

## **NOTICE OF FILING**

### **Details of Filing**

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	13/09/2023 5:39:47 PM AEST
Date Accepted for Filing:	13/09/2023 5:39:52 PM AEST
File Number:	NSD1148/2022
File Title:	ROXANNE TICKLE v GIGGLE FOR GIRLS PTY LTD ACN 632 152 017 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

### **Important Information**

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

**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”.<sup>1</sup>
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”.<sup>2</sup> 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*

---

<sup>1</sup> Respondents’ defence at [23].

<sup>2</sup> 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**).<sup>3</sup> 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.<sup>4</sup>

## **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*,<sup>5</sup> including as it applies to the first respondent (being a trading corporation);<sup>6</sup> 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.<sup>7</sup>

## **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.<sup>8</sup> 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

---

<sup>3</sup> Amended statement of claim at [34].

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

<sup>5</sup> