some people who are gender diverse do not identify as male or female[7] (eg they may identify or present as neither, despite their sex being designated male or female at birth).

9. As the definition in s 4(1) demonstrates, gender identity is not just limited to a person's gender-related *intrinsic* sense of self that forms part of their social identity. It also includes what the Explanatory Memorandum for the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (**2013 EM**) described at [13] as *outward* social markers: that is, gender identity also includes a person's "gender-related appearance", "gender-related mannerisms" and other "gender-related characteristics". Indeed, the appearance, mannerisms and other characteristics are outward manifestations of the person's intrinsic sense of self. They are tethered in how a person identifies themselves.

10. *Second,* the s 4(1) definition – in specifying that the gender-related characteristics of a person may be "by way of medical intervention or not" – also implicitly recognises that a person's gender identity may manifest in a need to change their appearance to match their sense of gender identity, and that this need may lead the person to seek "medical intervention" to achieve certain gender-related characteristics of the sex which conforms with their perception of their gender.[8] These may be surgical procedures to alter their bodies and appearance, or non-surgical procedures such as use of a gonadotrophin releasing hormone analogue (often referred to as "puberty blocking" treatment)[9] or the taking of either oestrogen or testosterone

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5 Explanatory Memorandum for the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) (**2013 EM**) at [13].

6 2013 EM at [13].

7 2013 EM at [11] and [13]. See also Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012,* February 2013 (**2013 Senate Report**) at [3.6]-[3.7].

8 See *AB v Western Australia* (2011) 244 CLR 390 at [1].

9 *Re Kelvin* [2017] FamCAFC 258 at [12].

(often referred to as "cross sex" or "gender affirming" hormone treatment).[10] The definition also acknowledges that gender-related appearance and gender-related characteristics might arise otherwise than from medical intervention, for example through the way a person dresses.

11. *Third,* one of Parliament's purposes in introducing s 5B was to combat the problem that it is usually by virtue of a person's outward manifestations that a person is detected as being of a certain gender identity (or as not belonging to another gender identity), and thereby subjected to discrimination on that basis. As the 2013 EM said:[11]

> This definition [of gender identity] provides maximum protection for gender diverse people. It includes the way a person expresses or presents their gender and recognises that a person may not identify as either male or female. *This acknowledges that it is often the discord between a person's gender presentation and their identity which is the cause of the discrimination.*

12. Further, the "Regulation Impact Statement" in the 2013 EM explained that "[t]he high levels of discrimination facing the lesbian, gay, bisexual, transsexual and intersex (LGBTI) community is well documented".[12] In support of that statement, the EM cited an Australian Human Rights Commission report that relevantly explained (emphasis added):[13]

> A number of trans … participants explained the unique challenges they faced in the workplace, *including not being recognised as their preferred gender*, being forced to disclose private information and being denied employment opportunities. For example:
>
> > Many companies are not willing to employ trans people, especially *those of us who do not "pass" as the gender we are transitioning to,* because we're considered too "difficult" for the workplace.

13. As an illustration of how s 5B could apply in practice, the 2013 EM explained that it would be unlawful under s 27 of the SDA for an employer to ask an applicant of female appearance with a masculine sounding voice for her medical history, but not to ask the same question of other applicants in order to avoid hiring a transgender person (at [63]).

14. Whilst obviously not relevant as extrinsic material, the UK Supreme Court expressed the same point very recently in *For Women Scotland Ltd v The Scottish Ministers*,[14] noting that "[m]any of the judgments handed down in earlier cases addressing transgender issues emphasise the importance to the trans person who had brought the proceedings before the court of modifying their appearance so that they look like a typical person of their acquired gender". The Court discussed in particular *Chief Constable of the West Yorkshire Police v A (No 2)* [2005] 1

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10 *Re Kelvin* [2017] FamCAFC 258 at [13] and [20]; *AB v Western Australia* (2011) 244 CLR 390 at [32].

11 2013 EM at [11] (emphasis added).

12 2013 EM at p 25.

13 Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination – Consultation Report* (2011) 10.

14 [2025] 2 WLR 879; [2025] UKSC 16 at [87].

AC 51 and *R (C) v Secretary of State for Work and Pensions* [2017] 1 WLR 4127. In the latter case, Baroness Hale PSC recorded that the applicant had "undergone full gender reassignment treatment and surgery, which in [the applicant's] case included facial feminisation surgery, in her words because it was 'incredibly important' to her 'easily to "pass" as a woman"' (at [3]).

15. ***Conclusions:*** It follows that the protection against gender identity discrimination in s 5B of the SDA applies both to discrimination based on how the person identifies themselves *and* how they are identified by others using these outward markers.

16. For example, a trans woman may say that her gender identity is female, but s 5B(1) would still protect her from *direct discrimination* on the ground that she was identified by the discriminator as a trans woman and was treated less favourably than a person with a different gender identity as a result. Specifically, a trans woman who identifies as female may face direct discrimination because her gender-related appearance, mannerisms or other gender-related characteristics are not perceived as being ("sufficiently") female. The relevant characteristics of the comparator for the purposes of s 5B(1) ("a person who has a different gender identity", understood as extending to gender-related appearance, mannerisms or other gender-related characteristics) will depend on identifying a person who is similarly placed ("in circumstances that are the same or are not materially different"). In the circumstances described above, the relevant comparator may be a cisgender woman whose gender-related appearance, mannerisms or other gender-related characteristics *are* perceived as being female. That said, it is not necessary for the person to be identified by the discriminator as a trans woman in order for a claim for direct discrimination to succeed (contra **PJ [131]**, see also **RS on Cross-Appeal at [10]**). This is because direct discrimination may be established where there is an explicit rule or policy of treating trans women less favourably than cisgender women "by reason of" their gender identity.

17. A trans woman may experience *indirect discrimination* under s 5B(2) if the discriminator imposes a condition which appears to be neutral but that has the effect of disadvantaging persons who have the same gender identity as her (the aggrieved person). One example is a human resources policy which does not permit amendments to existing records may disadvantage a trans woman by forcing her to disclose details regarding her trans status to explain discrepancies in the employment records (unless the policy is reasonable in the circumstances: ss 5B(3) and 7B).[15] Another is a policy that all inmates in a prison be referred to using personal pronouns that correspond to their birth sex and not their gender identity. This policy may disadvantage

[15] 2013 EM at [34]-[36].

people whose gender identity is different from their birth sex by "denying their gender identity" and limiting their ability to live in accordance with their affirmed gender.[16]

The meaning of "likely to have" (Commissioner's second argument)

18. The Appellants submit that s 5B(2) "requires that the condition *has* (as a matter of definition) or *is likely to*, (which on its true construction, is on the balance of probabilities) have the effect of disadvantaging the protected group" (**AS [12]**, emphasis in original). In this regard, they submit that the word "likely" in s 5B(2) "refers not to a future possibility but to the present effect of the condition, and imports a standard of probability—namely, that the condition has, or is more probable than not to have, the effect of disadvantaging persons with the relevant attribute", citing two decisions of the Full Court of the Federal Court.[17] The meaning of "likely to have" in s 5B(2) was not the subject of submissions in the Court below and was not addressed by the primary judge.

19. It may not be necessary for the Court to reach a concluded view on the meaning of "likely" in the context of s 5B(2) of the SDA. The Court may be satisfied that the Appellants imposed a condition that "had" the relevant effect, which would be sufficient to give rise to indirect discrimination (given the disjunctive "or").[18] But if it is necessary to decide, the Commissioner submits that the word "likely" should be construed to mean that there is a "real" and "not fanciful or remote chance" of the relevant effect, rather than "probably".

20. ***A protean term:*** The authorities relied upon by the Appellants make it clear that the word "likely" can have different meanings in different contexts. In *Tillmanns*,[19] Bowen CJ (Evatt J agreeing) said:

> The word "likely" is one which has various shades of meaning. It may mean "probable" in the sense of "more probable than not" – "more than a fifty per cent chance". It may mean "material risk" as seen by a reasonable man "such as might happen". It may mean "some possibility" – more than a remote or bare chance. Or, it may mean that the conduct engaged in is inherently of such a character that it would ordinarily cause the effect specified.

21. In the particular statutory context of that case, Deane J concluded that "likely" meant "real chance or possibility" and not "more likely than not".[20]

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16 See *Tafao v State of Queensland* [2020] QCATA 76 at [43]-[51], [137]-[139], [153] and [169]. This decision was overturned on appeal to the Queensland Court of Appeal for other reasons: *State of Queensland v Tafao* (2021) 7 QR 474.

17 *Australian Competition and Consumer Commission v* ***Pacific National*** *Pty Ltd* (2020) 277 FCR 49 at [222] and ***Tillmanns*** *Butcheries Pty Ltd v Australasian Meat Industries Employees' Union* (1979) 42 FLR 331 at 339, 346.

18 See, eg, *Director of Public Prosecutions v Natale* [2018] VSC 339 at [90].

19 (1979) 42 FLR 331 at 339. See similarly Deane J at 346.

20 (1979) 42 FLR 331 at 347. The other two members of the Court did not express a view.

22. In *Pacific National*,[21] Middleton and O'Bryan JJ said that the "ordinary meaning … in everyday language" of the word "likely" is "probable". However, their Honours ultimately followed previous authority in the relevant statutory context to the effect that "likely" in the relevant statutory context meant "a likelihood that is less than probable".[22] The joint reasons also referred (at [230]) to the "often overlooked" case of *Trade Practices Commission v TNT Management Pty Ltd*.[23] That case concerned a provision that referred to a restraint in trade or commerce that "has or is likely to have a significant effect on competition". In that context, Franki J said that "[t]he word 'has' requires the question to be tested against the established facts whereas the words 'likely to have' … allows any reasonable inference to be drawn".[24] That proposition has been referred to on other occasions without apparent disapproval.[25]

23. The Commissioner has not identified any previous authority directly on the meaning of "likely" in the SDA. The closest analogy upon which there is authority is s 18C of the RDA, which relevantly makes it "unlawful for a person to do an act" that is "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate". This Court has held that the requirement that the act is "reasonably likely" to have the requisite effect is satisfied if there is a "real" and "not fanciful or remote" chance of the relevant outcome.[26] One other authority raising broadly similar issues is *VVR (a pseudonym) v Trustee for Ironfish Property Management Melbourne Unit Trust*,[27] which concerned an analogous statute with the language of "has, or is likely to have". The Supreme Court of Victoria noted that the Victorian Civil and Administrative Tribunal "accepted that the use of the applicant's deadname in email correspondence caused her disadvantage and that there is *a possibility* of disadvantage to others with VVR's gender identity".[28] That finding was not challenged on appeal.[29]

24. ***Conclusion:*** As made clear in the discussion above, the word "likely" can have a variety of meanings. In those circumstances, the construction that better promotes the beneficial purpose of the legislation should be preferred.[30] As the 2013 EM noted at [11], the definition

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21 (2020) 277 FCR 49 at [222].

22 (2020) 277 FCR 49 at [243]. The third member of the Court, Perram J, did not express a view: at [399]-[401].

23 (1985) 6 FCR 1.

24 (1985) 6 FCR 1 at 50.

25 See *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi S.R.L. (No 12)* [2016] ATRP 42-525; [2016] FCA 822 at [185]; *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212 at [87].

26 *Wertheim v Haddad* [2025] FCA 720 at [184]; *Faruqi v Hanson* [2024] FCA 1264 at [240]; *Clarke v Nationwide News Pty Ltd* [2012] FCA 307 at [48]; *Eatock v Bolt* (2011) 197 FCR 261 at [260]; cf *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [65].

27 [2025] VSC 64.

28 [2025] VSC 64 at [28].

29 [2025] VSC 64 at [29].

30 *Acts Interpretation Act 1901* (Cth), s 15AA.

of "gender identity" was drafted to provide "maximum protection for gender diverse people".[31] There is a general rule of construction that a beneficial or remedial provision is to be given a "fair, large and liberal" interpretation rather than one which is "literal or technical".[32] A beneficial or remedial provision is "one that gives some benefit to a person and thereby remedies some injustice".[33] In particular, where legislation protects or enforces human rights, courts have a "special responsibility to take account of and give effect to the statutory purpose".[34] One of the objects of the Act is "to eliminate, so far as is possible, discrimination against persons on the ground of … gender identity" in the areas of public life covered by the Act.[35] The Appellants' construction would give an unduly narrow operation to s 5B(2), which would undermine that purpose.

The decision in *For Women Scotland*

25. The Appellants do not rely upon the UK Supreme Court's recent decision in *For Women Scotland*,[36] holding that the *Equality Act 2010* – in referring to "women" – refers to biological women only (but see **LAGS at [12]**). For completeness, the Commissioner notes her position that this decision is not relevant to the task of construing the relevant provisions of the SDA. As is evident from the helpful summary at [265] of the decision, the Court's conclusion in *For Women Scotland* was driven by matters of statutory construction particular to the *Equality Act*.

NoA Ground 3(a): Whether the Giggle App is a "special measure"

"Distributive" operation of s 7D (Commissioner's third argument)

26. The Appellants contend that the Giggle App was a "special measure" within s 7D(1)(a). A central plank of their case is a constructional argument. They submit that the primary judge erred in adopting a "distributive" interpretation of s 7D, by holding that a measure taken to achieve substantive equality between men and women under s 7D(1)(a) cannot protect the actor from liability under s 5B (dealing with gender identity discrimination) unless the measure *also* falls under s 7D(1)(ab) (providing for special measures to achieve substantive equality between "people who have different gender identities") (**AS [21]**). For the reasons below, there is no warrant for doubting the primary judge's construction of s 7D. It was correct.

27. ***Anterior propositions – proper construction of s 7D:*** Whilst s 7D is a statutory provision to which orthodox rules of construction apply, the relevance of international law adds a further

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31 See also 2013 Senate Report at [7.12].

32 *AB v Western Australia* (2011) 244 CLR 390 at 402 [24], citing *IW v City of Perth* (1997) 191 CLR 1 at 12.

33 *Re McComb* [1999] 3 VR 485 at 490 [22].

34 *Waters v Public Transport Commission* (1991) 173 CLR 349 at 359 (Mason CJ and Gaudron J). See also *IW v City of Perth* (1997) 191 CLR 1 at 22-23 (Dawson and Gaudron JJ), 58 (Kirby J).

35 SDA, s 3(b).

36 *For Women Scotland Ltd v The Scottish Ministers* [2025] 2 WLR 879; [2025] UKSC 16.

dimension. The Appellants correctly acknowledge that the language of "special measures" comes from art 4 of the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**) and should be understood "by reference to the context, object and purpose of" art 4 (**AS [18]**). Against that backdrop, the following propositions should inform the Court's analysis of s 7D.

28. *First*, by the settled principles that apply under arts 31(1) and 32 of the *Vienna Convention on the Law of Treaties* (1969), treaty interpretation is a "holistic exercise to ascertain meaning", which has regard to the treaty terms read in their *full* context – being context drawn from the treaty itself and from supplementary sources such as the preparatory work and the circumstances of the treaty's conclusion.[37] *Second*, noting that treaties "should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation",[38] the scope of the supplementary sources that can legitimately inform the construction exercise is fairly broad. Whilst primacy is given to the treaty text, "regard may be had to contemporary preparatory work", "the decisions of foreign courts", "the commentaries of learned authors, past and present",[39] and handbooks or guidelines issued by the UN body responsible for administering the treaty (as a source that aids interpretation in the manner "akin to the work of jurists").[40] *Third*, and relatedly, the interpretations adopted by an independent body established to supervise the application of the treaty (such as, in the case of CEDAW, the CEDAW Committee) should be given considerable weight.[41] *Fourth*, these same principles apply when interpreting domestic law that incorporates a treaty,[42] because that law "should be construed in conformity with" the treaty in the absence of any express legislative statement to the contrary.[43] *Fifth*, given that CEDAW arises for interpretation here through the medium of a Commonwealth statute, the extrinsic materials accompanying the SDA provide relevant context for Parliament's enshrinement of the instrument into domestic law.

29. ***Text of s 7D:*** As a matter of statutory text, the primary judge's construction is consistent with the structure of s 7D. Section 7D(1) contains nine paragraphs setting out nine ways in which a special measure could be framed. Those nine paragraphs correspond to the eight grounds of discrimination individually listed in s 7D(2) (noting that discrimination on the grounds of pregnancy or potential pregnancy, addressed in s 7D(1)(c) and (d), are both covered by s 7 of

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37 *Evans v Air Canada* (2025) 99 ALJR 941; [2025] HCA 22 at [7]-[8].

38 *Morrison v Peacock* (2002) 210 CLR 274 at [16].

39 ***NBGM*** *v Minister for Immigration* (2006) 150 FCR 522 at [160]-[162], appeal dismissed in *NBGM v Minister for Immigration* (2006) 231 CLR 52.

40 *NBGM* at [161]-[162].

41 *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at [22], citing *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 at 664 [66]. The submission in **LAGS fn 42** to the contrary should be rejected.

42 *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149 at [119].

43 ***Jacomb*** *v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 at [41]; see also [42]-[44].

the Act) – which together encompass all the statutory forms of "discrimination" in Part I of the SDA that are made unlawful by Part II. For example, s 7D(1)(a) relates to substantive equality between men and women, which corresponds to discrimination on the ground of sex under s 5. Section 7D(1)(aa) relates to substantive equality between people who have different sexual orientations, which corresponds to discrimination on the ground of sexual orientation under s 5A.

30. If the Appellants' construction were correct, Parliament did not need to list the eight individual discrimination provisions in s 7D(2). It could have just said: "A person does not discriminate under this Act [or under Part I of this Act] by taking special measures authorised by subsection (1)". It did not do so. Similarly, Parliament would not have needed to list out the nine forms of special measures in s 7D(1) as separate sub-paragraphs. The fact that Parliament separately articulated each form of substantive equality relevant to each head of discrimination (s 7D(1)(a)-(f)), and then separately identified each head of discrimination (s 7D(2)) such that every form listed in s 7D(1) correlated with a specific head listed in s 7D(2), evinces an intention to ensure that the authorisation in s 7D(2) attaches only to the *particular* discrimination that the special measure is designed to remedy – not to *all* discriminatory conduct.

