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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

NO. NSD 1148/2022

ROXANNE TICKLE

Applicant

GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR

Respondents

SUBMISSIONS OF THE SEX DISCRIMINATION COMMISSIONER

A. OVERVIEW

1. By orders made on 16 June and 8 August 2023 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 on the following issues:

   1.1. the construction, meaning and scope of provisions of the *Sex Discrimination Act 1984* (Cth) (**the SDA**) dealing with discrimination on the grounds of sex and gender identity;

   1.2. the construction, meaning and scope of provisions of the SDA dealing with special measures;

   1.3. the constitutional validity of the amendments to the SDA made by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (the **Amending Act**). Based on the Respondents' amended notice under s 78B of the *Judiciary Act 1903* (Cth) dated 30 June 2023 (**Amended s 78B Notice**), the Commissioner understands this issue is limited to the validity of s 5B in its application to s 22 of the SDA; and

   1.4. whether s 24[1] of the *Births, Deaths and Marriages Registration Act 2003* (Qld) (**BDMR Act**) is inconsistent with ss 5, 5B, 7B, 7D and 22 of the SDA within s 109 of the *Constitution*.

[1] While the Amended s 78B Notice refers to s 24(1), that only applies where a person has had the reassignment of their sex registered under a "corresponding law". Since the Applicant claims that her amended birth certificate was issued by the Queensland registry (ASOC [9]), it appears that she may have had the reassignment of her sex noted in the Queensland register and that the Respondents' challenge is really to s 24(4).

2. The Commissioner's role is limited to assisting the Court on those questions of statutory construction and constitutional validity. The Commissioner makes no submission as to whether the Respondents discriminated against the Applicant in the manner alleged.

3. The High Court has repeatedly cautioned that constitutional questions should not be decided unless there exists a state of facts which makes it necessary to do so in order to do justice in a given case and determine the rights of the parties.[2] The result is that:

   3.1. This Court may take the view that the merits of the Applicant's claim should be determined prior to the constitutional issues,[3] because if the claim is dismissed on its merits there will be no need to determine the validity of s 5B of the SDA.

   3.2. Further, in circumstances where the Applicant alleges a breach of s 22 of the SDA only, the validity of s 5B would only arise in its application to s 22 (not in relation to the other forms of discrimination prohibited in Part II, which may be supported by other heads of power under s 51).

4. The Commissioner submits, in summary, that:

   4.1. On the proper construction of ss 5 and 5B, the Applicant's claim is properly characterised as a claim of gender identity discrimination under s 5B.

   4.2. Even if the Giggle App were a "special measure" within s 7D(1)(a), it could still constitute discrimination within s 5B.

   4.3. Section 5B and s 22 are supported by s 51(xxix) and/or s 51(xx) of the *Constitution*. There is no inconsistency between s 24 of the BDMR Act and the SDA.

B. THE NATURE OF THE DISPUTE

5. The Amended Statement of Claim filed on 4 May 2023 (**ASOC**) pleads that the Applicant was assigned a male gender at birth but has since transitioned to a female gender: at [10]. It is pleaded that since 2017 the Applicant has presented her physical appearance as female and gone by the female name "Roxanne Tickle"; in October 2019 she underwent gender affirming surgery by which her gender as a woman was affirmed; and in January 2020 she was issued a birth certificate by the Queensland Registry of Births, Deaths and Marriages stating that she is female: [7]-[9]. The Applicant pleads that her

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[2] See eg *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655, at [20]-[21] (Kiefel CJ and Keane J), [117] (Gordon J); *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, at 248 [57]-[59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 259 [99] (Edelman J); *Knight v Victoria* (2017) 261 CLR 306, at 324 [32].

[3] Or at least prior to the issues raised under s 51 of the *Constitution*. The Respondents may contend that it is necessary to decide the s 109 issue, regarding s 24 of the BDMR Act, because whether or not that provision is operative may inform the ordinary meaning of "sex" in s 5 of the SDA: see further at [20]-[22] below.

gender-identity is female, and that she is a person protected from being unlawfully discriminated against because of her perceived gender-identity as a transgender person: [10]-[11]. All of those matters are either denied or not admitted by the Respondents.

6. The Applicant alleges that the Respondents breached s 22 of the SDA by discriminating against her on the ground of her gender identity. It is alleged that in around February 2021 the Applicant was granted ordinary access to the Giggle App (which is described on the Google Play store and App store as "made for women by women"), but that in September 2021 the Second Respondent decided to limit her access: ASOC [20]-[23]. The Applicant alleges that the First Respondent, on the instruction or at the will of the Second Respondent, imposed a condition that to be allowed ordinary access to the Giggle App, a user must either (ASOC [34]):

   6.1. be a cisgendered female;[4] or

   6.2. be determined as having cisgendered physical characteristics by the Second Respondent on review of a photograph provided during the application process

   (together, the **Imposed Condition**).

7. The Applicant alleges that, in breach of s 22, the First and/or Second Respondent discriminated against the Applicant by imposing the Imposed Condition; excluding the Applicant from using and accessing the Giggle App which was otherwise available to cisgender women; and not responding to the Applicant's request for access: ASOC [35]. It is alleged that as a result the Applicant was treated less favourably than cisgender women because the Applicant is a transgender woman: ASOC [37]. That is a claim of direct discrimination under s 5B(1). A claim of indirect discrimination under s 5B(2) is also made at ASOC [38].

8. The Respondents' case, in summary, is that the Applicant was granted ordinary access to the Giggle App via the artificial intelligence assessment process (which determined her photograph to represent a woman) and the removal of the Applicant's access took place because, it is alleged, the Applicant is an adult human "male": Defence [21], [25].

9. The Respondents submit inter alia that the claim should be brought as a case of discrimination on the ground of sex under s 5, not as gender identity discrimination under s 5B. The Respondents contend that the claim should fail in any event because s 5B is invalid, and also because the Giggle App was a "special measure" authorised by

[4] The term cisgender refers to a person whose gender corresponds to the sex registered for them at birth, in contrast to a person whose gender does not so correspond: *Tickle v Giggle For Girls Pty Ltd* [2023] FCA 553 at [11].

s 7D(1)(a) for the purpose of achieving substantive equality between men and women.

C. LEGISLATIVE SCHEME

10. The SDA has been amended since the time of the relevant conduct, although the changes are not material to the present case.

11. Section 22(1) provides that it is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's (among other things) gender identity:

    (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

    (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

    (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

12. Section 5B sets out the circumstances in which a person discriminates against another person on the ground of gender identity. "Gender identity" is defined in s 4 as follows:

> ***"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.*

13. Sections 5B and 22 apply subject to ss 7B and 7D. Section 7B directs attention to whether a condition, requirement or practice imposed under s 5B(2) is "reasonable in the circumstances". Relevantly, s 7D(1) provides that a person may take special measures for the purpose of achieving substantive equality between various groups and s 7D(2) provides that a person does not discriminate against another person under ss 5, 5A, 5B, 5C, 6, 7, 7AA or 7A by taking special measures authorised by s 7D(1).

D. CONSTRUCTION OF SECTIONS 5 AND 5B OF THE SDA

14. A threshold question has arisen in the proceedings as to whether the claim is properly brought under s 5B of the SDA as a claim of discrimination on the ground of gender-identity, or whether (as the Respondents contend) the Applicant could only make a claim of discrimination on the ground of sex under s 5 of the Act.

15. It is understood that the Respondents will contend that "sex" refers to biological features which produce a binary position of "man" or "woman", while gender is directed to a

person's individual identity as characterised by how the person signals their gender to others.[5] The Respondents contend that while the ASOC uses the term "cisgender" and "transgender", those terms do not appear in the SDA.[6] The Respondents will submit that s 5 precludes the case being brought under s 5B.[7]

16. The Applicant contends that the claim has not been brought under s 5 because the word "sex" in s 5 encompasses a person whose sex is "female" by virtue of being a transgender woman.[8] The Applicant says that because she is "female", she does not allege that she was discriminated against on the basis of being a "male". Rather, the Applicant alleges the Respondents discriminated against her on the ground that she is a transgender woman, and not a cisgender woman.[9]

17. The above dispute raises the proper construction of the words "sex", "gender identity", and the interaction between ss 5 and 5B.

D.1 Meaning of "sex" in s 5

18. In summary, the Commissioner submits that the word "sex" is not a biological concept referring to whether a person at birth had male or female physical traits. Nor is it a binary concept, limited to the "male" or "female" sex. The word "sex" takes its ordinary meaning, which is informed by how that term is used throughout Australia including in State and Territory legislation (discussed further below). "Sex" can refer to a person being male, female, or another non-binary status. It is also broad enough to encompass the idea that a person's "sex" can be changed.

19. Whether a person is of a particular "sex" for the purposes of the SDA may take into account a range of factors, which may include their biological and physical characteristics, whether they are legally recognised as that sex under State and Territory law, as well as how they present themselves and are socially recognised. However, for the purposes of these proceedings, the Court need not exhaustively identify all the relevant factors, or determine whether any of them is necessary to be a particular "sex". The Court need only conclude that, for a person to be of the female "sex", it is sufficient if that sex is recorded on the person's birth certificate and/or they have undergone gender affirming surgery to affirm their status as female. Although unnecessary to decide in the present case, a person may also be of the female "sex" in other circumstances, eg if they

[5] [2023] FCA 553 at [15].
[6] [2023] FCA 553 at [16].
[7] [2023] FCA 553 at [16].
[8] [2023] FCA 553 at [17].
[9] [2023] FCA 553 at [17].

have undergone hormonal therapy to affirm they are "female" and/or present themselves and are socially recognised as "female", and even if their sex has not been recorded as "female" on any official register.

Text and ordinary meaning

20. The word "sex" is not defined in the Act. It should take its ordinary meaning. That meaning must take into account the way that the term has been used throughout Australia, including in legislation dealing with birth registers.[10]

21. Registration of "sex": All States and Territories have legislation in place that permits a person to change the entry of their sex recorded in the register (or, in Tasmania, to have a gender registered, or, in Western Australia, to have a "recognition certificate" issued).[11] The new sex recorded may be male, female, or (in most jurisdictions) another non-binary descriptor.[12] A person who has changed the entry of their sex recorded in the register (or, in Tasmania, had a gender registered, or, in Western Australia, had a "recognition certificate" issued) is taken, for the purposes of the relevant State or Territory law, to be a person of the changed sex.[13] In Queensland, the law in force at times relevant to this

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[10] See *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 (***SRA***) at 316-317 (Lockhart J, with whom Heerey J agreed), where his Honour considered foreign and South Australian legislation, recognising the nominated sex of "post-operative transsexuals". See also *Attorney-General for the Commonwealth v 'Kevin and Jennifer'* [2003] FamCA 94; (2003) 172 FLR 300 (***Kevin and Jennifer***) at [348]-[358], where it was noted the trial judge had had regard to statutory recognition of gender reassignment of trans persons, and at [358] the Court concluded that these provisions provide "considerable assistance in determining whether the contemporary everyday meaning of 'man' and 'marriage'" extended to a transgender man. See also at [379].

[11] *Births, Deaths and Marriages Registration Act 1995* (NSW), Part 5A; *Births, Deaths and Marriages Registration Act 1996* (SA), Part 4A; *Births, Deaths and Marriages Registration Act 1999* (Tas), Part 4A; *Births, Deaths and Marriages Registration Act 1996* (Vic), Part 4A; *Gender Reassignment Act 2000* (WA), Part 3; *Births, Deaths and Marriages Registration Act 1997* (ACT), Part 4; *Births, Deaths and Marriages Registration Act 1996* (NT), Part 4A. The Queensland law at the time relevant to the events in this proceeding was the *Births, Deaths and Marriages Registration Act 2003* (Qld), Part 4, which permitted a reassignment of sex to be noted in the register. That position remains in substance under the *Births, Deaths and Marriages Registration Act 2023* (Qld), Part 5, which is yet to commence and will permit a person to alter the record of their sex in the register.

[12] *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490 at [35]; *Births, Deaths and Marriages Registration Act 2023* (Qld), s 39(2)(b) and Sch 2 (definition of "sex descriptor"); Births, Deaths and Marriages Registration Regulations 2011 (SA), reg 7A; *Births, Deaths and Marriages Registration Act 1996* (Vic), s 4(1) (definition of "sex descriptor") and s 30A(2); Births, Deaths and Marriages Registration Regulations 1996 (NT), reg 4A. In Tasmania, a non-binary gender may be registered: *Births, Deaths and Marriages Registration Act 1999* (Tas), s 3A. Western Australia does not appear to permit a non-binary sex description: *Gender Reassignment Act 2000* (WA), s 3 (definitions of "gender characteristics" and "reassignment procedure").

[13] *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32I; *Births, Deaths and Marriages Registration Act 2023* (Qld), s 47; *Births, Deaths and Marriages Registration Act 1996* (SA), s 29U; *Births, Deaths and Marriages Registration Act 1999* (Tas), ss 28C(7) and 28D(2); *Births, Deaths and Marriages Registration Act 1996* (Vic), s 30G; *Gender Reassignment Act 2000* (WA), ss 16 and 18; *Births, Deaths and Marriages Registration Act 1997* (ACT), ss 27(1) and 29D; *Births, Deaths and Marriages Registration Act 1996* (NT), s 28H. In Tasmania, the registration of a gender has the result

proceeding provided that if a reassignment of sex was noted in the register, then the person was a person of the sex as reassigned.[14] That status is preserved under the new Queensland legislation passed in 2023, which is yet to commence.[15]

22. What this State and Territory legislation establishes is that, in its ordinary meaning, the word "sex" encompasses the idea that "sex" is changeable. The fact that a person has been recorded as having a "sex" in the register[16] will be highly relevant in determining whether they are of that "sex" for the purposes of the SDA. It may even be *sufficient* to establish that they are of that "sex" (although, as submitted below, not *necessary*).

23. Gender affirming surgery: At least as early as the 1990s,[17] it has been accepted that "sex" is changeable and that the female "sex" includes a person who has undergone gender affirming surgery to affirm their status as female. That was the conclusion reached by the Full Federal Court in *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 (***SRA***), where it was held that the words "woman" and "wife" (defined as a "female married person") in the *Social Security Act 1947* (Cth) included a "post-operative transsexual" woman.[18] That conclusion was reached having regard to dictionary definitions of "sex change", medical and legal commentators' recognition of that concept,[19] as well as domestic and foreign legislation and caselaw.[20]

24. In *Attorney-General for the Commonwealth v 'Kevin and Jennifer'* (2003) 172 FLR 300 (***Kevin and Jennifer***) at [374]-[380], the Full Court of the Family Court considered the validity of a declaration made under s 113 of the *Family Law Act 1975* (Cth) that a marriage between 'Kevin' and 'Jennifer' was valid for the purposes of the *Marriage Act 1961* (Cth) (**Marriage Act**). Jennifer was a cisgender woman. Kevin was a trans man who had had gender affirming surgery, and whose birth certificate had been changed to show that he was male.[21] The Full Court confirmed that the term "marriage" in the

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that the person is no longer a person of the sex previously registered (s 28C(7)) and a reference in Tasmanian law to a person's sex is taken to be a reference to that person's registered gender (s 28D(2)).

[14] *Births, Deaths and Marriages Registration Act 2003* (Qld), s 24(4). The Respondents submit that the current legislation is inoperative by virtue of s 109 of the *Constitution* – see further at [84] below.

[15] *Births, Deaths and Marriages Registration Act 2023* (Qld), s 142.

[16] Or, in Tasmania, if they have had that gender registered or, in WA, had a recognition certificate issued.

[17] Or earlier: see *R v Harris* (1988) 17 NSWLR 158 at 193-194 (Mathews J; Street CJ agreeing).

[18] *SRA* (1993) 43 FCR 299 at 304-305 (Black CJ), at 325 (Lockhart J), at 328 (Heerey J agreeing with Black CJ and Lockhart J), cited with approval in *Kevin and Jennifer* (2003) 172 FLR 300 at [211]-[224], [374]-[375]. See also *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 at [4] (Black CJ).

[19] *SRA* (1993) 43 FCR 299 at 305 (Black CJ), 313-314, 316 (Lockhart J).

[20] *SRA* (1993) 43 FCR 299 at 317-325 (Lockhart J).

[21] *Kevin and Jennifer* [2001] FamCA 1047 at [29], [34].

Marriage Act described a union between a man and a woman,[22] and that in that context the terms "man" and "woman" took their "ordinary contemporary meaning according to Australian usage".[23] The Full Court approved the finding by the trial judge that this ordinary meaning "includes post-operative transsexuals as men and/or women in accordance with their sexual reassignment",[24] concluding that this was supported by the medical evidence; the weight of international legal developments; the widespread statutory recognition of trans persons as "man" or "woman"; and with "international law and humanity".[25] The Full Court did not appear to treat the fact that Kevin was recorded as "male" on his birth certificate as an being an essential reason for their conclusion.[26]

25. For those reasons, a person is of the female "sex" for the purposes of the SDA if they have had gender affirming surgery affirming their status as female, even if that change in sex is not recorded under the State or Territory legislation described above.

26. No registration or gender-affirming surgery? In *Kevin and Jennifer*, the Full Court left open the question whether it was necessary for a trans person to have gender affirming surgery in order to be recognised as a person of their affirmed sex.[27]

27. Although not necessary to decide here, it may be that there are other ways of demonstrating that a person is of a particular sex.

28. This is supported by the criteria for registering a change in sex under the State and Territory legislation described at [21] above. All jurisdictions other than New South Wales have removed the legislative requirement that a person have a surgical procedure in order to register a change in their sex (or, in Tasmania, to register a gender).[28] Broadly

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[22] This case was decided prior to the introduction of a statutory definition of "marriage" by the *Marriage Amendment Act 2004* (Cth) and prior to the amendment of that definition to refer to the union of two people by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

[23] *Kevin and Jennifer* (2003) 172 FLR 300 at [374]-[375]. For the way in which the trial judge used the term "sex", see [2001] FamCA 1074 at [16].

[24] *Kevin and Jennifer* (2003) 172 FLR 300 at [374]-[375].

[25] *Kevin and Jennifer* (2003) 172 FLR 300 at [379]-[380].

[26] See *Kevin and Jennifer* (2003) 172 FLR 300 at [374]-[378].

[27] *Kevin and Jennifer* (2003) 172 FLR 300 at [382]-[387]. Cf *SRA,* where the idea that "pre-operative male-to-female transsexual", who identified and lived as female, could be considered a "woman" was rejected: *SRA* (1993) 43 FCR 299 at 306 (Black CJ), 326-327 (Lockhart J), 328 (Heerey J agreeing with Black CJ and Lockhart J). However it is submitted that the ordinary meaning of "sex" is now broader than it was in 1993.

[28] This change was brought about by the following legislation: *Births, Deaths and Marriages Registration Act 2023* (Qld) (yet to commence); *Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (SA); *Justice and Related Legislation (Marriage and Amendments) Act 2019* (Tas); *Births, Deaths and Marriages Registration Amendment Act 2019* (Vic); *Births, Deaths and Marriages Registration Amendment Act 2014* (ACT); *Births, Deaths and Marriages Registration and Other Legislation Amendment Act 2018* (NT). Cf *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32B, which requires a surgical "sex affirmation procedure".

summarised, the requirements for adults now range from requiring a surgical or medical procedure (the latter including hormonal treatment),[29] to requiring appropriate "clinical treatment",[30] to requiring a statutory declaration that the applicant believes that they are, or identifies as, a person of the nominated sex[31] (in some cases with a supporting statement from someone who has known them for 12 months).[32]

Context

29. A broad construction of the word "sex" is supported by other provisions of the SDA and the extrinsic materials for the Amending Act.

30. Sex is not a binary concept*:* Contrary to the Respondents' submission, "sex" is not a binary concept. The fact that the SDA uses the expression "different sex" (instead of "opposite sex") confirms this. That expression was a deliberate choice. The Amending Act replaced the references to "opposite sex" with "different sex" (including in s 5 dealing with discrimination on the ground of sex).[33] The explanation given for this in the Explanatory Memorandum for the Amending Act (**2013 EM**) was that "sex is not a binary concept"[34] and that the terminology of "different sex" was "consistent with the protection of gender identity and intersex status, which recognises that a person may be, or identify as, neither male nor female".[35]

31. Sex can be changed: More importantly for the present case, the statutory context suggests that a person's sex can be changed.

32. *First*, the definition of "gender identity" in s 4 includes the words "with or without regard to the person's designated sex at birth". If, as the Respondents contend, "sex" simply

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[29] *Gender Reassignment Act 2000* (WA) requires a "reassignment procedure" which can be a "medical or surgical procedure" (ss 14-15). In *AB v Western Australia* (2011) 244 CLR 390 at [32] the High Court confirmed that a medical procedure such as hormonal treatment is sufficient.

[30] *Births, Deaths and Marriages Registration Act 1996* (SA), ss 29H-29K (clinical treatment need not be invasive and can include counselling: s 29H); *Births, Deaths and Marriages Registration Act 1997* (ACT) ss 24-25 (clinical treatment not defined, although the Explanatory Statement for the Births, Deaths and Marriages Registrations Amendment Bill 2013 (ACT), p 5, states that the term was not defined to ensure professional medical judgement was not expanded or impeded and confirms sexual reassignment surgery is no longer required); *Births, Deaths and Marriages Registration Act 1996* (NT), ss 28A-28J (clinical treatment not defined, although the Explanatory Statement for the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 (NT), p 3, states that the term was not defined to ensure professional medical opinions are not impeded and to recognise that "different types and levels of clinical treatment will be appropriate for different individuals").

[31] In relation to registration of gender, see *Births, Deaths and Marriages Registration Act 1999* (Tas), s 28A, and definition of "gender declaration" in s 3.

[32] *Births, Deaths and Marriages Registration Act 1996* (Vic), s 30A; *Births, Deaths and Marriages Registration Act 2023* (Qld) (yet to commence), s 39.

[33] See Amending Act, items 16, 36, 42, 47.

[34] 2013 EM at [15].

[35] 2013 EM at [25], [27], [61], [65] and [68].

referred to a person's sex determined at birth by reference to biological characteristics, the definition could have simply said "with or without regard to the person's sex". That the legislature chose to specify the sex "designated … at birth" supports the idea that sex is a broader concept, and may change over the course of a person's lifetime.

33. *Secondly*, the Amending Act repealed the definitions of "man" and "woman" that then existed. Prior to the Amending Act, "man" and "woman" were defined in s 4(1) as follows:

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

34. The 2013 EM described the reason for this change in the following way (at [18]):[36]

> *These items will repeal the definitions of 'man' and 'woman' from subsection 4(1). To the extent these terms appear in the Act, they will take their ordinary meaning. These definitions are repealed in order to ensure that 'man' and 'woman' are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA.*

35. Section 7 of the SDA expressly gives protection to "women" against discrimination on the grounds of a "woman's pregnancy or potential pregnancy". Section 4B defines "potential pregnancy" to include the fact that the woman has expressed a *desire* to become pregnant, or that the woman is *perceived* as being likely to become pregnant. The repeal of the definition of "woman", together with the comments in the 2013 EM, suggest that a trans woman should be able to access protections like this, which in turn confirms that the word "woman" is intended to include a trans woman.

36. *Thirdly,* this interpretation is also consistent with how the concept of "women" has been treated for the purposes of the Convention on the Elimination of all forms of Discrimination Against Women (**CEDAW**): see further at [69]-[71] below. While the word "women" is not defined, the CEDAW Committee's commentaries confirm that "women" include trans women and that States Parties should take steps to ensure their protection.

D.2 Meaning of "gender identity" in s 5B

37. "Gender" is not defined in the Act. It likewise bears its ordinary meaning. It is a different concept to "sex". "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

[36] Which can be considered under s 15AB(2)(e) of the *Acts Interpretation Act 1901* (Cth).

within the community.[37]

38. 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 male or female but identify as a different gender to their sex designated at birth.[38] Some people who are gender diverse do not identify as male or female[39] (eg they may identify or present as neither, despite their sex being designated male or female at birth). This may be the case whether or not that person has intersex status.[40]

39. As the definition in s 4 expressly recognises, 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 2013 EM describes 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".

40. The definition – in specifying that these may be "by way of medical intervention or not" – acknowledges that some people may seek "medical intervention" to achieve certain gender-related characteristics of the sex which conforms with their perception of their gender.[41] 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)[42] or the taking of either oestrogen or testosterone (often referred to as "cross sex" or "gender affirming" hormone treatment).[43] 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.

41. By including these "outward social markers" as part of gender identity, the legislature was acknowledging that it is "often the discord between a person's gender presentation

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[37] 2013 EM at [13].

[38] 2013 EM at [13].

[39] 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].

[40] People who are intersex face many of the same issues as people who are gender diverse (2013 EM, p 2). However, a separate ground of "intersex status" was introduced in order to recognise that "whether a person is intersex is a biological characteristic and not an identity" (2013 EM p 2 and at [15]). People who are intersex are provided with protection in s 5C against discrimination on ground of their intersex status. An intersex person may also face discrimination because of their gender identity. Intersex people can have the same range of gender identities as the rest of the community. Some intersex people have a gender identity that is male or female, and some intersex people have a gender identity that is neither male nor female (2013 EM at [38] and [40]).

[41] *AB v Western Australia* (2011) 244 CLR 390 at [1] (the Court).

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

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

and their identity which is the cause of the discrimination".[44] Thus the protection against gender identity discrimination applies both to discrimination based on how the person identifies themselves and how they are identified by others using these outward markers.

42. 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.

43. This is also consistent with how gender identity discrimination was dealt with in the 2013 EM. In relation to discrimination under s 27, it was said at [63] that it would be unlawful 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.

44. 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. For example, 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).[45] The person who did the act has the burden of proving that it was reasonable in the circumstances (s 7C). It is open to an applicant to plead a case of direct and indirect discrimination as alternatives, based on the same conduct.[46] However, the proper characterisation of the conduct is a matter for the Court and the same conduct

[44] 2013 EM at [11].

[45] 2013 EM at [34]-[36].

[46] *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247 at [16].

ultimately may not amount to both direct and indirect discrimination.[47]

D.3 Purpose

45. For the above reasons, the Respondents' construction of ss 5 and 5B should be rejected. Section 5 does not limit the operation of s 5B as alleged, and the Applicant's claim is capable of being characterised as a claim of gender identity discrimination.

46. That construction better promotes the beneficial purpose of the legislation.[48] As the 2013 EM noted at [11], the definition of "gender identity" was drafted to provide "maximum protection for gender diverse people".[49] 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".[50] A beneficial or remedial provision is "one that gives some benefit to a person and thereby remedies some injustice".[51] 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".[52] 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.[53] The Respondents' construction would give an unduly narrow operation to s 5B which would undermine that purpose.

E. CONSTRUCTION OF SECTION 7D (SPECIAL MEASURES)

E.1 General principles regarding s 7D

47. The language of "special measures" comes from art 4 of the CEDAW and should be understood having regard to the context, object and purpose of that Convention.[54] The aim of achieving substantive equality recognises the existence of historical and

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[47] *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 392–393 (Dawson and Toohey JJ), 400 (McHugh J); *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 97.

[48] *Acts Interpretation Act 1901* (Cth), s 15AA.

[49] See also 2013 Senate Report at [7.12].

[50] *AB v Western Australia* (2011) 244 CLR 390 at 402 [24] (the Court), citing *IW v City of Perth* (1997) 191 CLR 1 at 12 (Brennan CJ and McHugh J).

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

[52] *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).

[53] SDA, s 3(b).

[54] *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 (***Jacomb***) at [41]-[44]. Note that *Jacomb* was decided at a time when the SDA was expressed to give effect to CEDAW only, whereas it is now expressed to give effect to other relevant international instruments such as the ICCPR: ss 3(e), 4 (definition of "relevant international instrument"), 9(10). As such it is clear that s 7D permits "special measures" to address substantive equality between men and women as well as other groups.

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.[55] Differential treatment is therefore permissible, in order to achieve "de facto" equality.[56]

48. 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:

    48.1. an assessment of whether the subjective intention of the person taking the measure was to achieve substantive equality; and

    48.2. 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.[57]

49. This interpretation is consistent with general recommendations of the CEDAW Committee made under art 21(1) of CEDAW.[58] 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.[59] 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.[60] 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.[61] 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

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[55] *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).

[56] 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].

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

[58] When interpreting the meaning of a treaty, considerable weight should be given to the interpretations adopted by an independent body, such as the CEDAW Committee, established to supervise the application of the treaty: *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].

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

[60] *Ibid* at [24].

[61] *Ibid* at [33].

progress.[62] 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.[63]

E.2 Meaning of "man" and "woman" in s 7D(1)(a)

50. Section 7D(1)(a) refers to a special measure for the purpose of achieving substantive equality between "men" and "women". A question may arise in this case as to how the word "women" should be construed, and whether it includes transgender women. In that respect, the Commissioner adopts the submissions made above as to the meaning of "sex": just as the female "sex" can include a trans woman, so too can the word "woman".

51. If that be right, that will in turn inform the assessment of whether the Giggle App was truly for the purpose of achieving substantive equality between men and women, in circumstances where a trans woman has been excluded from ordinary access.

E.3 A special measure under s 7D(1)(a) is not discrimination under s 5, but may still be discrimination under s 5B

52. The Respondents contend that the Giggle App was a "special measure" within s 7D(1)(a). If, as submitted above, the Applicant's claim properly falls under s 5B, a question arises as to whether a special measure within s 7D(1)(a) will:

52.1. not amount to discrimination under s 5 (sex) only, with the result that it could still amount to discrimination under any of the other provisions listed in s 7D(2); or

52.2. not amount to discrimination under any of the provisions listed in s 7D(2).

53. The Commissioner submits that the former construction should be preferred. That 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 the Act). 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

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[62] *Ibid* at [36].

[63] 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).

discrimination on the ground of sexual orientation under s 5A.

54. The construction better promotes the purpose of s 7D. As submitted above, s 7D recognises that, in order to ensure substantive equality between eg men and women, it may be necessary to engage in differential treatment between men and women. The differential treatment between men and women results in a corresponding benefit in terms of achieving substantive equality between men and women. It is appropriate in that context that a special measure within s 7D(1)(a) be protected from claims of unlawful discrimination under s 5. However, a person who aims to achieve substantive equality between men and women should not also be permitted to engage in discrimination against persons with 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.

55. There is support for this construction in the 2013 EM at [47]. In relation to the insertion of paragraphs (aa), (ab) and (ac) into s 7D(1), it was said:

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

56. There was no indication that the inclusion 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.

57. 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".[64] There was no suggestion such special measures would avoid claims of discrimination on the other grounds.

58. 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

[64] Explanatory Memorandum, Sex and Age Discrimination Legislation Amendment Bill 2010, at [34].

substantive equality between people of different gender identities, it may still amount to discrimination under s 5B.

F. CONSTITUTIONAL VALIDITY

59. The Respondents' Amended s 78B Notice raises two constitutional questions:

59.1. First, whether s 5B is supported by a head of power under s 51 of the *Constitution*. As submitted above, this issue must be limited to s 5B in its application to s 22 only (not other forms of discrimination prohibited in Part II);

59.2. Secondly, whether s 24 of the BDMR Act is inconsistent with the SDA for the purposes of s 109 of the *Constitution*.

60. Again, the Commissioner has not seen the Respondents' submissions on these issues, and so reserves the right to supplement these submissions orally. Both arguments should be rejected for the following reasons.

F.1 Head of power under s 51 of the Constitution

External affairs power: s 51(xxix)

61. Section 9(10) of the SDA relevantly provides: "The prescribed provisions of Part II … have effect to the extent that the provisions give effect to a relevant international instrument".

62. The "prescribed provisions of Part II" are defined in s 9(1) as the provisions of Divisions 1 and 2 of Part II (other than ss 19, 26 and 27). They therefore include s 22. The result is that s 22 has effect to the extent that it gives effect to a "relevant international instrument", which is defined in s 4 to include a range of international treaties to which Australia is a party including CEDAW and the International Covenant on Civil and Political Rights (**ICCPR**).

63. Section 9(10) was drawn with a view to the scope of Commonwealth legislative power under s 51(xxix).[65] It is designed to ensure that the relevant provisions only apply to the extent constitutionally permitted under s 51(xxix)[66] (except of course to the extent they are supported by an alternative head of power). As such, the question before the Court

[65] *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 at [7] (Black CJ) (in dissent in the result, but not on this issue).

[66] *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 at [11] (Black CJ), [76] (Kenny J, with whom Gyles J agreed) (citing *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 at 405-407 per Black CJ and Tamberlin J, with whom Kiefel J agreed); also at [93] (Kenny J).

is primarily one of statutory construction, not constitutional validity:[67] that is, whether s 22 read with s 5B, insofar as it includes gender identity as a ground of discrimination, "gives effect" to one or more of the international treaties mentioned. But answering that question will involve consideration of caselaw addressed to s 51(xxix) and in particular the circumstances in which legislation will be considered to implement a treaty.

64. Section 51(xxix) provides the Commonwealth Parliament with power to pass legislation implementing any international obligation which the government has assumed under a bona fide international agreement, no matter what its subject matter,[68] subject of course to other limitations arising from the *Constitution*[69] (none of which are presently relevant). As to whether legislation "implements" an obligation, a measure of discretion is given to Parliament in selecting the means of implementation.[70] The ultimate question is whether the legislation is reasonably capable of being considered appropriate and adapted to implementing the treaty.[71]

65. The Amended s 78B Notice contends that "discrimination on the ground of gender identity … is not the subject of a specific treaty like CEDAW and nor could it plausibly be said that in enacting antidiscrimination provisions concerning gender identity … the Parliament is in some way giving effect to a Convention or treaty". It is also said that it is "doubtful that the provision could be validly enacted pursuant to the external affairs power by reference to isolated Articles of the international instruments". Both of those arguments should be rejected.

66. Gender identity discrimination is covered by CEDAW and the ICCPR: The Respondents will presumably argue that CEDAW is addressed to discrimination against women on the ground of sex, not discrimination on the ground of a person's gender identity.

67. There are two responses to this: first, CEDAW has been interpreted as applying to gender-based discrimination against women, including trans women; and, secondly, art

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[67] *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 at [96]-[97] (Kenny J, with whom Gyles J agreed).

[68] *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 483-5 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289 (Mason CJ and Brennan J), 298 (Wilson J), 309 (Deane J), 321-3 (Dawson J), 332 (Toohey J), 342 (Gaudron J); *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 127 (Mason J), 170-1 (Murphy J), 218-219 (Brennan J), 258 (Deane J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 681-2 (Evatt and McTiernan JJ), 641 (Latham CJ).

[69] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 642.

[70] *Richardson v Forestry Commission* (1988) 164 CLR 261 at 295-6 (Mason CJ and Brennan J), 304 (Wilson J), 327 (Dawson J).

[71] *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); see also *R v Wei Tang* (2008) 237 CLR 1 at [34] (Gleeson CJ, with Gummow, Heydon, Crennan and Kiefel JJ agreeing on this point).

26 of the ICCPR provides a further basis for the Commonwealth Parliament's power to legislate against gender identity discrimination.

68. CEDAW art 1 defines "discrimination against women" as any "distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women" of various rights and freedoms. The chapeau to art 2 condemns "discrimination against women", and for the purposes of eliminating such discrimination, the States Parties undertake to inter alia adopt legislative and other measures to prohibit all discrimination against women: art 2(b). However, CEDAW is not limited to addressing "discrimination against women" as defined. States Parties are also to take all appropriate measures, including legislation, to ensure the full development and advancement of women: art 3. They shall take appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women: art 5(a).

69. The Commissioner submits that the ordinary meaning of "women" in CEDAW includes trans women. Although not expressly mentioned in CEDAW, the Convention is also concerned with discrimination based on a woman's or trans woman's gender identity.[72]

70. That is confirmed by reference to commentary by the CEDAW Committee. In interpreting CEDAW, "considerable weight should be given to the interpretations adopted by an independent body established to supervise the application of [a] treaty".[73] General recommendation 28, issued by the CEDAW Committee, relevantly provides that:[74]

> *Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2(f) and 5(a) indicates that the Convention covers gender-based discrimination against women. The term "sex" here refers to biological differences between men and women. The term "gender" refers to socially constructed identities, attributes and roles for women and men and*

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[72] Cf *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, concluding that a previous version of s 9(10), which applied the provisions to "discrimination against women", did not extend to discrimination on the grounds of marital status unless it *also* constituted discrimination on the ground of sex: at [108]-[109] (Kenny J, with whom Gyles J agreed); cf the dissenting judgment of Black CJ at [19]-[21]. The decision is not binding given the amendments to s 9(10) and given the subsequent commentaries of CEDAW and other treaty bodies discussed at [70]-[71] below.

[73] *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at [22] (the Court, comprising Kiefel CJ, Gageler and Nettle JJ), citing *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 at 664 [66].

[74] CEDAW Committee, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (16 December 2010) UN Doc CEDAW/C/GC/28 (**General Recommendation 28**) at [5].

society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women.

71. The CEDAW Committee has also referred to the intersectional forms of discrimination faced by women, including on the basis of their gender identity,[75] and said that States Parties must recognise such intersecting forms of discrimination and prohibit them.[76] In 2018, the CEDAW Committee issued concluding observations in relation to Australia welcoming the provisions of the Amending Act which introduced gender identity discrimination, and recommended that Australia abolish requirements regarding medical treatment for transgender women who wish to obtain legal recognition of their gender so as to "guarantee the rights of transgender women to bodily integrity, autonomy and self-determination".[77]

72. Further or alternatively, ss 5B and 22 give effect to the prohibition on discrimination in art 26 of the ICCPR. Art 26 provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex [etc] or other status". When the Amending Act was introduced, reliance was placed on art 26 in the 2013 EM (p 5), noting that the list of grounds was "non-exhaustive" and "decisions by the United Nations Human Rights Committee suggest that a clearly definable group of people linked by their common status is likely to fall within 'other status'" which had "been found by the Committee to include age, sexual orientation and marital status".

73. Subsequently, there has been express recognition by the UN Human Rights Committee (which supervises implementation of the ICCPR) that art 26 extends to discrimination on

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[75] General Recommendation 28 at [18]; CEDAW Committee, *General recommendation No. 33 on women's access to justice* (3 August 2015) UN Doc CEDAW/C/GC/33 at [8]; CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (14 July 2017) UN Doc CEDAW/C/GC/35 at [12]; CEDAW Committee, *General recommendation No. 39 on the rights of Indigenous women and girls* (31 Oct 2022) UN Doc CEDAW/C/GC/39 at [22].

[76] General Recommendation 28 at [18].

[77] CEDAW Committee, Concluding Observations on the eighth periodic report of Australia, 25 July 2018, CEDAW/C/AUS/CO/8 at [4(d)], [49(e)], [50(e)]. See also other concluding observations calling on Paraguay and Russia to strengthen protections for transgender women: CEDAW Committee, Concluding observations on Paraguay, 21 October 2011, CEDAW/C/PRY/CO/6 at [12]; CEDAW Committee, Concluding observations on Russian Federation, 16 August 2010, CEDAW/C/USR/CO/7 at [41] and 30 November 2021, CEDAW/C/RUS/CO/9 at [46]-[47]. See also CEDAW Committee response under art 7(3) of the Optional Protocol to CEDAW to communication 134/2018 (Sri Lanka), CEDAW/C/81/D/134/2018 at [9.7] noting that the rights enshrined in CEDAW "belong to all women, including lesbian, bisexual, transgender and intersex women …".

the grounds of gender identity.[78] This is consistent with how art 2(2) of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) has been construed by the ESCR Committee as extending to gender identity discrimination.[79] It is also consistent with art 2 of the Yogyakarta principles, which provides inter alia that everyone is entitled to equality before the law and the equal protection of the law without discrimination on the basis of gender identity, among other things.[80]

74. Partial implementation: Based on the Amended s 78B Notice, the Respondents may argue that ss 5B and 22 go beyond s 51(xxix) because they constitute a partial implementation of CEDAW and/or the ICCPR. It is not yet clear how this argument will be put, and so the Commissioner will address this more fully in oral submissions.

75. To be reasonably capable of being considered appropriate and adapted to implementing a treaty, it is not necessary that a law implement every obligation in a treaty. A deficiency in the implementation of a treaty will lead to invalidity if "the deficiency is so substantial as to deny the law the character of a measure implementing the [treaty]" or if the deficiency (when combined with other provisions of the law) "make[s] it substantially inconsistent with the [treaty]".[81] This reasoning was applied by Full Federal Court in concluding that Part IIA of the *Racial Discrimination Act 1975* (Cth) was supported by s 51(xxix), despite the fact that it did not fully implement art 4 of the International

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[78] UN Human Rights Committee (**UNHRC**), *G v Australia*, Communication No. 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) at [4.14], [6.6] and [7.12]; UNHRC, *MZBM v Denmark*, Communication No. 2593/2015, UN Doc CCPR/C/119/D/2593/2015 (12 May 2017) at [6.6]; UNHRC, *Nepomnyashchiy v Russian Federation*, Communication No. 2318/2013, UN Doc CCPR/C/123/D/2318/2013 (23 August 2018) at [7.3]; UNHRC, *Ivanov v Russian Federation*, Communication No. 2635/2015, UN Doc CCPR/C/131/D/2635/2015 (14 May 2021) at [7.12]; UNHRC, *Alekseev v Russian Federation*, Communication No. 2757/2016, UN Doc CCPR/C/130/D/2757/2016 (9 June 2021) at [9.14]; UNHRC, *Mikhailova et al v Russian Federation*, Communication No 2943/2017, UN Doc CCPR/C/134/D/2943/2017 (29 August 2022) at [9.12]; UNHRC, *Savolaynen v Russian Federation*, Communication No. 2830/2016, UN Doc CCPR/C/135/D/2830/2016 (23 Jan 2023) at [7.15].

[79] Committee on Economic, Social and Cultural Rights, *General comment No 20: Non-discrimination in economic, social and cultural rights*, 2 July 2009, UN Doc E/C.12/GC/20 at [32]. While ICESCR is a "relevant international instrument" for the purposes of the SDA, since it only prohibits discrimination in relation to the exercise of the rights it contains, such as the rights to education and employment, it is does not provide an alternative basis for supporting ss 5B and 22.

[80] *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*, adopted March 2007. While these principles were agreed by a group of academics and UN experts, the experts agreed that they reflect the existing state of international human rights law (introduction p 7) and the principles have been relied upon by a variety of international and State bodies and courts as reflective of existing international human rights law obligations: see O'Flaherty 'The Yogyakarta Principles at Ten' (2015) 33(4) *Nordic Journal of Human Rights* 280 at 287-294. In addition to the sources cited by O'Flaherty, in 2018 the Court of Justice of the European Union relied on the Yogyakarta Principles in *F v Bevándorlási és Állampolgársági Hivatal*, case C-473/16 (25 January 2018), in interpreting the scope of the right to respect for private and family life under art 7 of the Charter of Fundamental Rights of the EU.

[81] *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 488-489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

Convention on the Elimination of All Forms of Racial Discrimination.[82]

76. Likewise, here, the Court should conclude that ss 5B and 22, when viewed as one element of the suite of discrimination prohibited by the SDA and other Commonwealth legislation, as well as the various exemptions given which reflect exemptions provided for in international instruments, are within the scope of options reasonably available to the legislature to implement CEDAW and art 26 of the ICCPR.

77. A matter of international concern?: Finally, it may be that ss 5B and 22 are supported by s 51(xxix) because they are addressed to matters of "international concern".[83] Although it has been held at the appellate level that this is not a separate aspect of s 51(xxix),[84] that has not been conclusively determined by the High Court. It is however unnecessary to decide the issue here, given the alternative sources of power available under s 51.

Trading corporation: s 51(xx)

78. Section 9(11) of the SDA provides: "The prescribed provisions of Part II have effect in relation to discrimination by … a trading … corporation formed within the limits of the Commonwealth, or by or in relation to a person in the course of the person's duties or purported duties as an officer or employee of such a corporation." Section 9(13) confirms that the provisions (which again include s 22) have effect to the extent that the discrimination takes place in the course of the trading activities of the trading corporation.

79. It is understood the Respondents will contend that the First Respondent was not a "trading corporation",[85] possibly on the basis that its trading activities were minimal at the relevant time. The following principles will be relevant.

80. Section 51(xx) gives the Parliament power to make laws with respect to constitutional corporations. A law will fall into that category if it "singles out constitutional corporations as the object of the statutory command" and in that sense has a "discriminatory operation" on constitutional corporations.[86] That is so even if it also applies to non-constitutional corporations. Here, constitutional corporations are made the object of the statutory command in s 22, in circumstances where it applies to "persons" (including

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[82] *Toben v Jones* (2003) 129 FCR 515 at [17]-[21] (Carr J), [50] (Kiefel J) and [140]-[146] (Allsop J).

[83] See *Souliotopoulos v La Trobe University Liberal Club* (2002) 120 FCR 584 (Merkel J), upholding provisions of the *Disability Discrimination Act 1992* (Cth) on this ground.

[84] *Alqudsi v Commonwealth* (2015) 302 FLR 454 at [126]-[147] (Leeming JA, with whom Basten JA and McCallum J agreed).

[85] See ASOC [2(b)], and Defence [2(b)] denying the First Respondent is a "trading corporation".

[86] *New South Wales v Commonwealth (WorkChoices case)* (2006) 229 CLR 1 at [246], [249], [258].

bodies corporate[87]) and s 9(10) expressly refers to constitutional corporations.[88]

81. Whether a corporation is a trading corporation is determined having regard to the activities in which the corporation was engaged at the relevant time: here, when the alleged discrimination occurred. That is informed by a number of principles, including the fact that a corporation may be a trading corporation even though trading is not its predominant activity; the trading must be substantial and not merely peripheral; "trading" is not given a narrow construction and extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services; the making of profit is not an essential prerequisite to trade, but is a usual concomitant; the ends which a corporation seeks to achieve are irrelevant to its description; while its current activities are relevant, consideration will also be given to the corporation's intended purpose; and the commercial nature of an activity is an element in deciding whether the activity is in trade or trading.[89]

82. In that context, even if the revenue-producing activities the First Respondent engaged in constituted a minority of its activities, and even if the First Respondent did not generate a profit overall, that would not be determinative.

F.2 Alleged inconsistency within s 109 of the Constitution

83. Although the distinction has been doubted, a majority of the High Court has recently affirmed the notions of direct and indirect inconsistency for the purposes of s 109 of the *Constitution*: describing the former as a case where the State law "alters, impairs or detracts" from the operation of the Commonwealth law, and the latter as a case where the Commonwealth law is read as expressing "completely, exhaustively, or exclusively" what the law shall be on a subject matter[90] and the relevant State law enters upon that subject matter. In both cases the aim is to discern whether there is a "real conflict" between the two laws.[91] Where a State law is inconsistent with a Commonwealth law, it

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[87] *Acts Interpretation Act 1901* (Cth), s 2C(1).

[88] The application of s 22 to officers of a corporation in the course of their duties via s 9(11), and the imposition of liability under s 105 on a person such as the Second Respondent who is alleged to have facilitated a contravention of s 22 (ASOC [41]), is also supported by the incidental aspect of s 51(xx). See *Fencott v Muller* (1983) 152 CLR 570 at 599-600 (Mason, Murphy, Brennan, Deane JJ) upholding s 82(1) of the *Trade Practices Act 1974* (Cth).

[89] See *Bankstown Handicapped Children's Centre Association Inc v Hillman* (2010) 182 FCR 483 at [48] (Moore, Mansfield and Perram JJ), citing *Aboriginal Legal Service (WA) Inc v Lawrence (No 2)* (2008) 252 ALR 136 at [68] (Steytler P, Pullin and Le Miere JJ agreeing). See also *United Firefighters' Union of Australia v Country Fire Authority* (2015) 228 FCR 497 at [135]-[140] (the Court).

[90] *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 (***Outback Ballooning***), [32]-[33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); cf [67] (Gageler J), [105] (Edelman J).

[91] *Outback Ballooning* (2019) 266 CLR 428, [70] (Gageler J) and [105] (Edelman J), citing *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [42] (the Court).

is inoperative (as opposed to invalid[92]) to the extent of the inconsistency.

84. In the Amended s 78B Notice the Respondents allege that the "legal construct of 'female'" that emerges from s 24 of the BDMR Act directly clashes with the operation of and/or applies to a matter that is comprehensively regulated by … ss 5, 5B, 7B, 7D and 22 of the SDA". It is assumed that both "direct" and "indirect" inconsistency is alleged.

85. Section 22 of the BDMR Act provides that the reassignment of a person's sex after sexual reassignment surgery may be noted on the person's entry in the register of births. Section 24(4) provides that a person who has had such a reassignment noted on their entry in the register "is a person of the sex as reassigned". Section 24(1) and (2) provide equivalent recognition for a reassignment of sex entered into a register maintained under the law of another State that provides for the registration of births, and for a "recognition certificate" issued under the law of another State that identifies a person as having undergone sexual reassignment surgery and as being the sex stated in the certificate.

86. The Commissioner has submitted above that State and Territory legislation such as the BDRM Act, which permits a person to change the record of their sex in this way, informs the ordinary meaning of the word "sex" as it appears in the SDA. It is understood the Respondents challenge the operation of s 24 in order to meet (at least) that argument, and to contend that the Applicant's status as "female" on the Queensland register should have no effect on whether she is of the female "sex" or a "woman" for the purposes of the SDA. (Presumably, if the Court were to conclude that the Applicant's status as "female" on the Queensland births register has no bearing on whether she is of the female "sex" for the purposes of the SDA, the Respondents' challenge to s 24 would fall away.)

87. The Commissioner submits that there is no direct inconsistency. As explained above, the SDA does not define the word "sex". The definitions of "man" and "woman" were repealed so that they could carry their ordinary meaning. For the reasons given at [20]-[22] above, provisions such as s 24 of the BDRM Act do not "detract" from the operation of the SDA but inform the meaning of the words "sex", "man" and "woman".

88. There is also no indirect inconsistency. Even if (contrary to the above submissions) the SDA creates its own unique meaning of "sex" and "woman" which is independent from the operation of State and Territory laws, there is no indication that it was intended to define those concepts for *all purposes* beyond discrimination law, including as to how those concepts are used for the purposes of birth registers (and nor is it clear that the

[92] *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 573 (Latham CJ), 599 (Williams J) (meaning that the State law is inoperative for so long as the inconsistency remains).

Commonwealth Parliament would have power to do so). The subject matter of the SDA is (relevantly) discrimination on the specified grounds. The BDMR Act does not address that subject matter, but rather addresses the register and the making of entries upon it.

89. The SDA is not even intended to be an exhaustive statement of the law of discrimination on the grounds it deals with. Sections 10 and 11 expressly preserve the operation of certain State and Territory discrimination laws and work health and safety laws, provided they are capable of operating concurrently with the SDA: s 10(3), 11(3).[93]

G. CONCLUSION

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

Date: 10 August 2023

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Counsel for the Sex Discrimination Commissioner

[93] While such a statement cannot avoid the operation of a direct inconsistency, it is relevant to (albeit not determinative of) the question whether the law was intended to be an exhaustive statement of the law on the relevant subject matter: *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518 at [20] (the Court); *Momcilovic v R* (2011) 245 CLR 1 at [111]-[112] (French CJ), [315]-[316], [342] (Hayne J), [654] (Crennan and Kiefel JJ), see also [272] (Gummow J, with Bell J agreeing).

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Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD 1148 of 2022

ROXANNE TICKLE

Applicant

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

Respondents

SUBMISSIONS OF THE APPLICANT ON THE SUBSTANTIVE APPLICATION

A. Overview

1. The applicant, Ms Tickle, is a woman. Her sex, as recorded in the Queensland Registry of Births, Deaths and Marriages, is female. Ms Tickle underwent gender affirming surgery in October 2019. She identifies as female. There is no conflict between her gender identity and her sex. Despite those facts, the respondents continue to allege that Ms Tickle is "an adult human male".[1]

2. The respondents created, owned and operated a digital application for use by women only – "Giggle". Access to Giggle was determined by artificial intelligence, engineered to determine whether an aspiring user was a woman. Ms Tickle – being a woman – was initially granted unencumbered access to Giggle for a period of 7 months, her access was, presumably, 'approved' by the AI processes in place. Notwithstanding that Ms Tickle is a woman, therefore meeting the requirements for Giggle use, the second respondent restricted Ms Tickle's access to Giggle. Why? Because the second respondent perceived, and continues to persist with her identification of, Ms Tickle as an "adult human male".[2] The natural inference is that Ms Tickle, for the respondents' purposes, does not bear sufficiently female characteristics.

3. In brief, those are the circumstances that caused Ms Tickle to bring an application in this Court for gender identity discrimination pursuant to sections 22 and 5B of the *Sex*

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1 Respondents' defence at [23].

2 See also Applicant's interlocutory submissions dated 24 March 2023, "Background" section. See also Applicant's submissions on termination of AHRC complaint dated 12 May 2023.

Discrimination Act 1984 (Cth) (**Sex Discrimination Act**). The respondents imposed a condition that users of Giggle be cisgender women or be perceived as cisgender women (**Condition**).[3] But by reason of Ms Tickle's gender identity as a transgender woman she has been treated less favourably than her cisgender counterpart who is perceived as being female. In this context, Ms Tickle's discrimination claim is one properly characterised as gender identity discrimination.[4]

B. The constitutional questions

4. Ms Tickle adopts the submissions of the Sex Discrimination Commissioner (**Commissioner**) that there is no question (without the benefit of the respondents' argument) as to the Constitutional validity of section 5B of the Sex Discrimination Act and section 24 of the *Births, Deaths and Marriages Registration Act 2003* (Qld) (**BDMR Act**).

5. For the reasons explained by the Commissioner, section 5B of the Sex Discrimination Act is supported by the external affairs power (section 51(xxix)) of the *Constitution*,[5] including as it applies to the first respondent (being a trading corporation);[6] and section 24 of BDMR Act is not inconsistent with the Sex Discrimination Act, least of all for the purposes of section 109 of the Constitution.[7]

C. The correct interpretation of "sex" and "gender identity"

6. Ms Tickle's application turns on the meaning of "sex" and "gender identity" for the purposes of the Sex Discrimination Act. Succinctly put by the Commissioner, there is a "threshold question" that must first be determined by this Court.[8] That is because the respondents contend that Ms Tickle's claim is one best characterised as discrimination on the basis of (their interpretation of) "sex": a fixed and immutable construct, and a binary construct. That is to be contrasted with Ms Tickle's position: sex may be

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3 Amended statement of claim at [34].

4 See also Submissions of the Sex Discrimination Commissioner dated 10 August 2023 at [45] (**Commissioner Submissions**).

5 Commissioner submissions at [61]-[77].

6 See Commissioner submissions at [78]-[82]. See further Applicant's submissions in response to respondents' submissions on objection to competency dated 14 April 2023 at [26]-[29] (**NOC Submissions**). This Court should not accept the submission that the First Respondent was not a trading corporation by the bare statement that its "trading activities were utterly diminutive". The Court must engage in a factual enquiry considering the criteria set out at [28] of the NOC Submissions.

7 Commissioner submissions at [84]-[89].

8 Commissioner submissions at [14], see further [15]-[17].

changed; and it need not be binary. Thus, Ms Tickle's position may be stated simply: she is a female for all purposes including the Sex Discrimination Act.

7. Ms Tickle adopts the submissions of the Commissioner,[9] and adopts them in full but in particular the following conclusions:

7.1 "a person is of the female 'sex' for the purposes of the [Sex Discrimination Act] if they have had gender affirming surgery affirming their status as female";[10]

7.2 "sex is not a binary concept";[11]

7.3 "sex can be changed";[12]

7.4 in addition to a person's intrinsic sense of self, "gender identity also includes a person's 'gender-related appearance', 'gender-related mannerisms' and other 'gender-related characteristics'";[13] and

7.5 "[b]y including these 'outward social markers' as part of gender identity, the legislature was acknowledging that it is 'often the discord between a person's gender presentation and their identity which is the cause of the discrimination'".[14]

D. Ms Tickle was subject to gender identity discrimination

8. The Commissioner's illustration of the direct discrimination a transgender woman may experience is especially apposite. She explains:

> "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".

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9 Commissioner submissions at [20]-[46].
10 Commissioner submissions at [25].
11 Commissioner submissions at [30].
12 Commissioner submissions at [31]-[36].
13 Commissioner submissions at [39].
14 Commissioner submissions at [41].

9. Ms Tickle gratefully adopts that submission which captures precisely one limb of Ms Tickle's case. Ms Tickle self-identifies as a woman and can be correctly identified objectively as both a woman and a transgender woman. The respondents, in treating and identifying her as a man, treated her as not sufficiently female. It follows, Ms Tickle has suffered direct discrimination on the basis of her gender identity. Had Ms Tickle been perceived as a cisgender female (or a transgender woman with such features so as to appear cisgender to the second respondent) her access to Giggle would not have been restricted.

10. Further, if this Court were to accept the respondents' argument that one's sex cannot be changed, then it would necessarily follow that a transgender man could access and use Giggle, without complaint by the respondents. That is because, notwithstanding, that this hypothetical person identifies as a man and appears as a man, the respondents must be taken to accept that he is a 'natal woman' and therefore eligible to access an app made for women. That would be entirely contradictory to the ostensible purpose of the app (and the respondent's claim that the Condition was a 'special measure' within the meaning of section 7D of the Sex Discrimination Act).

11. In the alternative, Ms Tickle submits that she has been subject to indirect discrimination. That is because the Condition operates to disadvantage transgender women in that most (if not all transgender women) are vulnerable to exclusion from the use of Giggle in the same manner as cisgender women.

12. The respondents will contend that the Condition was a "special measure" within the meaning of section 7D of the Sex Discrimination Act.[15] Presumably – because of the respondents' position that Ms Tickle is a man – this must be on the basis of section 7D(1)(a), being a special measure for the purposes of achieving substantive equality between men and women. The respondents' argument must fail. That is because a condition cannot achieve its intended purpose when applied to Ms Tickle, for the simple reason that Ms Tickle is not a man.[16] Whatever prima facie discriminatory condition is imposed, as noted by the Commissioner, there must be some observable *corresponding* benefit sounding in equality.[17] Thus, while the respondents may lawfully argue that the a condition is necessary to achieve substantive equality as

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15 Defence at [5].
16 See further Commissioner submissions at [53]-[54].
17 Commissioner submissions at [54], [55], [58].

between women and men (i.e., by creating a space for women only), this can only withstand scrutiny if the said condition is applied as against those who identify as men. Such a condition cannot be used to discriminate against a woman (be it a transgender woman or a woman without sufficiently female features). There is no reason for such discrimination between *women*.

13. In conclusion, Ms Tickle was discriminated against by the respondents. Because Ms Tickle is a woman, that discrimination cannot have been on the basis of sex. But Ms Tickle is a trans woman, and her gender identity is that of a transgender woman. The discrimination she suffered was gender identity discrimination. Her use of Giggle was restricted (or terminated) because she did not appear sufficiently female. A cisgender woman (in particular, one who was considered sufficiently female by the second respondent) would not have experienced the same discrimination. The short point is this: both cisgender and transgender women are women, in life and for the purposes of the Sex Discrimination Act, and both are entitled to equality – in society and at law – as women.

Date: 13 September 2023

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No. NSD4811 of 2022

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

ROXANNE TICKLE
Applicant

GIGGLE FOR GIRLS PTY LTD (ACN 632 152 017) & ANOR
Respondent

RESPONDENTS' OUTLINE OF SUBMISSIONS

INTRODUCTION

1. The Applicant is not a woman. The Applicant is a man.

2. He was excluded from the First Respondent's female only online App by the Second Respondent upon her visual perception of his male sex.

3. This act was not discrimination for the purposes of the *Sex Discrimination Act 1984* (Cth) (**SDA**) because, in the circumstances of this case, the exclusion of males from online female only spaces is a special measure for the purpose of achieving substantive equality between men and women: s 7D(1)(a), (aa), (c) – (f), (2) and (3) of the SDA.

SEX

4. It is well settled that "[t]he starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose".[1] Consistent with this approach the context and purpose of the SDA understood in its statutory and historical or other context situates the legislation firmly in the implementation of the Convention on the Elimination of All

[1] *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14], citing *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69]-[71]; and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 27; 239 CLR 27 at [47].

Forms of Discrimination Against Women[2] (**CEDAW**) as its primary object: see s 3 (a) of the SDA and the Schedule to the SDA[3].

5. CEDAW finds no equivalent in international human rights law, hence, extreme caution should be taken in applying approaches derived from other human rights instruments by analogy.

