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FEDERAL COURT OF AUSTRALIA **NO. NSD 1148/2022**
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

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

[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 S*RA,* 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

[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

[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.

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[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).