31. The Appellants' reliance on *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* (2024) 98 ALJR 1273 at [32] is misplaced (**AS [21]**). There, the Court was setting out the principles relevant to the construction of a statutory definition. It is not correct to characterise s 7D as a "statutory definition" that must be "read into" the "substantive provision". The relationship between s 5B and s 7D is made clear in s 5B(3), which provides that s 5B "has effect subject to sections 7B and 7D". A provision's use of the phrase "subject to [provision X]" shows that it is subordinate to provision X.[44] Here, the way that this subordination works is that s 7D operates upon s 5B as, in substance, an "exculpation, justification [or] excuse", which "denies the right or liability in a particular case by reason of additional or special facts",[45] and in respect of which the alleged discriminator bears the onus of proof.[46]

32. ***The effect of the Appellants' construction:*** In contending that s 7D(2) focuses on "the act of taking a measure for a legitimate equality purpose" (**AS [23]**), the Appellants mask the true effect of their construction of s 7D.

33. The Appellants appear to argue that, if a measure is taken for the purpose of achieving *one* of the forms of substantive equality in s 7D(1)(a)-(f), it will be treated as being taken for *that*

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44 See *DPP (Vic) v Leys* (2012) 44 VR 1 at [157]; see also Herzfeld and Prince, *Interpretation* (3rd ed, 2024) [5.210].

45 *Vines v Djordjevitch* (1955) 91 CLR 512 at 519; *Walker v Cormack* (2011) 196 FCR 574 at [25].

46 See, eg, *Jacomb* at [63]-[64].

purpose (and thus will engage the exclusion in s 7D such that there is no prohibited discrimination), even if it also pursues other purposes which may be unrelated to an equality objective (s 7D(3)) – and even if the measure would be discriminatory under the SDA on other grounds, or undermine substantive equality between other groups listed in s 7D(1). Accordingly, the consequence of the Appellants' interpretation is that s 7D would not *just* operate as a shield such that a given anti-discrimination objective of the SDA (eg avoiding discrimination against people on the ground of sex) may be pursued via a mechanism for substantive equality. It would *also* permit that mechanism to be used as a sword to perpetuate *other* forms of discrimination that are prohibited by the SDA.

34. In other words, under the guise of helping to eliminate one form of discriminatory conduct, the Appellants' construction would, by a side wind, expressly authorise other forms of discriminatory conduct and thus take the protections in the SDA backwards. So long as a given measure had as one purpose the achievement of equality between (eg) men and women (s 7D(1)(a)), the measure could expressly and deliberately disadvantage any of the other traditionally marginalised groups identified in s 7D(1).

35. On this reading, the SDA would not prohibit, for example: a women-only adult swim class that excluded lesbians (cf s 5A), a women's leadership course that was only open to women who acknowledge that they are not pregnant and are not seeking to become pregnant (cf s 7), or a women's fun-run that was only open to married women (cf s 6). It would permit an employer to advertise for a woman to take up a senior role in light of the employer's historically male-dominated workforce, but only if she undertook that she would be continuously available for work during all business hours and would not leave the office for school pickups or dropoffs (cf s 7A). And it would allow a landlord concerned about women being locked out of the rental market to reserve certain high demand apartments for female tenants, but to exclude all breastfeeding women (cf s 7AA), or all trans women (cf s 5B), or all women who are intersex (s 5C).

36. There is no indication in the text, context or purpose of the SDA that Parliament sought to bring about this alarming result. Indeed, that result is contrary to (i) the broader statutory context of the SDA, and (ii) the legislative history. As to (i), the statutory objects set out in s 3 of the SDA include eliminating, so far as is possible, discrimination against persons on *all* the grounds provided for in ss 5-7A (see ss 3(b)-(ba)), *as well as* achieving substantive equality between men and women (s 3(e)).[47] The multi-pronged statutory scheme, which targets many forms of discrimination simultaneously, indicates that a person who aims to achieve

[47] Identification of legislative purpose must start with an objects clause where there is one: see *Unions NSW v New South Wales* (2019) 264 CLR 595 at [79].

substantive equality between men and women should not also be permitted to engage in discrimination against persons with (eg) a certain gender identity. Permitting such discrimination, without any corresponding benefit in terms of ensuring substantive equality between persons of different gender identities, undermines the purpose of the SDA as a whole. The achievement of one "valid equality objective" or "legitimate equality purpose" should not be at the expense of another (contra **AS [22]-[23]**).

37. As to (ii), it is worth emphasising that the prohibitions in the SDA are no longer confined to "discrimination against women" (cf **LAGS [32]-[35]**). The amendments to the SDA effected by the 2013 Act occurred in a context where the constitutional basis of the SDA had been broadened in 2011.[48] Before the relevant amendment, s 9(10) provided that "[i]f [CEDAW] is in force in relation to Australia, the prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect in relation to discrimination against women, to the extent that the provisions give effect to [CEDAW]". Section 9(10) now provides that "[t]he prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect to the extent that the provisions give effect to a relevant international instrument". The term "relevant international instrument" is defined in s 4(1) to include eight instruments, including the International Covenant on Civil and Political Rights. Therefore, the 2013 amendments to s 7D were made after the scope of the SDA had been broadened, to make it clear that s 7D permits "special measures" to address substantive equality between men and women *as well as* between other marginalised persons and the rest of the community. As the Act currently stands, there is no warrant for considering that discrimination against women is a statutory mischief that assumes any greater importance or weight than the mischief reflected by the newer discrimination prohibitions.

38. More directly, support for the primary judge's construction of s 7D emerges from the explanation in the 2013 EM for Parliament's introduction of paragraphs (aa), (ab) and (ac) into s 7D(1). Those new paragraphs formed one component of the 2013 Bill's new "measures to extend the protection from discrimination to the new grounds of sexual orientation, gender identity and intersex status".[49] The 2013 EM explained that the introduction of the three new grounds of discrimination would "increase protection for groups that are often the target of discrimination" and "therefore promote the rights to equality and non-discrimination for LGBTI people" (at p5). As to the new paragraphs of s 7D(1), it then stated (at [47]):

> The amendments to section 7D in these items will ensure that special measures can be taken to address the particular needs of people who have different sexual orientations, people who have different gender identities and people

[48] *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth).

[49] 2013 EM at p2.

who are of intersex status, without producing claims of unlawful discrimination under the new sections 5A, 5B and 5C.

39. There was no indication that the satisfaction of (aa), (ab) or (ac) would avoid claims of unlawful discrimination on the *other* grounds listed in s 7D(2): ss 5, 6, 7, 7AA or 7A. Similarly, there was no indication that measures aimed at achieving substantive equality between groups listed in s 7D(1) prior to these amendments would be sufficient to avoid claims of unlawful discrimination on these new grounds. That would amount to a significant watering down of the Bill's express new protections for the abovementioned groups. The most reasonable inference is that, if those new protections were to be unavailable in answer to any "special measure" addressing a different form of discrimination, Parliament would have said so in terms.

40. Similarly, when the grounds of "breastfeeding" and "family responsibilities" were inserted into the SDA as ss 7AA and 7A, the relevant Explanatory Memorandum confirmed that the corresponding amendments made to s 7D were to ensure "that special measures can be taken to address the particular needs of persons who are breastfeeding or who have family responsibilities without producing claims of unlawful discrimination under new sections 7AA or 7A".[50] Again, there was no suggestion such special measures would avoid claims of discrimination on the other grounds.

41. ***Interpreting s 7D in conformity with CEDAW:*** The Appellants' construction of s 7D also jars with CEDAW. The mechanism for "temporary special measures" in art 4 of CEDAW reflects the proposition that the pursuit of *substantive* equality occurs against the backdrop of historical and entrenched inequality. Some groups continue to face systemic discrimination and structural barriers to equal participation in public life. To treat groups that are differentially situated as if they were the same can be a form of discrimination.[51] Differential treatment (or formal inequality) is therefore permissible, in order to achieve "de facto" equality.[52]

42. In order for conduct to qualify as a special measure, it must be done "for the purpose of achieving substantive equality": s 7D(1). In the language of art 4(1) of CEDAW, it must be "aimed at accelerating de facto equality". This requires both: (i) an assessment of whether the subjective intention of the person taking the measure was to achieve substantive equality; and

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50 Explanatory Memorandum to the Sex and Age Discrimination Legislation Amendment Bill 2010 at [34].

51 *South West Africa Cases (Second Phase)* [1966] ICJR 6 at 305-306 (Judge Tanaka), quoted with approval in *Gerhardy v Brown* (1985) 159 CLR 70 at 129 (Brennan J); *Street v Queensland Bar Association* (1989) 168 CLR 461 at 512 (Brennan J), 571 (Gaudron J); *Maloney v The Queen* (2013) 252 CLR 168 at [340] (Gageler J).

52 CEDAW, art 4. See also Committee on the Elimination of All Forms of Discrimination Against Women (**CEDAW Committee**), *General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)* (18 August 2004) at [8]-[10] and [14]. See also *Jacomb* (2004) 140 FCR 149 at [39], citing the relevant extrinsic materials for s 7D, and at [45]-[47], [60].

(ii) an objective assessment of whether the person taking the measure acted reasonably in assessing the need for the special measure, and of whether the measure has the capacity to achieve the purpose of substantive equality.[53]

43. This interpretation is consistent with general recommendations of the CEDAW Committee made under art 21(1) of CEDAW. The Committee has said that the word "special" means that the measures are designed to serve a specific concrete goal, namely, the achievement of de facto or substantive equality.[54] States parties are obliged to take such measures if they can be shown to be necessary and appropriate in order to accelerate the achievement of that goal.[55] Plans for special measures must be designed, applied and evaluated against the background of the specific nature of the problem that they are intended to overcome.[56] Finally, reporting on special measures should include references to concrete goals and targets, timetables and the reasons for choosing particular measures so that proponents of the measures are accountable for their progress.[57] In combination, these requirements indicate that a special measure involves more than simply taking action on a good faith basis with a subjective goal of achieving a particular purpose. There must also be an objective assessment of whether the measure is reasonably necessary to achieve the relevant purpose.[58]

44. Thus, the rationale of art 4(1), and in turn of s 7D, is that ensuring substantive equality between (eg) men and women may require measures that treat men and women differently. That differential treatment results in a corresponding benefit in terms of achieving substantive equality between men and women. But nothing about this rationale requires that it can or should occur at the price of permitting discrimination against *another* group of traditionally marginalised people – constituting, in many cases, a subset of the cohort (women) that CEDAW aims to protect. CEDAW, in referring to "women" generally, seeks to promote the substantively equal rights of *all* women. To the extent that certain women face additional layers of discrimination, CEDAW evinces no intention to legitimise the taking of measures that advance one cohort of women to the detriment of another, more marginalised, cohort. Indeed, in CEDAW's GR No. 25, the Committee acknowledged that certain groups of women may suffer from other forms of discrimination based on "additional grounds", and said that States

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53 *Jacomb* (2004) 140 FCR 149 at [34], [61]-[62] and [64]-[65]; cf *Walker v Cormack* (2011) 196 FCR 574 at [29]-[31].

54 CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)* (18 August 2004) at [19] and [21].

55 *Ibid* at [24].

56 *Ibid* at [33].

57 *Ibid* at [36].

58 See also *Maloney v The Queen* (2013) 252 CLR 168 at [20]-[21] (French CJ), [101]-[102] (Hayne J), [130] (Crennan J), [177] and [180] (Kiefel J), and [358] (Gageler J); contra [241]-[243] (Bell J), addressing special measures under the *Racial Discrimination Act 1975* (Cth).

parties "may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them" (at [12]).

45. ***Prior authorities:*** Finally, the "distributive" construction of s 7D approved by the primary judge is consistent with Crennan J's decision in *Jacomb v Australian Municipal Administrative Clerical and Services Union*.[59] In that case, her Honour was careful to identify both the relevant kind of substantive equality and the corresponding kind of discrimination that was foreclosed. Her Honour said:[60]

> … subs 7D(1)(a) authorises the taking of "special measures" for the purpose of achieving substantive equality between men and women. The phrase "substantive equality" means equality in substance or *de facto* equality, in contradistinction to notional equality or formal equality. Subsection 7D(2) provides that "special measures" authorised by subs 7D(1) do not give rise to discrimination *under s 5*. (emphasis added)

46. To similar effect, in *Walker v Cormack*,[61] Gray J extracted s 7D only "so far as relevant to this case", which were s 7D(1)(a) (special measures to achieve equality between men and women) and the reference in s 7D(2) to s 5 (sex discrimination).

47. It is accepted that both *Jacomb* and *Walker* were decided before the amendments in 2013, such that there was no question about whether a "special measure" authorised by s 7D(1) also did not give rise to discrimination under s 5B. However, it is nevertheless clear that in both cases the Court linked the purpose of a special measure with the specific prohibition to which the special measure is directed.

48. ***Conclusion:*** In summary, a special measure taken for the purpose of achieving substantive equality between particular groups has the result that the measure is not discrimination on the ground corresponding to those groups. A special measure for the purpose of achieving substantive equality between men and women would not amount to sex discrimination under s 5, but unless it was also a special measure for the purpose of achieving substantive equality between people of different gender identities, it may still amount to discrimination under s 5B. That construction does not produce an arbitrary result (cf **AS [24]**).

49. Having regard to the "distributive" construction of s 7D advanced above, the Commissioner does not consider it necessary to address the further issue of the meaning of "men" and "women" in s 7D(1)(a) of the SDA as raised in **AS fn 16** and in the submissions of the Lesbian

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59 (2004) 140 FCR 149.

60 (2004) 140 FCR 149 at [60].

61 (2011) 196 FCR 574 at [8].

Action Group (see eg **LAGS [1], [3], [9]**; cf **PJ [85]-[86]**).[62] To the extent that this is a live issue in the appeal, the Commissioner says that the primary judge was correct at **PJ [55]-[64]** and relies on her previous written submissions on this topic (Appeal Book, Part A, Tab 5, [14]-[36]). If the Appellants raise further construction issues in relation to Ground 2 of the NoA in their reply submissions that were not raised in their submissions in chief, the Commissioner seeks an opportunity to respond to those in writing.

NoA Ground 3(b): Whether condition was "reasonable" within s 7B

50. If the Court permits the Appellants to argue this ground, the Commissioner respectfully seeks to advance the following submission on the proper construction of s 7B.

The "reasonableness" test in s 7B (Commissioner's fourth argument)

51. ***"Reasonable":*** Section 5B is expressed to be "subject to", and therefore subordinate to (see [31] above), s 7B. Accordingly, the definition in s 5B(2) applies if the condition, requirement or practice is not "reasonable" within the meaning of s 7B. Analogous case law also indicates that it is the "condition" that must be reasonable, rather than the conduct of any of the parties.[63]

52. Section 7B(2) states a non-exhaustive list of matters that must be taken into account in deciding whether a condition, requirement or practice is reasonable. It is not apt to describe s 7B(2) as setting out "elements" (cf **AS [35]**). Each matter is addressed in turn below.

53. The *first* matter is "the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice" (s 7B(2)(a)). On that topic, the EM for the Bill that inserted s 7B said that it:[64]

> … incorporates considerations of the type or degree of disadvantage or detriment to members of the group to which the complainant belongs. For example, under paragraph (a) a relevant factor may be whether the condition, requirement or practice complained of subjects persons of, for example, a particular sex, to ongoing disadvantage by entrenching the results of past discriminatory practices.

54. This point is illustrated by the decision of the Human Rights and Equal Opportunity Commission in *Hickie v Hunt and Hunt*.[65] In that case, the respondent law firm argued that, if

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62 The primary judge accepted the Commissioner's submissions that, in the context of s 5 of the SDA, "sex is not confined to being a biological concept … nor confined to being a binary concept", but that it was not necessary "to determine the metes and bounds of the meaning of sex" for the purposes of the proceedings (**PJ [55], [62]**).

63 See *Ryan v Commissioner of Police (NSW) (No 4)* [2023] FCA 1016 at [109] (***Ryan (No 4)***), considering s 6(3) of the *Disability Discrimination Act 1992* (Cth) (which provides that ss 6(1) and (2) "[do] not apply if the requirement or condition is reasonable, having regard to the circumstances of the case").

64 Replacement Explanatory Memorandum to the Sex Discrimination Amendment Bill 1995 (Cth) at [31].

65 [1998] HREOCA 8. See the discussion in Rees et al, *Australian Anti-Discrimination and Equal Opportunity Law* (3rd ed, 2018) at [6.4.5].

there was an expectation or requirement that partners of the firm had to be present for 5 days to perform certain functions, then that was a "reasonable" requirement within the meaning of s 7B. Commissioner Evatt rejected that argument, reasoning that[66]

> The question of the reasonableness of the requirement has to be considered in the light of the nature and extent of the disadvantage, which in this case is clear and obvious. The imposition of a condition, requirement or practice that a partner work full time would inevitably disadvantage women practitioners, especially those who are, or who are aspiring to be partners. To regard this as a reasonable requirement would perpetuate and institutionalise indirect discrimination against women lawyers.

55. The need to consider the discriminatory impact of a decision was also recognised by Sackville J in *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission*,[67] which concerned the former s 5(2)(b) of the SDA. His Honour said:[68]

> The fact that a distinction has a "logical and understandable basis" will not always be sufficient to ensure that a condition or requirement is objectively reasonable. The presence of a logical and understandable basis is a factor — perhaps a very important factor — in determining the reasonableness or otherwise of a particular condition or requirement. But it is still necessary to take account of both the nature and extent of the discriminatory effect of the condition or requirement (in the sense in which the authorities interpret that concept) and the reasons advanced in its favour. A decision may be logical and understandable by reference to the assumptions upon which it is based. But those assumptions may overlook or discount the discriminatory impact of the decision. Depending on the circumstances, such a decision might be legitimately characterised as not reasonable, having regard to the circumstances of the case, within the meaning of s 5(2)(b) of the SD Act.