6. The object and purpose of CEDAW is to eliminate sex-based discrimination against women to achieve equality between the sexes in the enjoyment of human rights, chiefly by promoting men's equal involvement in family responsibilities, in contrast to traditional roles that apportion family responsibilities to women and public activity to men and recognising the unique challenges and barriers women face to their participation in public life.

7. CEDAW's overarching object and purpose, as stated by the CEDAW Committee (**Committee**), is "to eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms. States parties to the Convention are under a legal obligation to respect, protect, promote and fulfil this right to nondiscrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with men."[4] CEDAW seeks to protect women's rights to non-discrimination and equality in political and public life, economic and social matters and in legal and civil matters.

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[2] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

[3] See Commonwealth, *Parliamentary Debates*, House of Representative, 28 February 1984, p. 67 where Mr Young, Special Minister of State said "The objects of the Bill are to give effect to certain provisions of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women which the Government ratified last year; to eliminate discrimination on the ground of sex, marital status or pregnancy in the areas of employment, education, accommodation, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs, and discrimination of Commonwealth laws and programs, and discrimination involving sexual harassment in the work place and in educational institutions; and to promote recognition and acceptance within the community of the principle of the equality of men and women."

[4] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, [4], see also [6] – [10].

8. In fulfilling its object and purpose, CEDAW takes a notoriously asymmetrical approach to sex-based discrimination, addressing only women as subjects, and men as their comparators. That is, men are not rights holders under CEDAW rather they are the comparator class. States are obligated to take measures to transform patterns of behaviour of both sexes in order to eliminate stereotyped roles and harmful practices: CEDAW Article 5(a) and 10(c)[5].

9. Where legislation gives effect to a treaty by adopting the words used in that treaty, then in the interests of certainty and uniformity the provisions of the legislation should be interpreted using the interpretative principles which apply to that treaty.[6] CEDAW's approach to sex, gender, and sex-role stereotyping addresses the relationship between sex and gender in terms that acknowledge the differential experiences of men and women related to their sexed bodies, as well as the harm caused to women by prevailing gender relations based on differential roles for men and women associated respectively with male social hegemony. These features of CEDAW, as well as the application of canons of treaty interpretation[7] when applied to the definition of *women* and related terms, carry the way in which the implementation of CEDAW in the SDA is to be understood in providing for the protection of the rights of women and girls.

10. The terms *women*, *men*, *sex*, *male*, and *female* are necessary constituents of the stated aim of CEDAW to eliminate all forms of sex-based discrimination against women, yet they are not defined. There is no discussion of these terms in the travaux

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[5] This was faithfully implemented by the SDA until the purported amendment to s 9(10) in 2011 by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) s 3*,* [3(a)] *"*After "Women", insert "and to provisions of other relevant international instruments"."

[6] See eg. *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202; 140 FCR 296, per Allsop J, as the former Chief Justice then was, at [142] – [148] (with whom Black CJ agreed).

[7] Section 15 AB of the *Acts Interpretation Act 1901* (Cth). See eg. The Vienna Convention on the Law of Treaties (1969) 115 UNTS 331; 8ILM 679; [1974] ATS 2, (**VCLT**), Articles 31 and 32, which codify customary international law on the correct approach to treaty interpretation and are applied as such by Australian courts: *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74 at [113] ; *De L v Director General, New South Wales Department of Community Services* (1996) 187 CLR 640 at 675 – 676 per Kirby J, and *SZOQQ v Minister for Immigration and Citizenship* [2011] FCA 1237 at [22]. See also Article 26 and *pacta sunt servanda*, which requires a conservative not expansive interpretation of the text. A treaty is to be interpreted in the wider context of international law. See also *Koowarta v Bjelke-Petersen* [1982] HCA 27; 153 CLR 168 at 265 per Brennan J; *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; 190 CLR 225 at 240 and 247 per Dawson J; *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273 at 287 - 288 per Mason CJ and Deane J.

préparatoires.[8] The absence of debate as to the meaning to be ascribed to these terms suggests that they are to be understood according to their plain and ordinary meaning[9], and that this meaning was not viewed as ambiguous.

11. To the extent to which any weight can be given to it[10], the CEDAW Committee has at no time derogated from this approach to construction and meaning of these essential expressions.[11] Rather, the Committee has stated unequivocally that *sex* means the "biological differences between men and women" and *gender* means the "socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences".[12]

12. The plain meaning for the purpose of determining the rights holders under a treaty on elimination of discrimination against women would necessarily be the denotative one: that is, the counterpart to a man, an adult female human. Although the expression has connotative meanings associated with social roles and stereotypes, such meanings

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[8] Rehof, Lars Adam. 1993. *Guide to the travaux préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination against Women*. Dordrecht: M. Nijhoff Publishers and Rudolf, Beate, Marsha A. Freeman, and C. M. Chinkin. 2012. *The UN Convention on the Elimination of all Forms of Discrimination against Women: a commentary.* Oxford: Oxford University Press.

[9] See affidavit and expert report of Dr Kathleen Stock filed 24 October 2023.

[10] See eg. *Maloney v The Queen* [2013] HCA 28; 252 CLR 168 [61] per Hayne J.

[11] Cf. Commissioner's Submissions at [69] – [71]. The Committee in General Recommendation 28 (2010), explicitly couched their observations as to sex and gender discrimination that affect women belonging to such groups as occurring to a different degree or in different ways to men (at [18]). The same observations can be made of Recommendations 33 at [8], 35 at [12] and 39 at [22], cited in Commissioner's Submissions at fn. 75. Each refers to circumstances where ***females*** transgress normative stereotypes of their sex. The stated need for the removal of the definitions of *man* and *woman* as expressed in the 2013 Explanatory Memorandum to the Amending Act at [18] are apt to demonstrate the impermissible legislative abandonment of the SDA's stated purpose in a manner so substantial as to deny the law the character of an appropriate and adapted implementation of CEDAW: *Victoria v The Commonwealth* [1937] HCA 82; 58 CLR 618 (***Victoria v Cth***) at 488 – 489.

[12] See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, [5]. Although the definition of discrimination in Article 1 of CEDAW refers to 'sex', several provisions of CEDAW, for example Articles 2(f), 5, 16, encompass gender stereotypes and traditional gender related social roles. Moreover, the Committee has affirmed that CEDAW encompasses discrimination on the grounds of sex and gender: General Recommendation 28, UN Doc CEDAW/C/GC/28, [3], [5], [16]–[17]; General Recommendation 25, UN Doc A/59/38, annex I [5], [7], [11].

are inconsistent with not only the indubitable natural phenomenon, which is sex[13], but also with the stated objective of CEDAW to require states to take measures to eliminate "stereotyped roles for men and women". Accordingly, they are to be eschewed. This constructional choice is confirmed by not only ordinary common sense[14], but by the expression's usage in the treaty's textual provisions, which shed light on women's physical and social reality as distinct from that of men, and the treaty's asymmetrical object and purpose to eliminate sex-based discrimination against women occasioned by their membership of a global political class uniquely disadvantaged by the actions of men.

13. That CEDAW refers to *men* and *women* as *the sexes* and speaks of women's physical capacities to become pregnant, give birth, and lactate amplifies this meaning: see CEDAW Articles 5(a), 11 and 12. These capacities are unique to women and not shared by men. The treaty's text treats women's reproductive role as an incontrovertible fact and establishes substantive norms to provide for women in relation to these life experiences as a case of substantive equality rights. That is, because women's biological experiences are unique to them, they must be provided for in law and policy, on a permanent basis: not relegated because they pertain only to women and not to men.

14. These contextual references indicate that women under CEDAW are human beings whose bodies are female, who, by their sexed bodies have been disadvantaged not only by the relegation of their experiences related to this sexed embodiment, but also by the imposition of socially constructed roles, stereotypes, and limitations based on their membership in the class of persons who have female bodies. This is made pellucid by the fact that females are the class of persons who are vulnerable to male violence by reason of their sex regardless of their gender role, gender identity or sexual orientation.

15. These definitions must necessarily be implemented by the SDA and would, as the natural corollary, have meaning ascribed to those expressions as they appear in the SDA.

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[13] See the discussion to this effect from an ontological perspective by Dr Kathleen Stock in her affidavit and expert report filed 24 October 2023.

[14] See the critique and commentary by The Honourable Justice John Middleton in 'Statutory Interpretation: Mostly Common Sense?' *Melbourne University Law Review*, 2016, Vol 40: 626.

GENDER IDENTITY

16. The expression "gender identity" finds no support in CEDAW.

17. "Gender identity" is not a political class and cannot rationally be classified as an objective ascertainable characteristic of identifiable social groups necessary to qualify as "other status" for the purposes of Article 26 of the ICCPR[15].

18. To the extent to which the constellation of "other relevant international instruments"[16] are relied upon to give the SDA constitutional force, these instruments have been insufficiently implemented to be reasonably capable of being considered an appropriate and adapted implementation of the respective international instruments as required by 51 (xxix) of the Constitution[17], and thereby, can have no constitutional force.[18]

19. The Yogyakarta Principles are not a "matter of international concern"[19]. The Yogyakarta Principles are not legally binding for any state or governing body. They are the product of a civil society expert conference. It involved no act of the Australian Executive. They have not been embraced by the CEDAW Committee. They are

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[15] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Cf. Commissioners Submissions at [67].

[16] Sections 4 and 9(10) SDA as inserted by *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth).

[17] *Victoria v Cth* at 486 - 487.

[18] This submission finds support in the Commissioner's Submissions at [67], whereby reliance is placed on nothing more than Article 26 of the ICCPR. Regard need only be had to what Allsop J, as the former Chief Justice then was, said in *Toben v Jones* [2003] FCAFC 137; 129 FCR 515 at [138] and [140]. That is, "138. … *It is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty itself has defined with sufficient specificity to direct the general course taken by the signatory States*" and "140. Thirdly, it is unnecessary for the law to be a full and complete implementation of the treaty. There may be a deficiency in the implementation of the supporting Convention. This is not fatal, *unless the deficiency is so substantial as to deny the law the character of a measure implementing the Convention, or unless the deficiency, in the light of other provisions of the domestic law, makes the law inconsistent with the Convention*." [emphasis added].

[19] See for example, *XYZ v Commonwealth* [2006] HCA 25; (2006) 227 CLR 532 where at [19] Gleeson CJ said that it may be doubted that a topic is relevantly of international concern simply because it is discussed at an overseas conference. And, see also how the concept was examined explicitly to in Pape v *Federal Commissioner of Taxation* [2009] HCA 23; 238 CLR 1 at [470] – [473] by Heydon J; see also his Honour's remarks at [474] and particularly, fn. 509 thereto.

incapable of holding any constitutional force. Nevertheless, a textual comparison of their relevant provisions and ss 4 and 5B of the SDA reveals that they are the clear source of the legislative amendment.

20. The Yogyakarta Principles were drafted by a group of international human rights experts in Yogyakarta, Indonesia in 2007. The introduction acknowledges the universality, independency, indivisibility and interrelated nature of human rights. The Yogyakarta Principles do not purport to carve out a special category for sexual orientation or gender identity as a human right, rather they seek to remove the imposition by many states and societies of gender and sexual orientation norms on individuals through customs, law and violence which seeks to control how they experience personal relationships and how they identify themselves. The concern informing the participating experts was the policing of sexuality which was considered to be a major force behind continuing gender-based violence and gender inequality. Properly understood, the Yogyakarta Principles seek relief from gender norms in a manner no different to CEDAW through the lens of sexuality, and in that way relevantly reflect the existing state of international human rights law. This is, the relevant matter of concern vexing those experts was the abolition of fixed gender stereotypes which have by reason of their entrenched history, strong heteronormative features, which disadvantage some homosexuals, particularly in marital and family life. Neither the Yogyakarta Principles nor CEDAW require the deliverance from these stereotypes to be at the expense of a person's sex as a protected class.

21. In the Yogyakarta Principles, "gender identity" is understood to mean:

> each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[20]

22. Notably, in this definition, *gender* itself is not defined. Its adjacency to "sex assigned at birth," with which a person's internal experience of gender may or may not correspond situates a person's gender identity in personal expression, through dress, speech, and

[20] Compare the definition of "gender identity" in s 4 of the SDA "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."

mannerisms, 'modification of bodily appearance and function,' and other possible means, more commonly understood to be personality or personal expression. The inherent difficulty exposed by this definition, which carries through to the SDA, in ss 4 and s 5B, is attributing meaning in a human rights context to the way in which one's personality and outward expression of it can be understood to correspond or not correspond with their sex.