56. In assessing s 7B(2)(a) as it applies to gender identity discrimination against a trans woman, it may be relevant to consider whether the impugned exclusion of trans women entrenches or reinforces historical exclusion of trans women from women's spaces.

57. The *second* matter is "the feasibility of overcoming or mitigating the disadvantage" (s 7B(2)(b)). In relation to that matter, the EM relevantly said that:[69]

> … paragraph (b) involves an examination of the purpose for which the condition, requirement or practice was imposed or proposed to be imposed, and an assessment of whether alternative means of a less discriminatory, or non discriminatory, nature are available to achieve the result sought. Factors such as cost, workplace planning, business needs and business efficiency would be relevant considerations in determining the feasibility of overcoming or mitigating the disadvantage.

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66 [1998] HREOCA 8 at [6.17.12].

67 (1997) 80 FCR 78.

68 (1997) 80 FCR 78 at 112.

69 Replacement Explanatory Memorandum to the Sex Discrimination Amendment Bill 1995 (Cth) at [32].

58. It is evident from the EM that the consideration in s 7B(2)(b) is primarily directed to alternative actions that *the respondent* to a claim for discrimination could have taken. On that issue, in an earlier decision in the same litigation that yielded *Ryan (No 4)*, Abraham J stated that the Court needed to assess whether there was "a less discriminatory option, including any accommodation of the needs of the aggrieved person and the possibility of alternative action which would achieve the object of the condition and be less discriminatory".[70] However, "the fact that there is a reasonable alternative that might accommodate the interests of the aggrieved person does not of itself establish that a requirement or condition is unreasonable".[71]

59. The *third* matter in s 7B(2) is "whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice" (s 7B(2)(c)). In relation to this matter, the EM said:[72]

> Paragraph (c) contemplates a balancing approach. Consideration is to be given to the purpose or reason underlying the imposition, or proposal to impose, the condition, practice or requirement, balanced against the disadvantage which will flow, or is likely to flow, to members of the group to which the complainant belongs, if the discriminatory condition, practice or requirement is imposed.

60. Importantly, the matters identified in s 7B(2) are non-exhaustive. Various authorities addressing the SDA or anti-discrimination statutes with analogous provisions hold that the reasonableness test is objective and takes into account all of the relevant circumstances.[73]

61. In particular, in *Waters v Public Transport Corporation*,[74] the High Court considered Victorian legislation that relevantly provided that a person discriminates against another if they impose upon another a requirement or condition that, among other things, was "not reasonable". In their joint reasons, Dawson and Toohey JJ said that reasonableness was "a question of fact for the [Equal Opportunity] Board to determine but it can only do so by weighing all the relevant factors".[75] Their Honours quoted with approval the following passage in the joint reasons of Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles*,[76] which considered the former s 5(2)(b) of the SDA:

> [T]he test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. … The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory

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70 *Ryan v Commissioner of Police, NSW Police Force (No 2)* [2021] FCA 106 at [249]. This earlier decision was overturned by the Full Court of the Federal Court, but casting no doubt on this statement of principle.

71 *Ryan (No 4)* at [120].

72 Replacement Explanatory Memorandum to the Sex Discrimination Amendment Bill 1995 (Cth) at [33].

73 See also, in the context of s 18D of the RDA, *Wertheim v Haddad* [2025] FCA 720 at [217]-[218].

74 (1991) 173 CLR 349.

75 (1991) 173 CLR 349 at 395.

76 (1989) 23 FCR 251 at 263; see also *JM v QFG & GK* [2000] 1 Qd R 373 at 387.

> effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.

62. Brennan J said:[77]

> It is not possible to determine reasonableness in the abstract; it must be determined by reference to the activity or transaction in which the putative discriminator is engaged. Provided the purpose of the activity or transaction is not to discriminate on impermissible grounds, the reasonableness of a requirement or condition depends on whether it is reasonable to impose the requirement or condition in order to perform the activity or complete the transaction. There are two aspects to this criterion of reasonableness: first, whether the imposition of the condition is appropriate and adapted to the performance of the activity or the completion of the transaction; second, whether the activity could be performed or the transaction completed without imposing a requirement or condition that is discriminatory (that is, one to which pars (a) and (b) of s 17(5) would apply) or that is as discriminatory as the requirement or condition imposed. These are questions of fact and degree. Effectiveness, efficiency and convenience in performing the activity or completing the transaction and the cost of not imposing the discriminatory requirement or condition or of substituting another requirement or condition are relevant factors in considering what is reasonable.

63. McHugh J considered that "reasonable" should be taken to have its ordinary meaning, which is "reasonable in all the circumstances of the case".[78]

64. Further, in a case concerning former s 5(2)(b) of the SDA, the Federal Court (Davies J) repeated that "the reasonableness of a requirement or condition is to be addressed having regard to all the circumstances of the case".[79]

65. ***Burden of proof:*** The burden of proving that an act does not constitute discrimination because of s 7B lies on the person who did the act (s 7C). Before ss 7B and 7C were inserted by the *Sex Discrimination Amendment Act 1995* (Cth), the burden was on the complainant to prove that the relevant requirement or condition was "not reasonable having regard to the circumstances of the case" (see s 5(2)(b) as originally enacted). The Replacement Explanatory Memorandum for the Bill said that s 5(2) was amended "to simplify the test for indirect discrimination, clarify the meaning of indirect discrimination and *provide a defence to the respondent if the respondent can satisfy all the elements of the defence* including, that the condition, requirement or practice, the imposition of which it is alleged amounts to indirect discrimination, is reasonable in all the circumstances".[80] More particularly, the EM said that "[t]he new test does not require

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77 (1991) 173 CLR 349 at 378.

78 (1991) 173 CLR 349 at 410.

79 *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 84.

80 Replacement Explanatory Memorandum to the Sex Discrimination Amendment Bill 1995 (Cth) at p1 (emphasis added).

a complainant alleging indirect discrimination to satisfy the proportionality test nor prove that a requirement or condition is unreasonable in the circumstances", but rather that the discriminator can rely on a new "reasonableness" defence.[81] Further, it explained:[82]

> Under the existing test for indirect discrimination, the complainant had to prove, amongst other things, that a requirement or condition was unreasonable in the circumstances. (See Item 6 above for an explanation of the existing test for indirect discrimination.) It is recognised that requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination. It is a particularly onerous burden on the complainant who does not usually have access to the information needed to prove that actions allegedly amounting to indirect discrimination are unreasonable in the circumstances. By contrast, the respondent is likely to have access to the information needed to prove that such action is reasonable in the circumstances. Thus the respondent is better able to bear this burden of proof. For this reason "reasonableness" is provided as a defence to the respondent who must prove the elements of the defence in order to rely on it rather than as an element of the test for indirect discrimination to be proved by the complainant.

66. Accordingly, the legislative history and extrinsic material make it clear that the casting of burden on the respondent to a discrimination claim to prove reasonableness was a deliberate one. In shifting the burden, it was clearly intended that complainants would be able to establish indirect discrimination more easily than had previously been the case.

Conclusion

67. For the above reasons, the Court should adopt the conclusions set out in [4] above. Given her role as amicus curiae, the Commissioner does not seek costs and costs should not be awarded against her.

Date: 11 July 2025

Celia Winnett
Sixth Floor Selborne Wentworth
T: (02) 8915 2673
E: cwinnett@sixthfloor.com.au

Jackson Wherrett
Eleven Wentworth
T: (02) 8066 0898
E: wherrett@elevenwentworth.com

[81] Replacement Explanatory Memorandum to the Sex Discrimination Amendment Bill 1995 (Cth) at [16].

[82] Replacement Explanatory Memorandum to the Sex Discrimination Amendment Bill 1995 (Cth) at [35].

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Federal Court of Australia
District Registry: New South Wales

No. NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) and another
Appellants

ROXANNE TICKLE
Respondent

On appeal from the Federal Court

APPELLANTS' OUTLINE OF SUBMISSIONS IN RESPONSE TO THE SUBMISSIONS OF THE LESBIAN ACTION GROUP

Introduction

1. These submissions respond to those filed by the Lesbian Action Group[1] (**LAG**), which the Appellants support insofar as they construe the terms "sex", "man" and "woman" under the *Sex Discrimination Act 1984 (Cth)* (**SDA**) and uphold the SDA's comparator logic.[2] The central propositions are that the SDA treats "sex" and "gender identity" as distinct attributes, and that "sex", "men" and "women" as they appear in ss 5 and 7D(1)(a), must be interpreted by reference to a biological category, not legal status or subjective identity: cf. J[55] – [62]

2. This issue lies at the heart of Ground 2 of the appeal. The Appellants' primary position[3] is that the term "women" in s 7D(1)(a) refers to persons of the female sex, and that the SDA must be construed accordingly to preserve the integrity of its comparator logic and its function in giving effect to CEDAW.[4] On that footing, the primary Judge erred in concluding that legal sex recognition under State law determines the classification of the Respondent as a "woman" for all purposes under the SDA: J[62] – [64] and [178].

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[1] Written submissions of the Lesbian Action Group filed on 7 July 2025
[2] See eg. *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 at [222]–[225]; *IW v City of Perth* (1997) 191 CLR 1 at 67 - 69
[3] Appellant's Submissions filed 23 June 2025 at [28] and fn. 16
[4] As explained in ***Jacomb*** *v Australian Municipal, Administrative, Clerical and Services Union* (2004) 140 FCR 149 at [47], s 7D was enacted to give domestic effect to CEDAW Art 4(1), which authorises measures taken specifically for the advancement of women, and is structurally anchored in the comparison between men and women as fixed, binary sex classes. It assumes that asymmetry between the sexes may persist so long as the special measure promotes substantive equality. The SDA, in giving effect to CEDAW, reflects this binary comparator model. It presupposes binary, sex-based classes. Redefining "woman" by reference to identity collapses that structure and defeats the provision's intended function.

3. In the alternative[5], the Appellants maintain that even if the term "woman" were to be construed more broadly, the Giggle App would remain a valid special measure under s 7D(1)(a). While, the provision presupposes a binary comparison between "men" and "women" and requires that the measure be taken for the advancement of the latter group as a coherent class, the statutory purpose is nevertheless satisfied where the measure is directed to addressing disadvantage experienced by a defined class of "women" relative to "men". The measure does not lose its character because others seek inclusion into the broader category or because the outer boundary of the statutory class is contested. What matters is that the group the measure targets is a defined group of "women", in the statutory sense, who are experiencing the disadvantage, which the measure seeks to address.[6]

The correct construction of *sex*, *man* and *woman* in the SDA

4. The meaning and contemporary application of ss 5 and 7D(1)(a) must be understood in light of subsequent amendments enacted against the background of the SDA's original purpose and its continuing operation to give effect to CEDAW, the treaty to which the SDA partially gives effect.[7]

5. Within the design of the SDA as currently amended, s 7D(1)(a) can be seen to serve the ongoing legislative purpose of supporting Australia's continuing adherence to its obligations under CEDAW, particularly the adoption of temporary special measures to achieve substantive equality between "men" and "women". That foundational purpose remains embedded in the structure of the SDA, notwithstanding arguments that the contemporary operation of ss 5 and

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[5] Appellant's Submissions filed 23 June 2025 at [28] and fn. 16

[6] See *Gerhardy v Brown* (1985) 159 CLR 70 at 89 (Gibbs CJ), 108–109 (Mason J), 139 (Brennan J), where the High Court confirmed that a special measure may validly be directed to a defined subclass within a broader protected group, provided it is proportionate to the purpose of achieving substantive equality. This principle is reflected in the structure of the SDA itself. Section 7D(1)(a) does not require a measure to advance *all* women, but merely a group of women for whom the measure is intended. This is consistent with other provisions of the SDA that recognise and protect determined subsets of women — such as pregnant women (s 7), breastfeeding women (s 7AA), menopausal women (s 5) or women with endometriosis (s 5). E.g. A workplace risk policy tailored to pregnant employees, or a breastfeeding break policy, is not rendered invalid because it does not extend to non-pregnant or non-lactating persons who identify as women. Similarly, as the latter two examples under s 5 demonstrate a special measure under s 7D(1)(a) may lawfully target women of certain age or women with a certain condition as a subclass of "women" for the purpose of addressing sex-based disadvantage, without needing to encompass *all* women.

[7] SDA, s 3(a), *Jacomb v* at [43]–[44]; *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 at [11] – [16] per Kenny J. See CEDAW Committee, *General Recommendation No. 28: Core Obligations of States Parties under Article 2*, UN Doc CEDAW/C/GC/28 (16 December 2010), [5]. See also Human Rights Committee, *General Comment No 18: Non-discrimination*, UN Doc CCPR/C/21/Rev.1/Add.1 (10 November 1989) [6], [12], where the Human Rights Committee has confirmed that "sex" is a distinct ground of discrimination and that Article 26 operates autonomously to prohibit discrimination in any area regulated by law, without altering the content of the listed grounds.

7D(1)(a) is inconsistent with broader developments in legal recognition of gender identity to certify for administrative purposes a person's sex: J[62]. On the proper construction, that purpose continues to inform the scope and application of ss 5 and 7D(1)(a), which retain their binary sex-based logic and functions within a scheme that distinguishes "sex" (s 5) from *other* protected attributes such as "gender identity" (s 5B).

6. While the 2011 amendments[8] expanded the SDA's constitutional foundation by referencing additional treaties and removing the textual limitation in s 9(10), they did not repeal s 3(a), nor alter CEDAW's continuing relevance.

7. The stated rationale in the Explanatory Memorandum to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth) (at [18]–[19]) for repealing the definitions of "man" and "woman" was to avoid excluding transgender women from protection afforded by "***other*** attributes". The expressions "man" and "woman" appear only in s 7D(1)(a), where they operate not as protected attributes in themselves, but as identifiers of the comparator classes between whom a special measure may permissibly operate. Although "sex" in s 5 is not defined and has never been defined in the SDA, the reference to discrimination "on the ground of sex" necessarily incorporates, by inference, the binary categories of "man" and "woman" as used in s 7D(1)(a). The two provisions are structurally correlated: s 5 defines the attribute, while s 7D(1)(a) supplies the comparator framework through which measures advancing substantive equality between women and men are evaluated. The 2013 repeal of the definitions of "man" and "woman" did not alter that relationship, nor did it modify the meaning of "sex" in s 5, which remains operative as a binary biological concept.

8. The 2013 repeal of the definitions of "man" and "woman" was expressly directed to ensuring that "transgender women" were not inadvertently excluded from protection under ***other*** attributes — that is, attributes ***other*** than "sex". It was not directed to, and did not purport to, alter the meaning of "woman" for the purposes of s 7D(1)(a) or s 5, both of which continue to operate within the SDA's sex-based framework. The comparator logic of s 5 necessarily implies the binary categories "man" and "woman", which are then expressly referenced in s 7D(1)(a) to identify the beneficiary class of a special measure. While s 7D(2) renders such a measure

[8] The 2011 amendments to the SDA by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) expanded the constitutional basis for the SDA by referencing additional international instruments—specifically, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

lawful notwithstanding that it may constitute discrimination on another ground (including "gender identity"), that immunity is conditioned on the measure being taken for the advancement of "women", understood in their capacity as a sex-based class. The 2013 Explanatory Memorandum's reference to "*other* attributes" confirms that the repeal was designed to facilitate access to protections under grounds ***other*** than "sex" and was not intended to redefine "woman" or expand the scope of s 7D(1)(a) by implication. Accordingly, the repeal had no legal effect on the operation of s 7D(1)(a) and cannot be taken as a legislative instruction to modify the class to whom that paragraph refers.

9. The principal legal effect of the 2013 repeal of the definitions of "man" and "woman" was to ensure that trans-identifying females (i.e. transmen) were not excluded from accessing *other* sex-based protections under *other* attributes, particularly those related to pregnancy (s 7) and breastfeeding (s 7AA). For example, a trans-identifying female who had changed legal sex status to "male" might otherwise have been excluded from these provisions if "woman" were rigidly defined. The repeal addressed this interpretive risk. The intended beneficiaries of the repeal were therefore a narrow subset of biological females seeking access to female-specific protections — not trans-identifying males seeking inclusion in the comparator class of "women" for the purposes of special measures under s 7D(1)(a). Nor does the repeal support a redefinition of "woman" that would undermine the operation of other provisions that depend on a binary sex distinction — such as s 30, which permits sex-specific occupational qualifications in employment, and s 42, which allows sex-based participation rules in sport. These provisions operate on the assumption that sex is a stable and mutually exclusive category, with practical consequences in contexts such as undress, privacy, physicality, and shared accommodation. If "woman" is treated as an identity-based or legally mutable category, the legal basis for sex-based distinctions in those provisions dissolves, and the statutory scheme collapses into incoherence.

10. The terms "man" and "woman" continue to appear throughout the SDA in a biological context: see ss 4B(1), 7AA, 25(4), and 31. The Schedule to the SDA, which incorporates the text of CEDAW, likewise uses "men" and "women" in a manner that presupposes biological sex.

11. While the 2013 Explanatory Memorandum may be considered under s 15AB of the *Acts Interpretation Act 1901* (Cth), its relevance is strictly limited. Section 15AB permits reference to extrinsic materials only to confirm the ordinary meaning of a provision, or to assist in resolving ambiguity or avoiding absurdity. In this case, there is no ambiguity in the text of s

7D(1)(a), nor any absurd or unreasonable result. The statutory terms "man" and "woman" appear only in s 7D(1)(a) and operate in a binary comparator framework that coheres with the structure and purpose of the SDA, including its foundation in CEDAW. As the High Court has repeatedly emphasised, the task of statutory construction must begin with the text. Extrinsic materials may assist in understanding context, but they cannot displace or supplement the meaning of the statutory language. An explanatory memorandum cannot be substituted for the text, nor can it be used to alter its legal effect.[9]

12. Further, it is incorrect to suggest that the repeal of the definitions of "man" and "woman" in 2013 supports an ambulatory construction of those terms under the "always speaking" principle. While a statute is to be read as always speaking[10], that principle permits application to new facts, not alteration of original meaning. It does not support a reinterpretation of the term "woman" to include legal status or subjective identity when the statutory context continues to depend on a stable binary understanding of sex.

13. The SDA must be construed as a statute presently in force, comprising the 1984 Act as amended. The various amendments — including those of 2011 and 2013 — must be read together "as a combined statement of the will of the legislature".[11] The proper interpretive task is to assess how well a proposed construction of "woman" fits within the scheme of the SDA as it now stands. That scheme continues to deploy sex-based comparator logic (in ss 5, 7D(1)(a), (c) – (e) and elsewhere), presupposes a binary of "men" and "women" (e.g. ss 5, 7, 7AA, 25(4), 31, and 42), and relies on the distinction between "sex" and "gender identity" as distinct protected attributes separately provided for in ss 5 and 5B.

14. This structural coherence cannot be displaced by reference to a single amendment (cf J[58]–[61]). The fact that the SDA is "always speaking" does not authorise the conclusion that the meaning of "woman" has changed since 1984. The term remains anchored in the same essential meaning — the biological category of female — and continues to operate in a statutory framework grounded in binary sex.

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[9] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; 271 CLR 495 at [70] (Gageler J) citing *Re Bolton; Ex parte Beane* [1987] HCA 12; 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ); see also *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252 at 264–265 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ) and the authorities there cited.

[10] Cf *Aubrey v The Queen* (2017) 260 CLR 305 at 321–322 [29]–[30]; s 11B(1) of the *Acts Interpretation Act 1901* (Cth)

[11] ***Commissioner of Stamps*** *(SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463

15. The expert evidence adduced below supports this construction. Dr Stock[12] affirms that "woman" refers to a natural kind, not a subjective category. Dr Wright[13] confirms that sex is binary, immutable, and rooted in reproductive function. These views reflect the ontological and scientific meaning of "sex", "man" and "woman" consistent with the meaning to be ascribed to those expressions from the text, context and structure of the SDA. [14]

16. In any event, presumed ordinary usage of an expression may yield where the statutory structure demands it. Here, the structure of the SDA demands that "sex", and its corollaries remain binary, stable attributes. Where the legislative context signals a specific meaning, that meaning is not displaced by evolving or popular usage.[15]

17. The primary Judge's reasoning relying on legal sex recognition under State laws and decisions concerning administrative sex status under separate legislative schemes such as marriage[16], civil registration[17], or social security[18] departed from that approach. None addressed federal anti-discrimination law or the SDA's comparator logic.

Conclusion

18. A statute that prohibits discrimination on the ground of sex must preserve the coherence of the category it protects. To suggest that that the 2013 amendments to remove the definition of "man" and "woman" silently redefined the ordinary meaning of "sex"[19] and "man" and "woman" is to allow the tail to wag the dog. That approach departs from the principle that "both the Act which is amended and the amending Act are to be read together as a combined statement of the will of the legislature".[20] The amendments must be read in light of the SDA's unaltered structure, which remains principally grounded in biologically coherent comparator classes, discrete attributes, and its foundational purpose under CEDAW. The term "sex", "men"

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[12] AB 2, Tab 20.2
[13] AB 2, Tab 4.3
[14] As affirmed in *Project Blue Sky Inc v ABA* (1998) 194 CLR 355 at [69], and *CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384 at 408, inter alia
[15] The intended reach of a legislative provision is to be discerned from the words of the provision and not by making a prior assumption about its purpose: see *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 549 [39]; *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22]. As the plurality in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 explained at [14], although the ordinary meaning of a word is relevant, context and purpose may suggest another meaning, and if the ordinary meaning is inconsistent with the statutory purpose, it must be rejected.
[16] *Attorney-General (Cth) v Kevin and Jennifer* (2003)172 FLR 300
[17] *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528
[18] *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299
[19] An expression which was never defined and remains undefined.
[20] *Commissioner of Stamps* 453 at 463. See also *Ravbar v Commonwealth of Australia* [2025] HCA 25 at [120] per Beech-Jones J and *Babet v Commonwealth of Australia; Palmer v Commonwealth of Australia* [2025] HCA 21; 99 ALJR 883 per Beech-Jones at [32] and the cases there cited

and “women” in ss 5 and 7D(1)(a) continue to denote the stable, binary biological attributes necessary for the SDA to function as intended.

19. LAG’s submissions should be accepted to the extent they affirm this construction.

DATE: 15 July 2025

N. C. Hutley

B. K. Nolan

NOTICE OF FILING

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Federal Court of Australia
District Registry: New South Wales

No. NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) and another
Appellants

ROXANNE TICKLE
Respondent

On appeal from the Federal Court

APPELLANTS' OUTLINE OF SUBMISSIONS IN REPLY ON THE APPEAL

Introduction

1. These submissions are in reply to issues arising from the Respondent's submissions filed 7 July 2025 (**RS**), which require distinct treatment. While several arguments made by the Respondent on the appeal overlap with those of the Sex Discrimination Commissioner (**SDC**)[1], particularly in relation to the construction of s 7D, the threshold of "likely" in s 5B(2), and the definition of "gender identity" in s 4, the Respondent also advances matters that fall outside the joint scope of the SDC's and the Respondent's submissions. Submissions in response to the other overlapping arguments advanced by both the Respondent and the SDC, and the arguments arising on the Respondent's cross-appeal will be dealt with separately. These submissions will deal with: (a) the framing of the dispute as one of nihilistic denial of statutory attributes; and (b) the procedural objection to the Appellants' reliance on s 7B, which will deal with this issue as it arises in both the SDC and the Respondent's submissions.

The framing of the dispute as a nihilistic denial of statutory attributes

2. The Appellants do not deny the validity of "gender identity" as a protected attribute under s 5B of the *Sex Discrimination Act 1984* (Cth) (**SDA**). They accept that persons who have a "gender identity" are entitled to the protection of the SDA. The claim that the Appellants engage in "nihilistic denial": RS [1] and [13] is an unwarranted rhetorical flourish, designed to distract

[1] Written Submissions of the Sex Discrimination Commissioner dated 11 July 20225

068

from the essential point: that the condition imposed, namely, that users of the Giggle App must appear to be female is lawful, and directed to a legitimate protective purpose. The SDA does not compel ideological assent to contested metaphysical propositions about the nature of sex or gender.

3. The Respondent seeks to rely on a blog post authored by the Second Appellant in 2020 (RS [18],[2]), years before the impugned conduct. That reliance is misplaced. Liability under s 5B(2) turns on the imposition of a specific condition or requirement and its actual or likely effect. Public statements made in a different context, years prior, do not establish the evidentiary inquiry required by s 5B(2).

4. Equally, the Respondent's reliance on *Purvis*[3] and its "*because of*" formulation is misplaced. Unlike s 6 of the *Disability Discrimination Act 1992* (Cth), s 5B(2) turns on a factual inquiry into the effect of the condition on a protected group — an inquiry not undertaken below and not substantiated by the Respondent on appeal.

5. The Respondent's submissions on s 5B(2) elide a necessary evidentiary burden. Section 5B(2) does not presume group disadvantage; it deems discrimination to occur where the condition imposed has or *is likely to have* (on the balance of probabilities), the effect of disadvantaging persons with the same gender identity as the aggrieved person. The evidence must demonstrate that "transgender women", as a group, are more likely than not to be excluded by the condition — not merely that one person was excluded and had that gender identity. The Respondent led no such evidence, and the primary Judge did not engage with this question: cf J[135]. The Giggle App's condition was referable to visual sexed traits and was agnostic to "gender identity". Appearance rooted in biological sex is not equivalent or co-extensive to "gender identity" under the SDA, and perceived maleness is not a proxy for transgender womanhood.

6. That is because the category of "transgender women" is not a fixed or uniform class for the purposes of s 5B(2). The statutory definition of "gender identity" in s 4 encompasses "gender-

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[2] AB B Tab 23.10

[3] RS [12], fn. 32 referring to J[77], which refers to s 5B(1) and ***Purvis*** *v New South Wales* (2003) 217 CLR 92, not s 5B(2). Noting that the primary Judge dealt with s 5B(2) at J[80]. (Mason CJ & Gaudron J); The central and dispositive question for the primary Judge did not emerge from *Purvis* at [158], [160], [236] (Gummow, Hayne & Heydon JJ); and the cases cited by the Respondent, being *Waters and Ors v Public Transport Corporation* (1991) 173 CLR 349 at 359 and *State of New South Wales Sydney Trains v Annovazzi* [2024] FCAFC 120 at [104]-[107] (Bromwich, Raper & Shariff JJ).

related identity, appearance or mannerisms or other gender-related characteristics... with or without regard to... designated sex at birth." It is intentionally protean and unconstrained so it can be inclusive of a wide spectrum of self-understood and expressed identities, from those who identify with traditionally feminine or masculine characteristics to those who express gender identity in non-normative, fluid, or plural ways. As a deeply internalised and personally defined sense of self, "gender identity" is inherently non-prescriptive and variable in its expression, manifestation and appearance. A transgender woman's identity may be expressed in conventionally feminine ways or not, including not at all. It may manifest through appearance, social conduct, medical transition, linguistic self-description, or remain entirely internal and intermittent. There is no uniform or predictable pattern. The hallmark of the statutory protection in s 5B is its refusal to prescribe a standard form of gender-related expression. The primary Judge erred in treating the group disadvantage inquiry under s 5B(2) as capable of being resolved by reference to the circumstances of a single individual. That approach defeats the very purpose of the provision: to protect against systemic disadvantage experienced by persons who share an attribute, but who may express or embody it in a multitude of individualised and idiosyncratic ways. Reducing the protected class to the lived experience of one person is both reductionist and legally insufficient for the purposes of s 5B(2).

7. To presume otherwise is to conflate "gender identity" with the visual perception of sex, and to erase the diversity the SDA was amended in 2013 to affirm. The Respondent's argument — and the reasoning at J[135] — collapses the very distinction between "sex" and "gender identity" that the 2013 amendments to the SDA were designed to preserve, and which underpins the SDA's recognition of "gender identity" as a distinct and expansive protected attribute. That collapse not only misconceives the operation of s 5B(2) but defeats the statutory purpose of protecting gender diversity — not through binary equivalence, but through recognition of diversity and multiplicity.

8. Moreover, no public statement by the Second Appellant concerning views about transgender ideology or the definitional limit of womanhood displaces the legal requirement to identify, define, and evidence the group of persons said to share the protected attribute under s 5B(2). The protections of the SDA turn on legislative definitions, not political inference. A finding of group-based disadvantage cannot proceed on the basis of what the Second Appellant believes or asserts about gender; it requires careful analysis of the nature and diversity of the class of

persons with the same gender identity as the aggrieved person. That task — critical to the application of s 5B(2) — was not undertaken by the Respondent and not performed by the primary Judge.

The Appellants' reliance on s 7B

9. The Appellants expressly acknowledged in their written submissions in chief filed on 23 June 2025 at [35] that while s 7B was not initially relied upon below — owing to one interpretation of the pleadings — they sought to rely on it once it became apparent that s 5B(2) was engaged. The primary Judge accepted that s 5B(2) had been pleaded and that s 7B, as its statutory qualifier, was necessarily in issue (J[37]). The Respondent raised no objection on the basis of pleadings or procedural fairness, and the matter proceeded to judgment on the evidence before the primary Judge.

10. That is as it should be. Section 5B(3) expressly provides that the operation of s 5B(2) is subject to ss 7B and 7D. The qualification is not optional. A claim under s 5B(2) could not succeed unless the Appellants failed to prove, under s 7C, that the impugned condition was reasonable in all the circumstances.

11. The scope of that statutory burden, however, was shaped by the Respondent's own case. The Amended Statement of Claim[4] did not allege that the condition was unreasonable, disproportionate, or capable of being achieved through less discriminatory means. No alternative moderation procedure, onboarding mechanism, or accommodation was pleaded. The Respondent's case was framed in absolute terms: that the App's reliance on a sex-perception filter was itself discriminatory, notwithstanding that the condition applied uniformly to all users — that they appear female — and did not differentiate between cisgender and transgender individuals. By alleging that the App privileged the appearance of "cisgender women" (the appearance of which, incidentally, the Respondent did not prove), the Respondent elided the statutory test under s 5B(2), which concerns whether a condition imposed on all users results in group-based disadvantage, not whether it validates a philosophical claim that "female" must be redefined to include males who identify as such.

[4] See ASOC at [34] – [39], AB A, Tab 3

12. The Appellants led detailed, unchallenged evidence of the App's rationale, design and protective function. Witnesses — including the Second Appellant and multiple women from diverse backgrounds — gave sworn accounts of the harassment and sex-based hostility that made a female-only space necessary. That evidence demonstrated that the condition was limited, proportionate, and grounded in a legitimate aim. The Respondent chose not to contest it — whether under s 7D, to which it was originally directed, or under s 7B, which it also addressed.

13. Even if the Respondent were not expressly on notice that s 7B would be relied upon, the suggestion that further evidence might have changed the outcome is illusory. Section 7B requires a practical, context-sensitive assessment of justification, not abstract speculation about hypothetical alternatives. The requirement that users appear female is directly connected to the platform's protective purpose. Its reasonableness is borne out by the evidentiary record and confirmed by reference to well-documented social realities. That women seek refuge from male-pattern abuse, coercion and intrusion — and that such need justifies exclusion based on sexed appearance — is so entrenched in public discourse and jurisprudence that it approaches the level of judicial notice.[5] The idea that such a space must include males who assert a female identity, regardless of their appearance or the effect on female users, is not required by law, and would collapse the s 7B test into a demand for ideological conformity. The Court is not required to adopt that model, and the Respondent cannot demonstrate that it should.

14. The Respondent's case ultimately invites the Court to discard extensive, unchallenged evidence in favour of a solitary and unparticularised claim. More than a dozen women gave sworn accounts of the necessity of a female-only digital space, grounded in their lived experience of male-pattern violence, surveillance, and exclusion.[6] The Respondent, by contrast, did not adduce any probative evidence of harm or material exclusion — nor was there any cross-examination on the purpose, effect, or rationale of the App (J[148]). The complaint rested on an asserted entitlement to inclusion, not on rebutting the factual basis for the measure. That

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[5] See eg. *Wilson v Ferguson* [2015] WASC 15 at [59], *DPP v Saab* [2020] VCC 1468 at [40]-[41], *DPP v Hartland* [2019] VCC 628 at [71], Judicial Commission of NSW, *Equality Before the Law Bench Book*: Section 7.5.4 – Technology-facilitated abuse (Judicial Commission of NSW, 2025) accessed at https://www.judcom.nsw.gov.au/publications/benchbks/equality/section07.html at 17 July 2025; Flynn, A., Wheildon, L., Powell, A., Bentley, K., *Technology-facilitated coercive control: Mapping women's diverse pathways to safety and justice* (Final Report 1, Summary Report, CRG Report No 2021–22, 2024) https://doi.org/10.52922/crg77536 at 17 July 2025.
[6] AB B Tab 3, 5, 6, 7, 9, 10, 11, 11.1, 12, 13, 14, 14.1, 14.2, 15, 17, 18, and see also AB B Tab 3 [4] – [7], [9], [11], [15] – [17] and [36]

evidentiary imbalance is critical. Reasonableness under s 7B turns not on abstract ideals but on concrete effects. In no other legal context would untested personal grievance displace uncontroverted collective evidence of systemic need.

15. The Appellants' evidence was not generalised. It was granular and diverse, encompassing women of faith constrained by religious modesty[7], women of colour navigating digital abuse[8], lesbians seeking sex-specific solidarity[9], mothers of disabled children in search of community[10], women with disabilities who cannot safely engage in male-dominated spaces[11], and survivors of addiction and trauma whose healing depends on candid discussion of male violence[12]. These women explained not only why they sought digital refuge, but why the presence of persons perceived as male would fundamentally undermine their capacity to use the App. Their evidence demonstrated that female-only space is not a conceptual preference but a condition of participation.

16. This chorus of testimony was uncontradicted and unrebutted. The Respondent made no attempt to meet it at trial, nor does the Respondent now identify what evidence could or would have been led had s 7B been more clearly invoked. The asserted prejudice — that the Respondent may have made "different forensic decisions" (RS [32]) — is vague and strategic. It masks the absence of any conceivable factual case that could have been mounted in response. There was no evidentiary or legal pathway by which the Respondent could have shown that inclusion of persons who appear male would not frustrate the App's purpose. Nor could exclusion from a single private platform amount to material deprivation. These are not mere gaps. They are structural failures in the Respondent's case theory.

17. On the Respondent's own case, the use of the App was occasional, observational, and did not extend to any meaningful social engagement.[13] The complaint was not grounded in exclusion from health information, parenting support, or lesbian solidarity — but in the assertion that validation by acceptance on the App was denied: J[228] The evidence tends to suggest that the

[7] AB B Tab 11, 11.1, 12
[8] AB B Tab 18
[9] AB B Tab 7, 7.1, 8, 14, 14.1-14.3, 17
[10] AB B Tab 8, 18
[11] AB B Tab 6
[12] AB B Tab 8, 13, 21
[13] AB B Tab 23 [14]

Respondent sought not refuge but affirmation[14]; not shelter from male violence but public recognition as "female" by others. But female-only digital refuges are not, and never were, intended to provide emotional solace or social ratification to male persons, however sincere their self-identification. Their legal foundation, particularly under s 7D(1)(a) and CEDAW Article 4(1), lies in protecting women *as a sex class* from *sex*-based harms. That purpose does not collapse merely because an individual not of that *sex* class seeks to be treated as such. The Respondent's desire for inclusion cannot override the entitlement of women — survivors, lesbians, mothers, disabled women, women of faith, women in recovery — to seek temporary digital refuge from male-pattern presence and conduct.

18. In that light, the procedural complaint collapses. The issue of reasonableness was necessarily engaged under s 5B(3), the burden under s 7C was discharged on the evidence, and the Respondent did not engage with the point in pleadings or at trial. A finding of indirect discrimination could not have been made unless the condition was unreasonable, it was always an essential integer of the claim as the primary Judge came to interpret it. The Respondent cannot now invoke a procedural objection to avoid that statutory imperative.