23. Such is evidenced by the tautological incoherence of the Imposed Condition[21] the Applicant alleges in this case. The Applicant freely accepts that he is male but complains that the Second Respondent rapidly identified his male sex from a two-dimensional photograph on a visual assessment and excluded him from a female only app. If this is the effect of the gender identity provisions in the SDA, they are unworkable, as it is impossible to discern where the incoherence ends, and the discrimination begins. Assuming for the purposes of argument only, the validity of the SDA's 2013 gender-identity provisions, this cannot be their intended result[22]. Rather, the Court should resist the invitation implicitly extended by both the Commissioner and the Applicant to strain to give a meaning to the provisions which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity.[23]

24. Nor is *sex* defined by the Yogyakarta Principles. The nexus with 'sex assigned at birth' and 'modification of bodily appearance and function' suggests that the Yogyakarta Principles treats sex and gender as mutable social constructs that can change by modifying bodily structure and function or by redefining it to accommodate an individual's personal sense of self.

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[21] ASOC [34]. The Applicant complains that it was a condition of entry into the App that an applicant be a cisgendered female", (which is a woman who identifies as a woman) or "be determined as having cisgendered physical characteristics on assessment conducted on a photograph". Properly understood, his complaint is that only (1) women who look like women, or (2) people who look like women who are women, were permitted use of the App. The circularity of this complaint does not bear scrutiny. It is utterly meaningless. Looked at in this way, the complaint reveals the strained statutory construction required so the statutory language of ss 5 and 5D of the SDA to give it meaning.

[22] Inconvenience or improbability of result is a reason why one construction is to be preferred over another: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; 147 CLR 297 at 320-321 and *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14; (2004) 218 CLR 273 at [11].

[23] *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at [42].

25. In short, gender identity in this context purports to elevate the pursuit of a sexist stereotypical personal aesthetics to a human rights principle. A woman is not a dress, a string of beads and lipstick. She is not a eunuch. A woman who has breast implants, ribs removed, and or extensive facial rhinoplasty is not more a 'real' woman than a woman who has in no way altered her appearance.[24] Likewise, a man with breast implants, who has undergone hair removal, is not a woman. Similarly, offensive words cannot prevent a woman from experiencing the reality of her sexed embodiment.[25]

26. Shortly stated, the length to which a man may modify his physique to "shape himself and his fate" (as the case may relevantly be) does not and cannot make him a woman.[26] Nor can his expression of a desire to become pregnant[27] make him a woman any more than an expression of a desire to leap tall buildings in a single bound makes one a Superman. So too the modification of a woman's body in the contrasting way, voluntarily or otherwise, does not make her less of a woman, or indeed a man. A woman may seek removal of her reproductive organs or her breasts for its own sake because they are uncomfortable or redundant, or, for informed and voluntary medical reasons, without identifying as a man, or indeed, becoming one. Moreover, to endow such feelings, longings, or pursuits the character of transforming one to a different viz. opposite sex is completely antithetical to the purpose of CEDAW by the simple facts that it first, serves to entrench the very harmful gender stereotypes that it sought to eliminate and, second and most importantly, women are differentially and disproportionately affected and disadvantaged by it at the expense of men.

27. Consistent with CEDAW's and thereby the SDA's purpose and objectives, contesting the hierarchy of gender relations between men and women that prevail throughout the world and domestically, requires an ability to identify members of the advantaged and disadvantaged classes. This work is disrupted and fragmented when we cannot reliably know whether *woman* refers to someone who is female or male, for example, when rape by a "penised" individual can be reported and classified as rape by a

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[24] See the discussion to this effect by Dr Kathleen Stock in her affidavit and expert report filed 24 October 2023.

[25] Cf. Affidavit of the Applicant dated 13 September 2023 at [41].

[26] Cf. *The Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FamCA 94; 172 FLR 300 (***Kevin & Jennifer***) at [13]. See also the affidavits and expert report of Dr Kathleen Stock filed 24 October 2023 and Dr Colin Wright filed 23 October 2023.

[27] Commissioner's Submissions at [35].

woman. And should such an individual be placed in a female prison, as happens, women are put at risk of violence, rape, and pregnancy.[28]

28. By linking gender to personal expression with respect to dress, mannerisms and speech that may or may not be associated with a person's sex at birth, gender identity implicitly accepts a concept of gender as equivalent to stereotypes. When feelings and beliefs about mannerisms, dress, and speech appropriate to one sex or the other are abstracted and made to serve as a ground for personal identity, the legal potency of CEDAW's provisions to deal with harmful gendered stereotypes is rendered impotent. As the aim of eliminating sex-role stereotypes and harmful practices represents a strong theme in CEDAW jurisprudence, "gender identity" unmistakeably detracts from and undermines its object and purpose. It follows that its inclusion in the SDA is of the like effect.

29. The disparity of power and resources between males and females that CEDAW, viz. the SDA, seeks to redress does not disappear when males identify as women or vice versa. Both the transformation of prevailing gender relations and the adoption of substantive equality measures which CEDAW seeks to promote are undermined if women are deemed to be no more than a self-expression or aesthetic modification of the body, a feeling or desire; and include males.

30. Likewise, substituting biological sex for internal identity, manifested externally or not, recorded in the form of self-ID laws, upon the request of any person, or not, renders the political class of women incoherent and fragmented. It permits males, at their discretion, to proclaim no difference between themselves and females, and disallows females from asserting their natural and evolutionarily necessary perception of that difference[29]. It effectively allows men in places where men should not go[30] (women's dormitories, change room, bathrooms, toilets, prisons, rape crisis centres, hospital wards, domestic violence refuges, social and support groups, etc and their digital equivalencies), including those that have been deliberately constructed with a view to achieving women's dignity, advancement, safety, or cultural and political self-determination in a globally male-dominated society.

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[28] Affidavit of Dr Helen Joyce filed 24 October 2023 at [59]-[75].

[29] See affidavit and expert reports of Dr Colin Wright filed 23 October 2023 and Dr Helen Joyce filed 24 October 2023.

[30] Commissioner's Submissions at [43].

31. Lest it not be plain, the paramount problem here is the prospect of male violence for which women must be permitted to take preventative measures.

32. The category of self-declared "women" or "trans women", however, the purported subset is to be described, will inexorably be comprised of men - many with post-pubescent male strength, no surgical alteration of genitalia[31], and a sexual orientation towards females. As the above analysis clearly demonstrates, the entry of men, however they may choose to identify, into female-only spaces is not supported by CEDAW. Likewise, it is unfathomable how it could be otherwise supported by any of the constellation of "relevant international instruments" upon which the 2013 inclusion of s 5D of the SDA purports to derive its constitutional validity.

33. While the reverse would also hold in principle, the deterrent of the threat of male violence, aggression, and dominance, both physically and virtually, against women provides less justification for male-only spaces.

34. It perhaps should also be observed that the paradigm of reasoning that underpins gender-identity is profoundly offensive to men; in that it must necessarily follow that men who do not fulfil the typical male stereotype of masculine aesthetics and traits are, by this paradigm, relegated to the default sex of woman, and thereby, disadvantaged. That this is not the intended outcome of CEDAW is perhaps so palpable it need not be stated.

35. Understood properly, gender-identity effectively entails the erasure of women as a sex class and with it, women's human rights, primarily by rendering them unintelligible. While it may have been desirable to allow instances of same-sex marriage prior to the amendments to the *Marriage Act 1961* (Cth)[32] in 2017 to include same sex marriage by the device of one partner adopting a cross-sex gender identity[33], these measures provide individual solutions never considered in the context of the irreconcilable conflicts that have emerged in principle and practice between gender identity as social

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[31] Note also, for the purposes of the self ID law under consideration in this case, s 24 of the BDM, the definition of *sexual reassignment surgery* in s 4, Schedule 2, of the BDM Act, is not so narrow as to require surgical intervention to achieve a simulacrum of female genitalia. For example, an orchidectomy would qualify. And it is well established that castration is not an inhibition to erectile function. One only need look to the behaviour exhibited commonly by neutered male dogs.

[32] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

[33] See eg. *Kevin & Jennifer.*

policy and women's human rights and cannot survive the transplantation contended for by the Commissioner[34].

36. The purposive construction for which the Commissioner contends[35] fails to grapple with the universality, indivisibility, interdependence, and interrelatedness of all human rights, which is founded on the inherent dignity of all human beings. As the above analysis on sex and gender identity demonstrates, the human right to equality before the law – the keystone in the protective arch of the human rights framework – is lost for women when room is made for gender-identity rights at the expense of women's sex-based rights. The purposive approach contended for has the effect of turning women's rights into men's rights. Accordingly, to achieve this goal and give effect to CEDAW, men's (viz. male) "gender-identity" rights, to the extent that they exist as a separate and distinct category of rights, and are valid, can only begin where women's sex-based rights end.

2013 AMENDMENTS NOT CONSTITUTIONALLY VALID

External Affairs power

37. Section 51(xxix) of the Constitution, the power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs, supports the SDA by reason of the fact that the SDA implements CEDAW. As the above analysis on sex and gender-identity demonstrates, the 2013 amendments to the SDA to include protection for "gender-identity" is wholly antithetical to the SDA's primary object and purpose and is not supported by CEDAW and, it follows, the Commonwealth legislative power under s 51(xxix) of the Constitution and, thereby, invalid.

38. The Court should not accede to the Commissioner's (and Applicant's) implicit request to amend the 2013 amending legislation through statutory interpretation: this is the role of Parliament.

[34] Commissioner's Submissions at [10], [23] and [24].
[35] Commissioner's Submissions at [45] – [46].

Corporations power

39. On the facts of this case, the 2013 amendments to the SDA to include "gender identity" are not supported by s 51(xx) of the Constitution either, which limits the ambit of the SDA to *trading or financial* corporations. The First Respondent did not trade as is required by the ordinary meaning of the constitutional text; in that its trading activities did not form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation[36].

40. In *Cole v Whitfield*[37], the Court authorised reference to the Convention Debates "for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation". Accepting the relevance of historical context to constitutional interpretation, at a minimum, the historical sources[38] suggest that a corporation's purpose is relevant to its characterisation as a trading or financial corporation[39]. Purpose is identified from the corporation's constitution, annual reports, and other objective evidence.

41. Examining these documents[40], it is clear that the independent trading activities of the First Respondent overall, were on an insufficient scale, such as to see it characterised as a trading corporation.

42. In this case, the First Respondent had a barebones utilitarian constitution. Its financial documents showed a corporation with no other real income than that derived from government grants, and a loan to it by a related entity, which properly characterised, is in fact a liability, not income. It suffered repeated losses. The evidence establishes that the App which it provided was free to use without monetisation. While the App offered in-app purchases, it did not charge for them for any length of time, or with a

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[36] See eg. *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1; 228 FCR 497 at [135] and *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254; 37 WAR 450 (***Lawrence (No 2))*** at [68(1)] per Steytler P.

[37] [1988] HCA 18; 165 CLR 360 at 385.

[38] See eg. John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) at 606.

[39] Although it is not the sole or principal criterion of its character as a corporation: *Lawrence (No 2)* at [68(7)] per Steytler P.

[40] See affidavit of Sall Grover filed 24 October 2023 and, also, see affidavit of Sall Grover filed 23 October 2023 at [7], [9], [15] – [17], [35] – [37].

view to making a profit[41]. It did not have the ability to buy physical goods or services within it and did not display advertisements, which were productive of monetisation. It involved no aspect of trade as properly understood, that is, it involved no buying and selling, exchange of commodities, or purchase, sale, or exchange. Its purpose was to "create an exclusively women only platform that was a strong female support network for many different areas of life such as finding a roommate, employment opportunities, friendship, network, commune and engage in conversation while providing a refuge away from men free from harassment, "mansplaining", "dick pics", stalking, aggression and other male patterned online behaviour.[42]

43. In any event, on these facts, s 9(11) of the SDA is not engaged and the SDA has no application to the Respondents.

Inconsistency

44. The Constitution prescribes the priority of conflicting Commonwealth and State laws by s 109. The principle by reference to which inconsistency within the meaning of s 109 of the Constitution is discerned was usefully restated by Gageler J in *Burns v Corbett*[43]:

> Substantially, it amounts to this. When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.