19. In truth, the only serious challenge that could have been mounted was not evidentiary but ideological: a claim that persons with a female gender identity must, for all purposes, be treated as female. That, however, is a question of statutory construction, not reasonableness. It does not engage the test in s 7B(1).

20. The SDC's position[15] appears to adopt this same premise, urging a construction of s 7B under which any exclusion of a gender identity claimant from a sex-specific space is presumptively unreasonable. That is not what the statute provides. Reasonableness is not a synonym for inclusivity. It is a test of justification. And where, as here, two protected attributes are in tension, it does not follow that the assertion of one must negate the application of the other.

21. Even if the SDC's view were accepted, it would not disturb the outcome. No expert or sociological material, however sophisticated, could have displaced the objective reasonableness of a condition applied to all users in pursuit of a legitimate end. The statutory

[14] AB B Tab 3 [88] – [94] and [98]
[15] Written Submissions of the Sex Discrimination Commissioner filed 11 July 2025 at [51]-[66]

test is not a vehicle for advancing policy theories about the moral status of identity-based inclusion. It is a legal question about whether the condition was reasonable in the circumstances. Here, it plainly was.

22. The concept of reasonableness under s 7B is directed to effects, feasibility, and proportionality. It does not require compromise of women's privacy, safety or autonomy to accommodate the preferences of others. The SDC's approach would erase the deliberate legislative distinction between "sex" (s 5) and "gender identity" (s 5B) and would recast s 7B into a test of ideological approval — a test for which there is no warrant in the text.

23. In truth, the Respondent's case, and the SDC's position, rests on the proposition that a self-declared gender identity must override sex-based classification altogether. But that argument does not engage s 7B. It concerns the legal meaning of "woman" — a conceptual claim, not a proportionality claim.

24. The Giggle App was created to provide female users with a space grounded in shared experience of sex-based risk.[16] The exclusion of persons of the male sex — including those who identify otherwise — was the very measure by which that objective was to be achieved. To suggest that the App must be redesigned to include such persons is not to demand a reasonable adjustment; it is to demand the abandonment of the measure itself.[17]

25. The condition that users appear female is not susceptible to partial modification. There is no viable or proportionate way to "adjust" the App's framework without defeating its purpose. Female-only spaces exist not simply to exclude male-looking persons, but to preserve the trust,

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[16] That is, the evidence of the 13 women who gave affidavit testimony (including Anaum Sayed, Janet Fraser, Holly Lawford Smith, Samantha Jo Elson, Jennifer Mimiette, Victoria Bermudez, Louise Birt, Louise Carrigg, Carole Ann, Mardi Sandford, Alison Hill, Azure Rigney, and Ciantal Bigornia (AB B Tabs 5-15, 17-18, 21) demonstrated the unique and overlapping forms of social, physical, and psychological vulnerability arising from their biological sex. The evidence addressed experiences of male-pattern digital harassment, sexual violence, trauma, religious or cultural modesty norms, health-related privacy needs (e.g., gynaecological and maternal health), and the need for lesbian-specific social refuge. The commonality across these affidavits was the existential need for digital spaces that were both private and affirmatively female — where entry was not determined by self-identified gender, but by the perception of sexed embodiment, which directly mediated the safety and function of the space. Their collective testimony is not merely anecdotal but demonstrates a consistent pattern of sex-based harm and the necessity of exclusionary design principles to protect against that harm.

[17] A proposition which only underscores why the Appellants' construction of s 7D ought to be accepted. Section 7D permits measures taken for the purpose of achieving substantive equality between men and women. A condition designed to protect and empower women by creating a female-only digital space cannot be required to accommodate male persons — even those who identify otherwise — without defeating the very object for which the measure exists. To compel such accommodation is not to pursue equality, but to nullify the measure altogether.

safety, and agency of female users — particularly those who have experienced male violence. That purpose cannot be preserved if entry turns on asserted identity rather than perceived sex.

26. Accordingly, no responsive evidence adduced by the Respondent could have rendered the condition unreasonable.[18] The Appellants met their burden under s 7C with the uncontested evidence adduced without objection at trial. The Respondent has not demonstrated prejudice on appeal. The issue arises by operation of law. Section 5B(3) mandates that any claim of indirect discrimination under s 5B(2) is subject to consideration of s 7B, which was made out to the standard prescribed by s 7C. The Respondent's failure to engage with it — factually or legally — is now fatal to the claim.

DATE: 18 July 2025

N. C. Hutley

B. K. Nolan

[18] Cf *Whisprun Pty Ltd v Dixon* [2003] HCA 48; 77 ALJR 1598 at [51]

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Federal Court of Australia
District Registry: New South Wales

No. NSD1386 of 2024

GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) and another
Appellants

ROXANNE TICKLE
Respondent

On appeal from the Federal Court

APPELLANTS' OUTLINE OF SUBMISSIONS IN RESPONSE TO THE RESPONDENT'S AND SEX DISCRIMINATION COMMISSIONER'S SUBMISSIONS

Introduction

1. These submissions respond to the submissions filed by the Sex Discrimination Commissioner (**SDC**)[1](**SDCS**) and the Respondent[2] (**RS**) on the appeal. Each advances arguments which substantially align, both in framing and effect. Together, they seek to preserve the primary Judge's finding of unlawful discrimination by reframing the basis on which the impugned conduct is said to engage s 5B of the *Sex Discrimination Act 1984 (Cth)* (**SDA**).

2. That reframing rests on a series of analytical missteps. It conflates perception of sex with imputation of "gender identity"[3], recasts visual categorisation as discriminatory attribution[4], and inverts the statutory requirement of causation by placing the protected attribute not in the self-understanding of the person concerned, but in the eye of the beholder. It thereby collapses the distinction between "sex" and "gender identity" which the SDA maintains both in text and structure.

3. Those errors are compounded by a misreading of the statutory definition of "gender identity" in s 4[5], an overextension of the principle of imputation under s 5B(1), an evidentiary conflation under s 5B(2)[6], and an inapt analogy to the legal framework

[1] Submissions of the Sex Discrimination Commissioner filed 11 July 2025
[2] Submissions of the Respondent on the Appeal filed 7 July 2025
[3] RS [6], [16], SDCS [11]
[4] SDCS [15] - [16]
[5] SDCS [7] – [13]
[6] RS [6] – [9], [11] - [19]; SDCS [18] - [24]

applicable under the *Racial Discrimination Act 1975* (Cth) (**RDA**)[7]. In each instance, the analysis advanced by the SDC and the Respondent displaces the statutory test with a reasoning framework that is neither compelled by the text nor coherent in principle.

4. These submissions also address the separate error involved in the approach taken to s 7D[8]. The argument that s 7D must be read down or treated as subordinate to other attributes in Part I of the SDA finds no support in the statutory language, structure, or purpose. Section 7D is not a defence. It is a deeming provision. It answers the question of liability directly by providing that conduct meeting its criteria is not discrimination under the SDA. That conclusion follows from the express terms of the statute and is reinforced by the interpretive principles governing the operation of legal fictions.

5. The Appellants' submissions in response proceed by addressing these issues in turn.

Section 5B: visual perception of sex and "gender identity"

6. The SDC and Respondent's submissions on the appeal rest on a fundamental mischaracterisation of what the statutory attribute of "gender identity" under s 5B protects. It proceeds from the proposition that where a person is perceived, based on visual cues, not to "be" of female appearance, and is excluded on that basis, the exclusion is necessarily by reason of "gender identity"—either because of an imputed characteristic under s 5B(1), or through the imposition of a condition that disproportionately burdens persons with that "gender identity" under s 5B(2).

7. The argument emerges from the circularity created by the primary Judge's reasoning at J[55]–[62], which treats legal recognition of affirmed sex under State law as determinative of the statutory classification of "woman" under the SDA. On that view, exclusion inconsistent with that recognition amounts, without more, to indirect discrimination under s 5B(2) on the ground of "gender identity": cf J[131]–[135]. The Respondent and SDC now seek to preserve that conclusion by recasting the visual perception of sex as an imputation of "gender identity". That reformulation transposes what the primary Judge found to be a perception of maleness into an attribution of "gender identity", notwithstanding that the Respondent's gender identity was neither known nor expressed. The shift is necessary to sustain the syllogism of the primary Judge's findings, but it does so only by collapsing the distinction between "sex" (s 5, s 7D(1)(a)) and "gender identity" (s 5B and s 7D(1)(ab)) that the SDA maintains.

[7] SDCS [6]
[8] SDCS [26] – [49]; and RS [21] – [26]

8. A construction of s 5B that treats conduct based solely on perceived sex as discrimination on the ground of "gender identity", and not "sex" collapses the distinction between attributes that the statute treats as separate. The argument advanced conflates perception of sex with expression of gender, treating ordinary and intelligible acts of visual categorisation—registering an individual as male or female—as if they entail a rejection of "gender identity", whether or not identity is known, claimed, or expressed. The result is to untether the statutory concept of "gender identity" from self-understanding or expression and relocate it in the eye of the beholder. That is not the function of the provision. The protection attaches where that "gender identity" is known, communicated, or otherwise made relevant to the treatment. To transpose visual perception of sex into an imputed "gender identity" is to conflate the existence of the attribute with its causal relevance, and in doing so, render the distinct operation of ss 5 and 5B redundant.

9. The Respondent and the SDC's submissions maintain this error through a series of interconnected propositions, each of which contributes to the distortion of the statutory test. These are: (1) a misreading of the text of s 4, treating "appearance" as severable from "*gender-related*" expression; (2) a misapplication of the imputation principle under s 5B(1); (3) an evidentiary elision under s 5B(2), treating perception of sex as presumptively disadvantageous to trans-identifying persons; and (4) a misplaced analogy to race discrimination law, particularly ***Eatock*** *v Bolt* (2011) 197 FCR 261. Each point is addressed in seriatim.

A misreading of the text of s 4, treating "appearance" as severable from "gender-related" expression

10. The first misstep lies in the construction of the definition of "gender identity" in s 4 of the SDA. That definition identifies the attribute protected for the purposes of s 5B. It is a composite formulation: it includes "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." (emphasis added)

11. Grammatically, the term "*gender-related*" qualifies each element—identity, appearance, and mannerisms—not merely the final phrase. The clause "with or without regard to designated sex at birth" operates permissively: it expands the coverage of the definition to protect those whose "gender identity" diverges from natal sex, but it does not expand the scope of the attribute beyond what is "*gender-related*". That is, the appearance in question must be "*gender-related*"; it must convey, signify, or express something about the person's internal gendered self-conception. It is not enough that the person has an appearance, nor that someone else reads that appearance as male or female. The attribute is not perception simpliciter; it is perception of *gender-related* expression.

12. The SDC and Respondent's construction treats "appearance" as it appears in s 4 as if it stands alone—as though any visual cue that triggers a conclusion about sex is sufficient to invoke the statutory protection. That is not the natural reading of the text, and it is not a construction consistent with the purpose of the provision. The legislative context confirms this interpretation. The Explanatory Memorandum to the 2013 Amending Act at [13][9] expressly distinguishes between "sex" and "gender", defining the latter as socially and self-referentially expressed. "Appearance", in this context, is a vehicle of "gender identity"—not a proxy for sex.

13. Properly construed, the definition operates to protect those whose "gender identity" is expressed, embodied, or socially legible in gendered terms. It does not require surgical intervention, nor legal recognition, nor conformity to binary norms. But it does require a connection between the characteristic said to ground the discrimination and the person's *gender-related* identity or expression.[10]

14. *Conclusion:* The SDA protects individuals from being treated adversely because of how "gender identity" is expressed, not because of how sex is perceived in the absence of any such expression. That distinction is structural, not semantic. It preserves the coherence of the statutory attributes and maintains the boundary the SDA draws between "sex" and "gender identity." To treat appearance, without more, as sufficient to engage s 5B is to sever the term "appearance" from its *gender-related* qualifier in s 4, and in doing so, to collapse perception-based exclusion into "gender identity" based discrimination. The result is to expand the reach of s 5B beyond its textual and purposive limits. On that construction, the scope for drawing distinctions by reference to sex is functionally extinguished, with the effect that s 5B subsumes the operation of s 7D(1)(a), and the statute's accommodation of sex-based measures loses practical coherence.

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[9] The Explanatory Memorandum to the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 at [13] 'Gender' is used in this definition rather than 'sex' as it is a different concept, understood to be part of a person's social identity (rather than biological characteristics). Gender refers to the way a person presents and is recognised within the community. A person's gender might include outward social markers, including their name, outward appearance, mannerisms and dress. It also recognises that a person's sex and gender may not necessarily be the same. Some people may identify as a different gender to their birth sex and some people may identify as neither male nor female.

[10] To illustrate: when one encounters a person who appears physically male, what is immediately apprehended are features consistent with that perception—read through ordinary visual cues. But where additional visual elements emerge—such as styling, presentation, or aesthetic cues that signify a self-understanding divergent from or consistent with sexed appearance—an observer may begin to apprehend an expressive component. That expression may include aesthetics, clothing, accessories, or affect—features not merely referable to male appearance, but suggestive of *gender-related* identity. It is that communicative quality to which s 4 is directed. It protects not perception of sex per se, but appearance that manifests, however variably, a gendered orientation. That is the operative distinction: the statute under s 5B protects appearance as expression of a *gender related* identity, not appearance simpliciter.

A misapplication of the imputation principle under s 5B

15. The second misstep lies in the reliance on imputation as a basis for liability under s 5B(1). The argument advanced is that where a person is treated adversely because appearance does not conform to an observer's expectation of what a "woman" or "man" looks like, that treatment is necessarily "by reason of" gender identity, on the footing that an identity has been wrongly imputed. That submission overextends the principle. Imputation, in the context of discrimination law, permits liability where the discriminator acts on the basis of a mistaken assumption that a person possesses a protected attribute, such as pregnancy or religion. The principle turns on the reason for the treatment, not its effect. It is not sufficient that a person is misperceived; it must be shown that the treatment was by reason of a belief about "gender identity"—not merely by reason of sexed appearance.

16. The conclusion advanced at SDCS [15] - [16] does not concern mistaken belief about "gender identity" but seeks to characterise a visual classification based on sexed appearance as an imputation of a "gender identity". The conduct in question on this appeal did not involve any assumption that an individual possessed a particular "gender identity", but rather a conclusion that an individual did not appear to be of the sex required by the condition. That is not an imputation of the protected attribute of "gender identity"; it is a sex-based classification undertaken without knowledge of, and indifferent to, any gendered self-identification. To treat such conduct as discrimination as attributable to an imputation of "gender identity" is to extend the principle of imputation beyond its doctrinal limits. The principle applies where adverse treatment occurs because of a belief that the individual possesses a protected attribute—not merely because of how the individual appears. Absent evidence that "gender identity" was believed, assumed, or acted upon, the principle has no application.

17. *Conclusion:* The construction urged would treat any act of visual differentiation, undertaken without knowledge or expression of identity, as presumptively referable to "gender identity". That would effectively invert the requirement of causation in s 5B(1), transforming it from a test of intention or inference into a doctrine of liability by implication.

An evidentiary elision under s 5B(2)

18. The third misstep lies in the way the Respondent simply ignores the evidentiary inquiry required under s 5B(2). That provision is not engaged merely because a condition may exclude a person with a protected attribute. It requires proof—on the balance of probabilities—that the condition has, or is likely to have, a disproportionate effect on persons who share that attribute.

19. The Respondent's submissions do not address this evidentiary threshold directly or at all. Instead, the submissions apparently treat the fact that the Respondent was excluded as sufficient to ground an inference of group disadvantage. That reasoning is flawed. Section 5B(2) does not operate on assumptions. It requires the identification scope of a relevant class—persons with the same gender identity as the aggrieved person and what that means or entails—and then proof that the condition in question disadvantages that class of persons *because of* their possession of the attribute.

20. Here, no evidence was led to establish that the indeterminate class of persons with a gender identity of "transgender woman", is more likely, as a group, to be excluded under the App's sex-based appearance condition. There was no evidence as to the visual presentation of transgender women as a class of persons, no evidence of how the App's filter interacted with that presentation, or how the First Appellant's agents reacted when presented with images of this class of persons on a quick and reflexive visual inspection. There was no statistical or empirical foundation on which the primary Judge could conclude that the condition had the requisite discriminatory effect. Indeed, the primary Judge's inquiry did not identify such a burden as engaged, nor, for that reason, find that such a burden was discharged. Accordingly, no such conclusion can properly be sustained on appeal.

21. *Conclusion*: By apparently treating the Respondent's individual exclusion as a proxy of systemic disadvantage, the submission elides the distinction between individual treatment and group-based impact. It is precisely that distinction which s 5B(2) insists upon. The provision is not directed to isolated outcomes, but to conditions that bear unequally on persons with a particular attribute. That inquiry is evidentiary, not inferential. To accept the Respondent's approach would be to render any exclusion of a transgender individual from a sex-based space presumptively actionable under s 5B(2), irrespective of whether the condition disadvantages the protected group of persons, as a whole. It is not enough to identify an excluded individual who possesses the attribute; the causal connection between the condition and the group-based disadvantage must be demonstrated. In this case, it was not and cannot be on appeal.

A misplaced analogy to Racial Discrimination law

22. The fourth error lies in the reliance placed by the Respondent on an analogy to racial discrimination, and, in particular, to the decision of *Eatock*. That reliance is misplaced, both as a matter of statutory structure and as a matter of conceptual coherence.

23. The analogy is drawn on the footing that, just as a person may suffer racial discrimination by reason of skin colour—regardless of subjective identification with a racial group—so

too may a person suffer gender identity discrimination by reason of how gender is perceived. But that analogy dissolves at the point of statutory comparison.

24. The decision in *Eatock* turned on s 18C of the RDA—a provision unconcerned with causation, comparator classes, or the structure of direct and indirect discrimination. Its focus is on the effect of public acts, assessed objectively by reference to offence, insult or humiliation, as judged by the standards of a reasonable member of the relevant group, informed by community standards. Section 5B, by contrast, imposes a different and more structured inquiry of whether the treatment or condition was referable to the attribute as defined.[11] The analogy misdirects by importing into s 5B a test designed for a different statutory purpose, and in doing so, distorts the elements that must be established under the SDA.

25. Equally, the analogy misconceives the nature of identity in the gender context. Race, for the purposes of s 18C, includes characteristics such as ethnicity and descent that are inherently immutable. "Gender identity", by contrast, is expressly defined in s 4 of the SDA as a subjective, internally held and potentially fluid self-conception, which may or may not be expressed through appearance or mannerisms.

26. *Conclusion*: The protection conferred by s 5B is engaged where "gender identity", as defined, is known, expressed, or forms part of the reason for the treatment. It is not engaged by appearance alone, absent any connection to that attribute. The analogy drawn with race, and in particular the inference that visible sex characteristics operate in the same way as skin colour, overlooks the textual and structural differences between the respective grounds. Race, for legal purposes, often inheres in outward markers. "Gender identity", as defined, does not. To transpose the reasoning in *Eatock* to s 5B is to misread both. The result is to relocate the protected attribute from the person to the observer, and in doing so, to displace the causal inquiry the statute requires.

Section 5B(2): the meaning of "likely"

27. The SDC submits that "likely" in s 5B(2) need not mean "more probable than not," and instead imports a lower threshold — a "real and not remote possibility" of disadvantage to persons with the relevant attribute. On that view, the condition need only carry a non-trivial risk of exclusion, rather than a probable one. That construction, however, cannot be

[11] Liability under s 5B(1) requires treatment "by reason of" a protected attribute. Liability under s 5B(2) requires proof that a condition has, or is likely to have, a disproportionate impact on persons with that attribute. In neither case is it sufficient to show that a person was perceived in a particular way, or that the perception was reasonably likely to cause offence.

sustained when regard is had to the text, context, and purpose of s 5B(2), the structure of the SDA, and the relevant authorities.

Text

28. Section 5B(2) is directed to the operation of 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". The structure is conjunctive. It distinguishes between actual and anticipated disadvantage. That distinction is not merely semantic; it is functional. The second limb exists to capture cases where disadvantage has not yet occurred but may properly be inferred. It does not follow that the phrase "is likely to have" invites open-ended speculation. "Likely" is placed in contrast to "has" and must be read as a proxy for actual effect. It is required to perform equivalent legal work.

29. To treat "likely" as satisfied by anything more than a remote possibility is to collapse the operative distinction. A construction that equates "likely" with "real chance," untethered from probability, would render the first limb redundant. Any condition that might result in disadvantage—even if not expected to do so—would suffice. The binary structure would dissolve into a single threshold of conceivable effect. The requirement of proof would be replaced by a threshold of plausibility. That is not what the text provides.

30. The point is illustrated by *Victims Compensation Fund Corp v* ***Brown*** (2003) 77 ALJR 1797. There, the High Court declined to adopt a construction of "and" as "or," notwithstanding the remedial character of the legislation. The Court (at [12] – [16]) held that the structure of the provision required fidelity to the conjunction. That reasoning applies with equal force here. "Likely" cannot be abstracted from its place in the two-limb formulation. It must be read so as to preserve the internal logic of the section. A construction that allows "likely" to stand for any non-fanciful possibility of effect would strip the provision of its calibrated function. It would convert a requirement of evidence into a presumption of risk. The result would not uphold the textual structure; it would efface it.

Context and coherence

31. The construction advanced by the SDC would distort the structure of Part I of the SDA. Section 5B(2) does not operate in isolation. It creates liability only where a condition imposes a discriminatory effect and is not reasonable in the circumstances (s 7B). The structure presupposes a sequential inquiry: effect followed by justification. If "likely" were satisfied by the existence of a "real chance" of disadvantage, that sequence would

be inverted. Liability would arise in virtually every case where a condition touched upon a protected attribute, and s 7B would become the only operative constraint. The logic of the framework would collapse. That result is not merely untidy; it is conceptually incoherent. It would recast s 5B(2) as a catch-all provision under which even general conditions—such as "use your legal name" or "produce a government-issued ID"—might be presumptively unlawful, on the footing that they could exclude persons whose formal status does not align with their self-identification. That cannot be what the statute intends. The function of s 5B(2) is to identify structural or probabilistic disadvantage operating at the level of class. It is not to convert every facially neutral rule with disparate operation into presumptive discrimination.

Purpose and authority

32. The protective purpose of the SDA is not in doubt. But purpose does not displace text. The 2013 Explanatory Memorandum records the intention to ensure that persons who live, or seek to live, in a gender other than that assigned at birth are protected from discrimination. That intention may explain the amendments, but it does not determine the meaning of the enacted provision. As the High Court has consistently affirmed, it is not the intention of those who made the law, but the meaning of the law as enacted, that governs its application: *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31]; *Byrnes v Kendle* (2011) 243 CLR 253 at [97]. Even where a statute is remedial in character, the ordinary principles of construction apply. That discipline is reflected in *Brown*, where the High Court held that remedial purpose cannot be invoked to rewrite the terms of a statutory test. The reasoning is directly applicable here. The SDC's construction would alter the evidentiary threshold in s 5B(2) by reference to purpose alone. It would substitute policy aspiration for statutory instruction.

33. Moreover, this is not a clear case for the application of the presumption in favour of a beneficial construction. As Black CJ observed in *Adelaide Brighton Cement Ltd v CEO of Customs* (2004) 139 FCR 147 at [17], where competing public interests are evident from the legislative history, the presumption does not automatically apply. [12] Where, as here, the provision reflects a balance between enabling and excepting purposes—protecting persons with gender identity while maintaining the integrity of sex-based measures—the provision must be interpreted so as not to disturb that balance: *Rose v Secretary, Department of Social Security* (1990) 21 FCR 241 at 244. The SDA may have a remedial object, but its provisions are structured, and that structure must be respected.

[12] See *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47 at [5] (Gleeson CJ)

34. That point is reinforced by the Full Court's decision in ***Tillmanns*** *Butcheries Pty Ltd v AMIEU* (1979) 42 FLR 331, which concerned s 45D(1) of the *Trade Practices Act 1974 (Cth)* (**TPA**). The relevant provision imposed liability where conduct "would have or be likely to have the effect of causing substantial loss or damage." Bowen CJ (at 339 -340), with whom Evatt J agreed, accepted that "likely" may bear different meanings depending on context, and declined to resolve the ambiguity, holding that the evidence satisfied either standard. Deane J (at 346–347) elaborated that "likely" may mean "probably" in some contexts and a "real and not remote chance" in others. His Honour emphasised that the content of the term must be derived from its statutory setting. That case confirms that "likely" is not a term of fixed legal meaning, but one whose function depends entirely on legislative structure and purpose.

35. Section 5B(2) adopts the same syntactic form: a two-limb test encompassing conditions that "has" or "is likely to have" the requisite effect. But the statutory setting is different. Section 45D(1) of the TPA was directed to economic regulation. It was preventive in character and operated prospectively to restrain commercial conduct. The evidentiary burden may be shaped accordingly. Section 5B(2) is different. It is concerned with the discriminatory effect of conditions imposed on a class of persons with a protected attribute. It does not regulate market behaviour, but identifies systemic group based disadvantage. Its dual-limb structure presupposes a distinction between proven and inferable effect. That distinction loses meaning if "likely" is read to include any non-fanciful possibility. To transpose the lower threshold accepted in *Tillmanns* into this setting would collapse the very distinction that the text enacts. The word "likely" must be construed to do evidentiary work. It must operate as a proxy for probability—not as a licence for speculation.

36. That distinction is sharpened by the Full Court's reasons in *ACCC v* ***Pacific National*** *Pty Ltd* (2020) 277 FCR 49. At [243]–[254], the Court expressly declined to determine whether "likely" in s 50 of the *Competition and Consumer Act 2010* (Cth) meant "probable" or merely a "real chance." The reason was procedural. No legal burden of proof was imposed on the ACCC in the context of merger authorisation, and the question of how "likely" should be construed was therefore not determinative. The dual standard remained acknowledged but unresolved. That restraint reinforces the very point the Court was unwilling to settle: that the meaning of "likely" is not fixed and must be resolved according to the structure and function of the provision in which it appears. In the context of s 5B(2), where the statute differentiates between conditions that "have" and those that are "likely to have" the requisite effect, that function demands a threshold of inferential probability. To construe "likely" as satisfied by any real chance is to abandon the evidentiary separation the provision was designed to maintain. The discipline that the Full Court preserved In

Pacific National by declining to decide is the very discipline that this Court must now apply to s 5B(2).

37. *Conclusion*: The provision is not concerned with hypothetical or possible harm. It is concerned with disadvantage that is established, or may be inferred, on the balance of probabilities. That is an evidentiary inquiry. It requires a causal mechanism and a demonstrated impact. It does not permit the Court to speculate. The threshold is not whether disadvantage might occur. It is whether it probably does—or probably will—occur as a result of the condition's operation.

Misuse of the test in s 18C of the RDA[13]

38. The SDC draws an analogy with *Eatock*, submitting that because s 18C of the *Racial Discrimination Act 1975* (Cth) employs the phrase "reasonably likely" to offend, insult, humiliate or intimidate—and that phrase has been interpreted to require only a "real chance" of that outcome—the same approach should apply to "likely" in s 5B(2). The analogy is inapt.

39. In *Eatock*, the Federal Court held that the phrase "reasonably likely" was satisfied where there was a real, and not remote or fanciful, chance that the proscribed effect would occur (at [260] citing *Bropho v HREOC* (2004) 135 FCR 105 at [65]). That evaluative inquiry was conducted on the balance of probabilities, but directed to a different legal question: whether conduct was likely, in context, to offend or insult. As Bromberg J explained in *Eatock*, the inquiry under s 18C turns on the likely impact of the act in question from the perspective of the relevant group, informed by that group's values, standards, and circumstances. The focus is not on material or structural disadvantage, but on the potential for expressive harm to dignity, assessed through the lens of social cohesion and tolerance. The standard is thus culturally and contextually embedded, and directed to the consequences of racialised speech in the public domain.

40. That test reflects the subject matter of s 18C. It is a provision concerned with speech-based injury and the protection of persons from emotional or social harm. It applies where conduct is "reasonably likely to offend," and necessarily accommodates a lower evidentiary threshold than a provision addressed to structural disadvantage. That inquiry has no analogue under s 5B of the SDA. Section 5B(2) is directed to a different inquiry. It addresses the operation of a condition, requirement or practice, and whether it probably does, or is likely to have, a disproportionate impact on persons with a

[13] See *Wertheim v Haddad* [2025] FCA 720 at [184]; *Faruqi v Hanson* [2024] FCA 1264 at [240]; *Clarke v Nationwide News Pty Ltd* [2012] FCA 307 at [48]; *Eatock v Bolt* (2011) 197 FCR 261 at [260]; cf *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [65].

protected attribute. The concern is not with subjective impact, but with discriminatory structure. That distinction in subject matter is not incidental. It shapes the legal threshold. The two provisions are directed to distinct mischiefs, and the interpretive method applicable to one cannot be transposed to the other.

41. *Conclusion*: *Eatock* is not authority for the proposition that "likely" always means "real chance." Nor does it support the view that remedial legislation may be construed without regard to statutory design. The reasoning in *Eatock* is context-specific and legally contained. It cannot be transposed to a provision such as s 5B(2), which operates as part of a two-limb evidentiary framework aimed at systemic inequality. The analogy obscures the function of the word "likely" in that structure. It should be rejected.

Section 7D

42. The Appellants rely on their primary submissions concerning the structure, purpose and application of s 7D. It is unnecessary to restate those arguments here. The present section is concerned with replying to the position adopted by the Respondent and the SDC, each of whom resists the application of s 7D by reference to constructions that are unsustainable in text, structure and purpose.

The distributive misconstruction

43. The Respondent and the SDC adopt what may be described as a distributive logic of the primary Judge: that a measure for the benefit of "women" must extend to all persons who identify as women, and that exclusion of any such person places the measure outside the scope of s 7D. That reasoning is circular. It presumes the very question the provision asks: who is the group for whom the measure is taken, and what is the purpose it serves?

44. Section 7D(1)(a) is not framed by reference to subjective identity. It requires that the act be done "for the purpose of achieving substantive equality between men and women." A measure taken for the benefit of female persons as a sex-based class is within the protection of s 7D, even if it excludes individuals who identify differently, including those who assert a "gender identity" they regard as congruent with womanhood. The statute does not compel alignment between identity-based claims and the scope of measures taken to redress sex-based inequality; it leaves that question to the purpose and design of the measure itself. The fact of exclusion does not negative the purpose.

45. The logic advanced by the SDC and the Respondent would render s 7D almost entirely inoperative in any context where "gender identity" is in play. Any special measure for "women" that does not include persons who identify as "women"—but who are not female—would be said to fall outside the provision. That construction effectively strips s 7D of its protective function and makes protection for women as a sex class group contingent on how others within the community identify. That is not what the text requires, and it is not what the provision was enacted to do.

The conflation of identity and purpose

46. As earlier submitted at [7] herein, the Respondent's and SDC's reasoning proceeds from the assumption that "gender identity" must be treated as coextensive with "sex" for the purposes of s 7D(1)(a). That conflation is not compelled by the statute, which expressly accommodates protection for "gender identity" under s 7D(1)(ab), nor is it supported by the international instruments on which s 7D is based. Article 4(1) of the CEDAW speaks explicitly to special measures aimed at accelerating de facto equality between men and women as sex-based classes. It does not refer to gender identity. The target of the measure is structural inequality between men and women. The fact that the measure excludes some individuals who claim a female identity does not take it outside the scope of the Article, nor outside the protection of s 7D.

47. This point is reinforced by the very materials on which the SDC relies. In General Recommendation No. 25, the CEDAW Committee emphasises the importance of intersectionality in the application of special measures. At [12], it recognises that "certain groups of women… suffer multiple forms of discrimination" and that States must "address the particular needs of women belonging to such groups." At [27]–[28], the Committee calls for States parties to describe the "actual life situation" of the women targeted by the measure, including "the specific group of women whose situation the measure is designed to improve".

48. The logic is plain: special measures may, and often must, be tailored to a sub-set within the group of women. They are not rendered unlawful because they do not encompass *all* persons who identify as women. The purpose of s 7D is not to guarantee the inclusion of all persons who may claim the status of "woman" for the purposes of a particular measure. It is to authorise the adoption of positive measures directed to addressing structural disadvantage experienced by women, however defined by the context of the measure.

49. The Giggle App is precisely such a measure. It was designed to provide a female-only digital space, in response to a persistent pattern of sex-based exclusion, harassment and surveillance experienced by women online. Its exclusion of male-bodied persons—even

those who identify differently—is integral to its function. It is not ancillary. It is the means by which the space is rendered effective. That exclusion is not inconsistent with s 7D. It reflects the kind of sex-based differentiation the provision is designed to permit, where reasonably directed to the purpose of redressing structural inequality.

The error in reading down s 7D by reference to other attributes

50. The Respondent and the SDC appear to treat s 7D(2) as if it operates in tension with the operative provisions of Part I and, on that basis, must be read down or subordinated to other grounds of discrimination such as "gender identity". That approach misconceives the function of s 7D(2). It is not an exemption. It is a deeming provision — one that positively reclassifies conduct that would otherwise fall within Part I as not discriminatory if undertaken for the purpose identified in s 7D(1). The provision is declaratory: where the criteria are met, the conduct is deemed not to be discrimination under the SDA. This is made plain on the text and structure of Part I of the SDA.

51. ***First***, all provisions listed in s 7D(2) are, by their own terms, subject to its effect.[14] The provision does not create a hierarchy of attributes. It does not imply that "gender identity" must prevail over "sex". It calls for and makes no such evaluative judgment. It applies in its own terms. Where a measure is taken for any of the purposes listed in s 7D(1)(a), it is taken not to be discrimination.

52. ***Second***, s 7D(2) provides that "[a] person does not discriminate against another person under section 5, 5A, 5B, 5C, 6, 7, 7AA or 7A by taking special measures authorised by subsection (1)." The language is categorical: it operates as a reclassification of conduct.

53. That is, ss 5 to 7A do not define the primary norm, to which s 7D carves out an exception, viz. s 7D does not assume liability and then excuse it.[15] It defines a field of conduct that does not attract the character of discrimination in the first place. The measure is not excused. It is deemed not to be discrimination. That conclusion flows directly from the

[14] Each of the operative anti-discrimination provisions—ss 5 to 7A—is expressly made "subject to sections 7B and 7D" by its subsection (3). That language is declaratory. It confirms that the operation of the general prohibition is confined by the terms of those two provisions. Section 7B introduces a reasonableness constraint in the case of indirect discrimination. Section 7D reclassifies certain conduct as not being discrimination at all. To say that ss 5–7A have effect "subject to" those provisions is not to require reconciliation between them, but to acknowledge that their ordinary application is displaced where either s 7B or s 7D applies. The text leaves no room for inference that one protected attribute takes precedence over another. It merely states that the general rules yield where the conditions for exception or reclassification are met.

[15] To the extent that Gray J's observations at *Walker v Cormack* (2011) 196 FCR 574 at [25] would support this construction it is not correct and should not be followed.

text. The language used—"a person does not discriminate"—is the language of statutory fiction. Its effect is to remove the conduct from the reach of the prohibition altogether.

54. The High Court has repeatedly cautioned that such provisions are to be given effect according to their legal function, not merely their form. In *Vines v Djordjevitch* (1955) 91 CLR 512 at 519, the High Court explained that a provision should not be read as exculpatory unless clearly intended to operate in that way. Where the provision forms part of the statement of the legal standard itself, it is not a defence. It defines the legal position. Section 7D is also not cast in the language of exculpation. It contains no procedural indicia of a defence: no reversed onus, no burden of justification, no test of reasonableness or necessity. It does not suspend liability. It precludes its arising.

55. Likewise, in *Walker v Cormack* (2011) 196 FCR 574 at [25], Gray J recognised that the use of deeming language in a civil liability framework alters the legal character of the conduct, rather than excusing liability for that conduct.