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[41] See affidavit of Sall Grover filed 24 October 2023. See also, *R v Trade Practices Tribunal; Ex parte St George County Council* [1974] HCA 7; 130 CLR 533 at 539 per Barwick CJ, 563 per Gibbs J and 569 per Stephen J; *Re Ku-Ring-Gai Co-Operative Building Society (No 12) Ltd* [1978] FCA 107; 22 ALR 621 at 140 per Bowen CJ and 167 per Deane J.

[42] Affidavit of Sall Grover filed 23 October 2023 at [7], [9], [15] – [17] and [36].

[43] [2018] HCA 15; 265 CLR 304 at [85] citing *Victoria v Cth* at 630; and to similar effect *Ex parte McLean* [1930] HCA 12; 43 CLR 472 at 483; and *Stock Motor Ploughs Ltd v Forsyth* [1932] HCA 40; 48 CLR 128 at 136-137.

45. His Honour went on[44] to say:

> There is, of course, no need for a State law to impinge upon the field of legal operation of the Commonwealth law in order for the State law to impair or detract from the operation of the Commonwealth law. Impairment or detraction can result from the practical effect of the State law. It follows that a State law can impair or detract from a Commonwealth law's conferral of jurisdiction under s 76 or s 77(i) or (iii) "by directly or indirectly precluding, overriding or rendering ineffective an actual exercise of that jurisdiction".

46. As the analysis on sex and gender-identity above demonstrates, the state of domestic law in the form of promulgation of self-ID laws in each state (except, presently, NSW) does not support or promote the objects of the SDA. Indeed, self-identification legislation whether it requires surgical intervention or not, are inconsistent with the work that *sex* must necessarily do under the SDA. If *sex* in the SDA were required to extend to include this legal status created by s 24 of the *Births, Deaths and Marriages Registration Act 2003 (Qld)* (**BDM Act**) (and cognate legislation), it would work to alter, impair and detract from the Commonwealth law by reason of the fact that this status is negated by the clear purpose the SDA implements. It would render s 24 of the BDM Act invalid to the extent that impairs and detracts from the clear purpose of the SDA.

47. As the above analysis on sex and gender-identity demonstrates, if s 5 of the SDA were to include the legal construct of sex created by reason of s 24 of the BDM Act and other cognate statutes, the Commonwealth would effectively be precluded by the legislation of a State from classifying the sexes differently, consistent with the natural meaning as ascribed to sex by CEDAW, and as implemented in the SDA.

48. Rapid identification of another's sex is a skill of key social significance, which has a deeply entrenched evolutionary imperative. Changing one's sex marker on identification documents does not render another's ability to discern biological sex redundant. The imposition of penalties to coerce others to pretend a person is not the sex as perceived on observation is repugnant to the observer's natural instinct to determine another's sex. Forcing a person to lie about what they have determined by threat of sanction is an abrogation of their fundamental human rights, and as this case

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[44] Citing *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44 224 CLR 322 at [196]-[209], relevantly at [86].

ably demonstrates, particularly, women's sex-based rights. The exclusion from the female sex class of a male, by reason of the perception of his obvious secondary sex characteristics as derived from his primary sex characteristics inherent to his maleness, is a measure authorised by the provisions of the SDA in implementing CEDAW. If this authorisation were to be abrogated by mere assertion of a State record of legal status, as derived from s 24 of the BDM and other cognate legislation, it impinges upon the field of operation of the Commonwealth law in a manner which substantially impairs its practical effect and is invalid to the extent of that inconsistency.

SPECIAL MEASURES

49. Section 7D of the SDA was introduced by the *Sex Discrimination Amendment Act 1995* (Cth), repealing s 33 of the SDA[45], which provided that an act that would otherwise be discriminatory for the purposes of the SDA was not unlawful if a purpose of that act was to ensure equal opportunity. Thereto, the SDA was structured on an "equal treatment" model under which any difference in treatment was prima facie discriminatory. Section 33 had operated to provide an exemption to the anti-discrimination provisions of the SDA and treated special measures as lawful discrimination.

50. The legislative amendment which introduced s 7D of the SDA[46] moved the special measures provision from the exemptions section of the SDA to the definitions section, ensuring that it was presented and understood as an expression of equality rather than an exception to it.

51. Section 7D of the SDA has two effects:

    a. First, it provides that special measures form part of the threshold question of whether there was discrimination at all, and thus do not require any exemption; and

    b. Second, the focus of the provision shifted from an emphasis on the attainment of equal opportunities, which ignored the historical and structural barriers to

[45] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1995, 2456 (Second Reading Speech, Sex Discrimination Amendment Bill 1995 (Cth)).
[46] Sex Discrimination Amendment Act 1995 (Cth), Schedule, cl. 3.

equality, to measures aimed at achieving substantive equality for men and women.

52. See the discussion in *Jacomb v Australian Municipal Administrative Clerical and Services Union*[47] (***Jacomb***) which remains good law despite the amendments to s 9(10) of the SDA.[48]

53. So as to avoid entrenching existing discrimination, s 7D of the SDA mandates a liberal and substantive interpretation of equality in order to produce equality in fact and outcome. To achieve substantive equality, it is necessary to look at the end result of a practice that purports to treat people equally. In this way, structural barriers that prevent a disadvantaged group from attaining real or genuine equality can be taken into account.

54. The special measures provision in the SDA is limited, in its terms, by a test as to purpose. Section 7D(1)(a) provides that a person may take special measures for the purpose of achieving, relevantly, substantive equality between *men* and *women*. As the submissions hereto contend, that the meaning of *men* and *women* in s 7D(1)(a) of the SDA is correlative with biological sex. Tested this way, it cannot include a transwoman, because transwomen are necessarily men.[49] That is to say, the only qualification of trans women is that they are men.

55. Section 7D(2) provides that that special measure means that a person does not discriminate against another person under any of ss 5, 5A, 5B, 5C, 6, 7, 7AA or 7A by taking the special measures authorised by s 7D(1). This means that if a threshold in s 7D(1) is met, there is no discrimination for the purposes of the SDA, at all.[50] Section 7D(3) makes clear that the achievement of substantive equality need not be the only, or even the primary, purpose of the measures in question. Measures fall fairly within the section if the achievement of substantive equality was one of the purposes for which they were taken. Accordingly, any application of s 7D of the SDA requires an assessment of whether the measure in question was taken for the purpose of achieving

[47] [2004] FCA 1250; 140 FCR 149.
[48] Cf. Commissioner's Submissions at fn. 54.
[49] Cf Commissioner's Submissions at [50].
[50] Cf. Commissioner's Submissions at [58].

substantive equality. It was accepted by Crennan J in *Jacomb*[51] that the test as to purpose is a subjective test.

56. Section 7D requires the court to assess whether it was reasonable for the person taking the measure to conclude that the measure would further the purpose of achieving substantive equality between men and women. In making this determination the court must at least consider whether the measure taken was one which a reasonable entity in the same circumstances would regard as capable of achieving that goal[52]. The court ought not substitute its own decision, but should consider whether, in the particular circumstances, a measure imposed was one which was proportionate to the goal. Consequently, in addition to the subjective test as to purpose, s 7D is limited by a consideration of the proportionality of the particular measure sought to be employed. This approach is consistent with the approach of the CEDAW Committee to the construction of the phrase 'special measures' within the text of CEDAW: Article 4(1)[53].

57. The evidence filed by the Respondents going to this special measure of a female only digital space speaks loudly of the fact that the disadvantage experienced by women is a continuum of online and offline experiences. See generally:

    a. The affidavit of Sall Grover filed 23 October 2023, where she speaks of the purpose and object of the App, emanating from her own experiences of sexual abuse, and the need for female only spaces to constitute, in effect, an "online women's refuge". The App's experience of repeated attacks by men constitutes in and of itself satisfactory evidence of precisely the male pattern of digital violence, which justifies the special measure achieved by the App;

    c. the affidavit and expert report of Dr Helen Joyce filed 24 October 2023 sets out in detail the many bases for the special measure of women only spaces, most of which have digital equivalencies catered for by the App;

[51] at [61] and [64].

[52] This limb is palpably satisfied in this case. See eg. the affidavits of Janet Fraser filed 23 October 2023; Azure Rigney filed 23 October 2023; Holly Lawford Smith filed 23 October 2023; Carole Ann 23 October 2023; and Jennifer Mimiette filed 24 October 2023.

[53] *Jacomb* at [43].

d. Anaum Sayed, a Muslim woman, in her affidavit filed 23 October 2023 speaks of her experiences as a woman of faith whose practise of her religion precludes her from discussing issues uniquely and exquisitely female in public and the deficit this occasions her knowledge of female anatomy and health issues;

e. Janet Fraser, in her affidavit filed 23 October 2023, who speaks from her experience of the chilling effect of male intrusion upon women's online spaces in circumstances where women are discussing their bodies, health needs and sex-specific experiences;

f. Holly Lawford Smith, a lesbian, in her affidavit filed 23 October 2023, speaks of the traumatising effects of the colonisation of formerly female only spaces by men, and the coercive transgression of sexual boundaries imposed upon same sex attracted females in the online dating milieu;

g. Samantha Jo Elson, a woman of colour and mother of autistic children isolated by her parenting responsibilities, speaks in her affidavit of filed 24 October 2023 of the benefits of an online digital space for the purposes of community and a refuge away from racially motivated digital violence, vilification and aggression against women of colour;

h. Jennifer Mimiette, a lesbian, who in her affidavit filed 24 October 2023 speaks of the need for an online digital space for same sex attracted females to escape the voyeurism of male sexual fetishists;

i. Victoria Bermudez, in her affidavit filed 23 October 2023, speaks of the refuge and reprieve that an online digital space provided her from her daily experiences in a male dominated industry;

j. Louise Birt, a woman recovering from a relationship breakdown, speaks in her affidavit filed 23 October 2023 of her need to participate in online political discussions free from the scourge of male digital dominance and aggression;

k. Louise Carrigg, a lesbian and recovering alcoholic, in her affidavit filed 23 October 2023, speaks of experience of trauma of raising a disabled son, suffering sexual assault by her husband, her experiences as a recovering alcoholic in women's rehabilitation facilities, and the need for online female

spaces to support women with respect to each of these matters in a way that caters properly to their exquisitely female experience of each;

l. Carole Ann, a lesbian, in her affidavit filed 23 October 2023, speaks of the loss of lesbian spaces and how the trans ideology is forcing same sex attracted women, underground in a manner equivalent to being put back in the closet by reason of self-exclusion;

m. Mardi Sandford, a survivor of sexual assault and homelessness, in her affidavit filed 23 October 2023, speaks about the negative experiences of male intrusion into digital female spaces for survivors of trauma;

n. Alison Hill, living with a traumatic brain injury, in her affidavit filed 23 October 2023, speaks of the effects of her brain injury on her inability to interact in a digital environment where men are present and the need for a safe and respectful space away from male digital dominance and aggression;

o. Azure Rigney, advocate and national convenor for Maternity Choices, in her affidavit filed 23 October 2023, speaks of the exquisite need for female digital spaces to permit the free and necessary personal discussion of gynaecological, obstetric and maternal health issues; and

p. Ciantal Bigornia, in her affidavit filed 23 October 2023, speaks of her experience managing social media accounts in the course of her work and her frequent exposure to derogatory, vitriolic and sexual comments directed at women; the negative impact on her mental health from this experience and her personal self-exclusion from social media. She speaks in comparison of the sanctuary and refuge provided by a female-only digital space free from unwanted male advances and abuse, and how it positively improved her mental health and ability to participate in digital public life.

58. What this evidence makes plain is that the blurring of the distinction between online and offline worlds is unmistakeably real in the digital age. If there is anything that the recent global pandemic ably demonstrated, it was precisely that.

59. A female only digital space by eliminate the barriers to women participating in public life is a necessary special measure to ensure women's substantive equality with men.

This is the purpose of which the First Respondent speaks informing its creation and maintenance of the App[54] and is one harmonious with the objects and purpose of CEDAW, and thereby the SDA, validly framed.

CONCLUSION

60. The Amended Application and Amended Statement of Claim thereby fails and should be dismissed with costs.

Date: 25 October 2023

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[54] Affidavit of Sall Grover filed 23 October 2023 paragraphs 7, 9, 15-17, 35-37.