56. In *Wellington Capital Ltd v ASIC* (2014) 254 CLR 288 at [51], Gageler J (as the Chief Justice then was) observed that deeming provisions are not construed to have an operation "beyond that required to achieve the object of their incorporation." In *Queensland v Congoo* (2015) 256 CLR 239 at [165], his Honour confirmed that such provisions are to be applied as far, but no further than their text and purpose require.

57. That principle has also been applied to analogous deeming language in the UK and in Australian tax and revenue contexts. In *DCC Holdings v Revenue and Customs Commissioners* [2011] 1 WLR 44 at [38]–[39], Lord Walker explained that a deeming provision must be given its ordinary and natural meaning, consistent with legislative purpose, but not extended beyond what the fiction reasonably implies. In *Newcastle Airport v Chief Commissioner of State Revenue* [2014] NSWSC 1501 at [56], White J relied upon Lord Walker's application of Neuberger J's formulation in *Jenks v Dickinson* [1997] STC 853, that a deeming provision does not displace normal interpretive principles, but reflects a statutory assumption to be respected within its purpose.[16]

58. Section 7D must be construed accordingly. It does not render the conduct lawful for all purposes. It deems it not to be discrimination under ss 5–7A. That is the full extent of its operation. The statute does not invite reconciliation within those provisions. It displaces them where the criteria in s 7D(1) are met. That is not because they are overridden, but because they no longer apply. The conduct does not fall within their scope.

[16] See also *Ellison v Sandini Pty Ltd* (2018) 263 FCR 460 at [209]-[210] (Jagot J); and *Holdsworth v Commissioner of Police, New South Wales Police Force* [2020] NSWSC 228 at [41] (Beech-Jones J).

59. *Conclusion*: To argue, as the SDC and Respondent do, that s 7D must be read subject to other provisions in Part I is to reverse its operation. The provision does not qualify ss 5 to 7A; it displaces them where the conditions of any one of the placita of s 7D(1) is satisfied. The statute does not prioritise one protected attribute over another. It does not prescribe which measures are to be taken, or for whose benefit, or how the relevant classes are to be defined. It leaves those matters to the purpose of the measure and the terms in which it is framed. Nothing in the SDA requires that a measure directed to improving the position of "women"—however categorised—must yield to a competing claim made on another ground. To read it the way the SDC and Respondent urge this Court to do is to introduce a hierarchy of attributes that the statute does not contain and to frustrate the legislative object of enabling targeted responses to structural inequality, by according greater legal significance to externally assumed *gender-related* cues than to the structural disadvantage experienced by the class of women for whom the measure was taken.

60. It follows that the argument advanced by the SDC and the Respondent—that the lawfulness of the measure must be assessed independently by reference to s 5B(2) or "gender identity"—is conceptually unsound. Section 7D supplies its own test. It does so in unqualified terms. There is no warrant in the SDA for reordering protected attributes, or for treating sex-based measures as presumptively subordinate to other claims. The provision operates precisely as it is written. It must be given its full literal effect.

DATE: 20 July 2025

N. C. Hutley
B. K. Nolan

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Important Information

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IN THE FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: New South Wales Registry

DIVISION: General

NSD 1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017
and another named in the schedule
Appellants[1]

and

ROXANNE TICKLE
Respondent[2]

MS TICKLE'S SUBMISSIONS IN RESPONSE TO SUBMISSIONS OF THE LESBIAN ACTION GROUP INC (LAG)[3]

1 Ms Grover / Giggle are also Cross-Respondents to Ms Tickle's Notice of Cross-Appeal filed on 25 February 2025.

2 Ms Tickle is also a Cross-Appellant.

3 On 12 June 2025, LAG was granted leave to intervene pursuant to r 9.12(1) of the *Federal Court Rules 2011* (Cth) (**FCR**) to file 10 pages of written submissions and 30 minutes of oral advocacy, limited to addressing issues raised on the appeal or the cross-appeal which are also relevant to the grounds of judicial review in its action against the Australia Human Rights Commission: Orders of Perry, Abraham & Kennett JJ dated 12 June 2025 at [3]. Ms Tickle's submissions in response were to be filed by 25 July 2025: Orders of Perry, Abraham & Kennett JJ dated 12 June 2025 at [5]; Orders of Perry J dated 24 July 2025 at [6].

Filed on behalf of: The respondent / cross appellant

Prepared by: Counsel for the Respondent: Georgina Costello KC, Christopher McDermott, Briana Goding, Elodie Nadon and Lawyers for the Respondent: Clayton Utz

Law firm: Clayton Utz

Address for service:
Level 15
1 Bligh Street
Sydney NSW 2000

Contact details:
Tel: (02) 9353 4000
Fax: (02) 8220 6700
Contact: Kym Fraser
Email: kfraser@claytonutz.com
Ref: 11475/21269/81047928

OVERVIEW

1 Beyond LAG's submissions (**LS**) on s 7D of the *Sex Discrimination Act 1984* (Cth) (**SDA**), LAG raises several matters of little to no relevance. LAG raises unconstructive grievances and examples factually divorced from this case.

2 LAG essentially aligns with Giggle / Ms Grover's position[4] on the construction of s 7D(1)(a), which the Primary Judge (**PJ**) correctly found to be "plainly untenable".[5] Establishing the Giggle App as a special measure under s 7D(1)(a) of the SDA for the purpose of achieving substantive equality between men and women does not shield Giggle and Ms Grover from engaging in discrimination against transgender women, it only excuses discrimination against men.

3 Roxanne Tickle is a woman.[6] LAG reads the SDA to exclude Ms Tickle from being a woman on the basis that her "designated sex at birth"[7] ultimately controls any access she might otherwise have to the statutory protections generally afforded to (cisgender) women. On LAG's construction, transgender women – a minority group within Australia – are deprived of the protections afforded to women under the SDA, when the SDA was purposefully designed to recognise, and protect, the inherent dignity of sex and gender diverse individuals in contemporary Australian society.[8] The PJ's decision does not conflict with the terms of s 7D(1)(a) of the SDA. It would be absurd if one group of women was elevated to a statutory mandate to exclude "other" categories of women.

4 The SDA does not define "man / male / woman / female" or "gender" *per se*. LAG's retrograde, stereotypical and ideologically reductionist interpretation of men / women should be rejected. Judicial cognisance of the "contemporary every day meaning"[9] of the SDA's key definitional concepts[10] based on orthodox statutory interpretation principles which have regard to text, context and purpose, is called for. The inexorable conclusion in this case is that Ms Tickle is a woman who was discriminated against by Ms Grover / Giggle based on her gender identity as a transgender woman. Whether that discrimination was direct or indirect, and the appropriate measure of damages and aggravated damages, are the real issues in the case. LAG's submissions ought not distract from those matters.

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4 Giggle / Ms Grover's Submissions in response to LS filed 15 July 2025.
5 J[86].
6 J [3].
7 SDA s 4(1) definition of "gender identity".
8 SDA s 3(b): "The objects of this Act are: (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex…or gender identity…in the areas of…".
9 *Attorney-General (Cth) v "Kevin v Jennifer"* (2003) 172 FLR 300 at [105]-[108], [374]-[380] (Nicholson CJ, Ellis & Brown JJ); *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [54] (Moore, Kenny & Tracey JJ). See, too, Explanatory Memorandum to the Amendment Act at Item 8 at [18]-[19] p 13.
10 Sex / gender / a different sex / man / male / woman / female.

The Amendment Act supports Ms Tickle's construction

5 The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (**Amendment Act**) introduced new terminology, repealing the definitions of "man" ("a member of the male sex irrespective of age")[11] and "woman" ("a member of the female sex irrespective of age"),[12] substituting the phrase "a different sex"[13] for the phrase "the opposite sex" in the direct (sex) discrimination protection in s 5(1), s 21(3)(a) & (b) (admission of students at single sex educational facilities), s 25(3) (membership of single sex clubs), s 27(1)(c)(i) (unlawful requests for information), and s 30(1) & s 30(2)(a) & (2)(f)(ii) (genuine occupational qualification exemptions). Contrary to LS[30],[14] these amendments change from "the ordinary use of language, [where] to speak of the opposite sex is to speak of the contrasting categories of sex: male and female".[15] The SDA reflects a clear intent to afford maximum protection on the grounds of sex and gender identity, and a broader interpretation of the meaning of "man" and "woman" that is not immutable or binary. The enlivened provisions of the SDA should not be construed to "negate the evident policy or purpose of [the] substantive enactment"[16] (*cf* LS[29]), the PJ was correct to so find at J[55]-[60]; there is no error in the PJ's conclusion at J[59] citing *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd*.[17]

6 The Court can take the same orthodox approaches to construction as in other areas of social policy, like social security, marriage,[18] or parenthood.[19] Ms Tickle's submissions reflect the settled and current approach of construing the terms of the statute as a whole, and by reference to its (beneficial) purposes,[20] which necessitate a "fair and liberal interpretation" to the relevant provisions at play.[21]

7 The Explanatory Memorandum to the Amendment Act confirms what is clear from the provisions. The definitions of "man" and "woman" in s 4(1) "take their ordinary meaning", and are "not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from

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11 Amendment Act Item 8.

12 Amendment Act Item 14.

13 Amendment Act Item 16.

14 See, too, Ms Grover / Giggle's Submissions in response to LAG's Submissions at [7]-[8].

15 *Registrar of Births, Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490 at [33] (French CJ, Hayne, Kiefel, Bell & Keane JJ); *cf* LS [30].

16 *Kelly v The Queen* (2004) 218 CLR 216 at [103] (McHugh J); *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* (2024) 98 ALJR 1273 at [32] (Gageler CJ, Gordon, Edelman, Gleeson & Beech-Jones JJ).

17 (1995) 184 CLR 453 at 463 (Brennan CJ, Dawson & Toohey JJ): "The result is that both the Act which is amended and the amending Act are to be read together as a combined statement of the will of the legislature. Thus the effect of the amending Act may be to alter the meaning which remaining provisions of the amended Act bore before the amendment".

18 "The status of marriage, the social institution which the status reflects, and the rights and obligations which attach to the rights and obligations which attach to that status never have been, and are not now, immutable": *Commonwealth v Australian Capital Territory* (2013) 350 CLR 441 at [16] (French CJ, Hayne, Crennan, Kiefel, Bell & Keane JJ); *EHT v Melbourne IVF* (2018) 263 FCR 376 at [116] (Griffiths J).

19 "[There is] little contextual support for the proposition that the word "parent" has some restrictive meaning, signifying only a biological parent, as opposed to a parent, whoever that may be, within ordinary meaning of the word": *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [54] (Moore, Kenny & Tracey JJ).

20 ***AB*** *v Western Australia* (2011) 244 CLR 390 at [10] (French CJ, Gummow, Hayne, Kiefel & Bell JJ).

21 *AB* at [38] (French CJ, Gummow, Hayne, Kiefel & Bell JJ).

discrimination on the basis of other attributes contained in the SDA".[22] The words "other attributes" do not exclude the protected attribute of "sex" for the purposes s 5 and s 7D(1)(a).[23] The change from "the opposite sex" to "a different sex" was to "ensure [s 5(1)] was consistent with the introduction of protections for gender identity and intersex status, which recognise that a person may be or identify as, neither male or female".[24] Extrinsic materials aid interpretation of the provisions[25] and reinforces Ms Tickle's constructional arguments. There is no material error in the extrinsic materials,[26] including of the kind where the "tail wags the dog".[27] The words to be construed can readily bear the load of the meaning contended for.

8 There is no reason to limit the ordinary and natural meaning of man and woman to a person's "designated sex at birth".[28] The words "female" or "woman" include a person who has taken steps to medically affirm their gender,[29] because "sex is not merely a matter of chromosomes".[30] J[55]-[60] is a correct and logical reflection of the "broader ordinary meaning(s)" of the words used in the SDA (*cf* LS[27]). There is no call for any supererogatory approach to the interpretation of the SDA,[31] including as to rigid exclusion – without any textual or contextual indications – of the legal, social and other relevant factors that may properly inform the ordinary meaning of the words in question.[32]

9 LS[17] assumes a (binary) contest exists as between persons with various protected attributes under the SDA, such that the orthodox approach to the construction of the SDA as a remedial and beneficial legislation[33] is now to be "treated with caution" (LS[8]). There is no warrant for such caution when the asserted basis for the foundational contest fails to recognise the multiple aspects of an individual's identity that may require statutory protection and erroneously assumes that all cisgender women essentially share the same homogenous viewpoint that transgender women should be treated as is contended for. LS[8] invites the very interpretation it asks the Court not to endorse, "to construe the [SDA] so that it prefers one protected class [cisgender women] over another [transgender women], in a way that undermines the protections afforded to members of the female sex".

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22 Explanatory Memorandum to the Amendment Act at [18] p 13.

23 *cf* Giggle / Ms Grover's Submissions in response to LS [8].

24 Explanatory Memorandum to the Amendment Act at [27] p 14. See, too, at [25] pp 13-14, [61] p 19, [65] & [68] p 20.

25 Compare, *Norrie v NSW Registrar of Births, Deaths and Marriages* (2013) 84 NSWLR 697 (***Norrie NSWCA)*** at [76]-[80] (Beazley ACJ).

26 ***Mondelez*** *Australia Pty Ltd v Automotive Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495 at [72] (Gageler J); *cf* LAG Submissions at [31].

27 *Mondelez* at [72] (Gageler J). A similar submission is made in Ms Grover / Giggle's Submissions in response to LS at [18].

28 SDA s 4(1) definition of "gender identity".

29 *Secretary, Department of Social Security v* ***"SRA"*** (1993) 43 FCR 299 at 305 (Black CJ).

30 "*SRA*" at 325 (Lockhart J); *AB* at [2] (French CJ, Gummow, Hayne, Kiefel & Bell JJ). *cf* LAG's Submissions at [27]-[28]; J [56]. See, too, the assertion of a "stable binary understanding of sex" in Ms Grover / Giggle's Submissions in response to LAG's Submissions at [12].

31 *cf LS* [5]-[6]. A similar submission is made in Giggle and Ms Grover's's Submissions in response to LAG's submissions at [17].

32 *cf* LAG's Submissions at [28]; J [57].

33 *AB* at [5], [31] (French CJ, Gummow, Hayne, Kiefel & Bell JJ).

LAG's approach to definitions in the SDA should be rejected

10 Contrary to LS[10]-[11], the term "intersex status" (principally used in SDA s 3(a), s 4(1), s 5C, s 7D(1)(ac)) does not establish a "[remaining] sex class for the purposes of the SD Act" comprising of (binary) males and females. Intersex status is irrelevant to the facts of this case. In any event, the statutory definition of "intersex status"[34]does not establish that a binary / biological conception of "sex" is then used for all purposes in the SDA. Rather, the "intersex status" definition is an interpretive guide for recognising characteristics of intersex persons who deserve unique statutory protection *vis-à-vis* gender identity,[35] and reflects an interpretation that "'sex' is not necessarily a binary construct".[36]

11 Similarly, LS[12] as to sexual orientation relying on the word "sex" wrongly assumes that a person who considers themselves to be same-sex attracted cannot retain their sexual orientation[37] if they form a relationship or attraction to someone who may have taken steps to legally, socially or medically affirm their gender from their "designated sex at birth". A gay man is still a gay man if he has a sexual relationship with a transgender man (who himself identifies as gay) despite being "designated female at birth". LAG ignores how the definition of "sexual orientation" in s 4(1) of the SDA uses the terms "the same sex" and "a different sex" (and not "the opposite sex"; see at [7]). The definition of "gender identity" does not indicate that a binary / biological conception of "sex" is intended for use for all purposes in the SDA.[38] LS[24] seeks to use a "dictionary definition" as some form of fortress.[39]

12 Section 7 (pregnancy discrimination) and s 7AA (breastfeeding discrimination) protect an "aggrieved woman"[40] who is pregnant or potentially pregnant as a question of fact.[41] Where sex or gender diverse persons are pregnant or potentially pregnant, the provision can be read inclusively to afford statutory protection to those without intrinsic gender identity as an "aggrieved woman",[42] including persons with an intersex status. A person simply needs to come within the relevant statutory factum: a pregnant (or potentially pregnant) woman or a breastfeeding woman. In any event, there is another reason to distinguish the concept of (aggrieved) "woman" as deployed in s 7 and s 7AA from the use of the word

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34 SDA s 4(1) "***intersex status*** means having physical, hormonal or genetic features that are: (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male".

35 Second Reading Speech of the (then) Attorney-General, the Hon Mark Dreyfus MP QC, House of Representatives Hansard, 21 March 2013, p 2894: "A separate ground of intersex status is also introduced as a result of the consultations on the draft Human Rights and Anti-Discrimination Bill and the recommendations of the Senate committee. People who are intersex can face many of the same issues that are sought to be addressed through the introduction of the ground of gender identity". See, too, Report of the Senate Legal and Constitutional Affairs Legislation Committee on the Amendment Bill at [1.11] p 3 and [2.6] pp 7-8 (June 2013).

36 Compare, *Norrie NSWCA* at [121] (Beazley ACJ).

37 Note, the Report by the Senate Legal and Constitutional Affairs Committee on the Bill for the Amendment Act that the term "sexual preference" was to be removed from other Commonwealth legislation in favour of "sexual orientation" (e.g. the *Fair Work Act 2009* (Cth)) s 351): Recommendation 2 at [3.72] p vii (June 2013).

38 LS[13].

39 *cf* LS[25]. Compare, *Norrie NSWCA* at [84]-[90] (Beazley ACJ).

40 *cf* "aggrieved person" in ss 5, 5A, 5B, 5C, 6 and an "employee" in s 7A.

41 *cf* LS[14]-[15], [24].

42 By reason of s 23(a) of the *Acts Interpretation Act 1901* (Cth): "In any Act: (a) words importing a gender include every other gender".

"woman" in other parts of the SDA, for example, in s 7D(1)(a), namely, to enable the taking of special measures to achieve substantive equality between women who are pregnant, potentially pregnant and are breastfeeding from those "**people** who are not".[43]

The PJ's construction does not dilute discrimination protections in public life

13 LS[17]-[19][44] contend the language "on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities" points up the importance of maintaining the reservation and distinction of the "sex" class, especially in education (SDA s 21), accommodation (SDA s 23), membership of clubs (SDA s 25), and in unlawful requests for information (SDA s 27). LAG invokes these provisions (and various exemptions) to lament "the innumerable unintended consequences" and the "impossibility, irrationality or unreasonableness" of the inclusivity of transgender women.[45] In truth, LAG agitates for a global interpretation that enables unfair exclusion based on stereotypes, and the illegitimacy of transgender women as women *per se*. The exclusionary consequences of LAG's interpretation give rise to: sex or gender diverse young people not being admitted to a school that aligns with their "gender identity"; transgender women being unable to access critical social services when they themselves experience domestic violence or rape or simply being able to use a restroom in their workplace. LAG's approach reinforces a dangerous stereotype of transgender women on the unstated and highly dubious assumption that their very existence presents a risk to "vulnerable or disabled girls".[46] Extreme examples posited by LAG as to unlawful requests for information (s 27) and insurance do not arise on any sensible factual hypothesis[47] and the "floodgates" will not open.[48]

14 The *Births, Deaths and Marriages Registration Act 2023* (Qld), can operate concurrently with the SDA without causing any practical conflict.[49] The legal fact of Ms Tickle's gender identity under Queensland law is a relevant fact in the interpretive exercise of discerning the ordinary meaning and application of key definitional concepts.[50]

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43 SDA ss 7D(1)(c)-(e); see, too, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at [25] (Kiefel CJ, Keane, Gordon, Steward & Gleeson JJ); *cf* LAG's Submissions at [16].

44 A similar point is made at LS [20] as to the prohibition based on "harassment on the ground of sex" in s 28AA, noting that the sex or gender identity of the of the person experiencing such harassment is a circumstance to be taken into account when evaluating the harassment". See, too, definition of "harassment on the ground of sex" in s 4(1), which makes direct reference to that term having a "corresponding meaning" (within s 18A of the *Acts Interpretation Act 1901* (Cth) for all purposes in the SDA.

45 LS [18]-[19], [21]-[24]. A similar point in Giggle / Ms Grover's Submissions in response to LS at [9]-[10] & [12].

46 LS [24].

47 LS [24]. See, for example, in relation to insurance, the possibility of an exemption under s 44 of the s 41(1A).

48 "*SRA*" (1993) at 327 (Lockhart J).

49 SDA s 10(3): "[The SDA] is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act", and s 11(3): "[The SDA] is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of relevant international instrument and is capable of operating concurrently with [the SDA]".

50 LS [26].

CONCLUSION

15 LAG's bare assertion that the protection afforded to (all) lesbians is undermined, or that sex-based protections have been substantially eroded,[51] should be rejected. LAG's selective reliance on the *obiter* views of a former Justice of this Court as to what "society" circa 1993[52] might have concluded as to who is / is not a female at law do not reflect the clear legislative intention achieved by the substantive reforms affected by the Amendment Act.[53] LAG's throwaway lines as to what is "commonplace for lesbians" or their "generalised lived experience"[54] (made on a remote hearsay basis, on a highly contestable factual footing not canvassed at trial, and for which this Court cannot take judicial notice as a matter of common knowledge[55]) are irrelevant and should be given no weight. If these submissions are directed at Ms Tickle personally, they should be withdrawn.

25 July 2025

Georgina Costello KC
Christopher McDermott
Briana Goding
Elodie Nadon
Counsel for the Respondent

Clayton Utz
Lawyers for the Respondent

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51 LS [36]. Ms Grover / Giggle's submissions [15], relying on purported expert evidence as to the immutability / binary nature of womanhood is not a matter for which judicial notice can be readily taken, either: Compare, *Norrie NSWCA* at [91]-[114] (Beazley ACJ).

52 LS [36].

53 LS also conveniently ignore Lockart J's view that "[post-operative] transsexuals should not be denied by society the inner peace of life which is their right" and the recognition of their legal status as a woman: "*SRA*" at 326 (Lockhart J).

54 At the time of LAG's application for an exemption on 3 August 2023, it constituted only 8 individual members: see, *Lesbian Action Group inc. v Australian Human Rights Commission* [2025] ARTA 34 at [2]; Annexure **KD-1** to the Affidavit of Katherine Denniss affirmed 3 April 2025.

55 *Evidence Act 1995* (Cth) s [144(1)]. Compare, *Norrie NSWCA* at [121] (Beazley ACJ).

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Important Information

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IN THE FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: New South Wales Registry

DIVISION: General

NSD 1386 of 2024

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017
and another named in the schedule
Appellants[1]

and

ROXANNE TICKLE
Respondent[2]

MS TICKLE'S SUBMISSIONS[3] IN RESPONSE TO THE SUBMISSIONS OF THE SEX DISCRIMINATION COMMISSIONER[4]

1 Ms Grover / Giggle are also Cross-Respondents to Ms Tickle's Notice of Cross-Appeal filed on 25 February 2025.

2 Ms Tickle is also a Cross-Appellant.

3 Orders of Perry J dated 23 May 2025 at [6(b)]; as extended by orders of Perry J dated 24 July 2025 at [5].

4 Hereafter, "**the Commissioner**". On 12 February 2025, the Commissioner was granted leave to appear as *amicus curiae* pursuant to s 46PV of the *Australian Human Rights Commission Act 1986* (Cth) and r 9.12(1) of the *Federal Court Rules 2011* (Cth) (**FCR**) "in relation to the same topics on which leave was granted by the primary judge: Orders of Abraham J dated 12 February 2025 at [1]; see, J [12]-[15].

Filed on behalf of: The respondent / cross appellant

Prepared by: Counsel for the Respondent: Georgina Costello KC, Christopher McDermott, Briana Goding, Elodie Nadon and Lawyers for the Respondent: Clayton Utz
Law firm: Clayton Utz
Address for service:
Level 15
1 Bligh Street
Sydney NSW 2000

Contact details:
Tel: (02) 9353 4000
Fax: (02) 8220 6700
Contact: Kym Fraser
Email: kfraser@claytonutz.com
Ref: 11475/21269/81047928

A OVERVIEW

1 Ms Tickle makes these submissions in response to the Commissioner's submissions filed on 11 July 2025. Where necessary, Ms Tickle also addresses aspects of the Appellants' submissions filed on 20 July 2025 in response to the Commissioner's submissions.[5]

Discrimination on the ground of gender identity

2 Ms Tickle concurs with the submissions made by the Commissioner at [5]-[17], which are similarly reflected in Ms Tickle's submissions made in support of her Notice of Cross-Appeal dated 7 July 2025 (at [11]-[13]) and in Ms Tickle's submissions in reply to Giggle and Ms Grover's submissions on her Cross–Appeal dated 25 July 2025 (at [2]). In addition to the extrinsic materials addressed by the Commissioner's submissions, the breadth of the definition of "gender identity" in the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (**Amendment Act**) is a product of the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs (**Committee**) made in 2013.

3 In November 2012, the Senate referred to the Committee an exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth) (**2012 Bill**), which involved a proposed consolidation of the four Commonwealth anti-discrimination laws and the *Australian Human Rights Commission Act 1986* (Cth) into a single Act.[6] The 2012 Bill also introduced proposed statutory protections for the attributes of sexual orientation and gender identity.[7] The Committee recommended a broader definition of "gender identity" than had been proposed in the 2012 Bill,[8] following a public consultation process.[9] In the 2012 Bill, the proposed definition of "gender identity" meant:[10]

> …the identification, on a genuine basis, by a person of one sex as a member of the other sex (whether or not the person is recognised as such):
>
> (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
>
> (ii) by living, or seeking to live, as a member of the other sex.

4 The Committee was clearly concerned to ensure that any statutory protection for the attribute of "gender identity" involved "comprehensive protection" and the "maximum possible protection for

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5 The Appellants were required to file and serve only 5 pages of responsive submissions to the Commissioner's submissions: Orders of Perry J dated 23 May 2025 at [5(c)]. They filed submissions of 16 pages.

6 Report of the Committee on the Exposure Draft of 2012 Bill at [1.1]-[1.7] pp 1-2 (February 2013).

7 Report of the Committee on the Exposure Draft of 2012 Bill at [2.3] p 9 & [2.11] p 11 (February 2013).

8 Report of the Committee on the Exposure Draft of 2012 Bill at [7.11]-[7.15] pp 84-85 (February 2013).

9 Report of the Committee on the Exposure Draft of 2012 Bill at [3.6]-[3.11] pp 20-21 (February 2013).

10 Report of the Committee on the Exposure Draft of 2012 Bill at [2.11] p 11 (February 2013).

gender diverse individuals" and not "[be] too restrictive [so as to] not go far enough to cover gender-related identity, appearance or mannerisms".[11] The Committee also opined that the use of a "genuine basis" in the definition of "gender identity" as a threshold would be likely to "cause confusion as to when an individual will be covered by this protected attribute".[12] The Committee recommended that the definition of "gender identity" be amended to read:[13]

> ***gender identity*** means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism.

5 Subsequently, in March 2013, following introduction of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (**2013 Bill**) into the House of Representatives, the 2013 Bill was referred by the Senate to the Committee.[14] The Committee noted that the revised definition of "gender identity" in the 2013 Bill was based on the definition in the Tasmanian Anti-Discrimination Amendment Bill 2012.[15] The material differences between the definition above at [4] and the definition in s 4(1) of the *Sex Discrimination Act 1984* (Cth) (**SDA**) are the use of "a person" rather than "an individual", and the omission of the words "and includes transsexualism and transgenderism".[16]

6 The Explanatory Memorandum to the Amendment Act adverts to the Committee's work in the context of the 2012 Bill and 2013 Bill respectively.[17]

7 The Appellants' interpretation presents a binary and exclusionary distinction between "sex" and "gender identity",[18] which should be rejected for the reasons outlined in Ms Tickle's earlier submissions. The Appellants' position leans too much towards the "subjective and ongoing state of

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11 Report of the Committee on the Exposure Draft 2012 Bill at [7.12] p 84 (February 2013).

12 Report of the Committee on the Exposure Draft 2012 Bill at [7.13] p 84 (February 2013).

13 Report of the Committee on the Exposure Draft 2012 Bill at [7.20] p 85 (February 2013). Note, the "Dissenting Report by Coalition Senators" recommended an amendment to the SDA to include "identity as a gay, lesbian, bisexual, transgender or intersex person as a protected attribute to which the SDA extends" (at [1.35], p 110), on the basis that "[people] in that category are no doubt vulnerable to unfair discrimination", which was "unacceptable by modern community standards" (at [1.33], p 109).

14 Report of the Committee on the 2013 Bill at [1.1] p 1 (June 2013).

15 Report of the Committee on the 2013 Bill at [1.10] p 3 & [2.3]-[2.4] p 7 (June 2013). Note, the "Minority Report by Coalition Senators" acknowledged its broad support for the provisions of the 2013 Bill, save in respect of its application for religious organisations (at [1.1]-[1.2] p 35).

16 The Explanatory Memorandum to the Amendment Act at [12] p 12 makes clear that the definition was "still intended to apply to transsexual and transgender people, but the definition does not use these descriptions to ensure the definition is not unnecessarily limited in its application". The use of "person" rather than "individual" was for the purpose of consistency with other provisions of the SDA.

17 Explanatory Memorandum to the Amendment Act at [10] and [14] p 12 and the Regulatory Impact Statement at p 31.

18 Giggle / Ms Grover's submissions in response to the Commissioner's submissions at [10]-[17].

mind" of the alleged discriminator rather than "an objective judgment about the position taken by the alleged discriminator".[19] It is not for the Appellants only to decide with impunity for consequential discrimination in the provision of services, who should be seen as a woman and who should not.

The meaning of "likely to have" in s 5B(2) of the SDA

8 Ms Tickle concurs with the submissions made by the Commissioner at [18]-[24] in relation to the meaning of the term "likely to have" in s 5B(2) of the SDA; which are reflected in Ms Tickle's reference[20] to *Save our Strathbogie Forest Inc v Secretary to the Department of Energy, Environment and Climate Action* (2024) 306 FCR 316 at [338]-[348] (Horan J). In that matter, Horan J interpreted s 18(3)[21] of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) by reference to the similar threshold of a "real (in the sense of non-remote) chance", in part because there was no obvious legislative intention that the phrase "likely to have a significant impact" (in s 18(3)(b) of the EPBC Act) "would have been intended to refer to future impacts that are more probable than not, as such impacts would already be covered by [s 18(a) of the EPBC Act, with the phrase 'has or will have a significant impact']".[22] On appeal, no issue was taken by the parties as to Horan J's use of the "real (in the sense of non-remote) chance" in s 18(3) of the EPBC Act, and no doubt was expressed by the Full Court as to that interpretation, either.[23]

9 In any event, a beneficial, and not a narrow or artificial, construction for the approach to discerning the relevant disadvantaging effect is to be preferred.[24]

10 There is otherwise no sensible reason to distinguish the wording deployed in s 5B(2) of the SDA *vis-à-vis* s 18C(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**),[25] because each provision is concerned with the possibility of the detrimental effect to the person aggrieved connected with an

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19 *Watts v Australian Postal Corporation* (2014) 222 FCR 220 at [30] (Mortimer J, in the context of "reasonable adjustments" in s 5(2)(a) of the *Disability Discrimination Act 1992* (Cth)).

20 Ms Tickle's submissions in response to the Appellants' submissions on the NOA dated 7 July 2025 at [17] (fn #50).

21 EPBC Act s 18(3) relevantly provided:

> (3) A person must not take an action that:
>
> (a) has or will have a significant impact on a listed threatened species included in the endangered category; or
>
> (b) is likely to have a significant impact on a listed threatened species included in the endangered category.

22 *cf* Giggle / Ms Grover's submissions in response to the Commissioner's submissions at [32]-[41]. There is no reason to distinguish.

23 *Save our Strathbogie Forest Inc v Secretary to the Department of Energy, Environment and Climate Action* (2024) 306 FCR 331 at [62]-[63] and [116] (Moshinsky, Charlesworth & Kennett JJ).

24 Compare, *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 at [63]-[73] (Driver FM).

25 Commissioner's submissions at [23]; *cf* Appellants' submissions at [38]-[41].

intrinsic part of their human identity;[26] whether race is "immutable" *vis-à-vis* gender identity[27] is not a coherent basis for any distinction for the approach to discerning the relevant disadvantageous effect when the Legislature has clearly sought to afford substantive and meaningful protection based on the attribute of gender identity.

United Kingdom (UK) Supreme Court decision - *For Women Scotland v The Scottish Ministers* [2025] 2 WLR 879; UKSC 16 (For Women Scotland)

11 The UK Supreme Court's decision in *For Women Scotland* concerned the different statutory architecture of the ***Equality Act*** *2010* (see, in particular, [2025] 2 WLR 879; UKSC 16 at [114]-[128], and [265]). The protections in the SDA, for example, in s 5, 5B, s 7D(1)(a) and s 7D(1)(ab), as well as the statutory definition of "gender identity" in s 4(1), are significantly different from the core provisions in the Equality Act and provide no useful analogue in the circumstances. The Commissioner is therefore correct to describe the UK Supreme Court's decision in *For Women Scotland* as irrelevant to the task of construing the relevant provisions of the SDA which are the subject of these proceedings.[28]

"Special measures"

12 With respect to "special measures" as referenced within s 7D(1) of the SDA, Ms Tickle concurs with the submissions made by the Commissioner [26]-[40] and also relies on Ms Tickle's submissions dated 7 July 2025 in response to the Appellants' submissions on the NOA at [21]-[26], and Ms Tickle's submissions in response to LAG's submissions dated 25 July 2025 at [5]-[9] and [12].

CEDAW underpinnings to s 7D of the SDA

13 Ms Tickle concurs with the submissions made by the Commissioner at [41]-[47],[29] and relies on Ms Tickle's earlier submission in response to the Appellants' submissions on the NOA (at [26]) that *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 must be viewed in its proper (circa-2004) statutory context, operating before the reforms to the SDA were effected by the Amendment Act. Further, it is clear from the definition of "***relevant international instrument***" in s 4(1) of the SDA that the SDA is supported by several international instruments to which Australia is a party, including CEDAW and the International Covenant on Civil

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26 See, *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 at 333 (Lee J): "The context in which the word [discriminates as used in SDA ss 5-7] appears involves a concept of detriment arising out of one person treated less favourably than another".

27 *cf* Appellants' submissions in response to the Commissioner's submissions at [22]-[26].

28 Commissioner's submissions at [25]; *cf* LAG Submissions at [12].

29 *cf* Appellants' submissions in response to the Commissioner's submissions at [46]-[49]; *cf* LAG's Submissions at [32]-[35].

and Political Rights (1966) (**ICCPR**).[30] The PJ's reasoning as to how the ICCPR[31] relevantly underpins the SDA provisions concerning gender identity the subject of this appeal are not now relevantly impugned by any party.[32] Ms Tickle otherwise specifically endorses the PJ's finding at J[70] (and similarly at J[160]):

> [70] In 2011, amendments were made to s 9 to provide that [the SDA] 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) [of the SDA]. Section 9(10)….now provides that the prescribed provisions have effect to the extent that they "give effect to a relevant international instrument"…The combined effect of [s 9(4) and s 9(10)] is that s 22 will be given effect to the extent that it implements Australia's obligations under relevant instruments.

Section 7B of the SDA

14 The Commissioner's submission that, at trial, she did not apprehend that the Appellants relied on s 7B of the SDA (at [3]) accords with the position reflected in Ms Tickle's submissions dated 7 July 2025 in response to the Appellants' submissions on the NOA (at [28]-[29]). Ms Tickle relies on her earlier submission that the Court should not permit the Appellants to advance ground [3(b)] of their NOA.

28 July 2025

Georgina Costello KC
Christopher McDermott
Briana Goding
Elodie Nadon
Counsel for the Respondent

Clayton Utz
Lawyers for the Respondent

30 J[70].
31 J[181]-[188].
32 Note, Ground 5 of the NOA is abandoned.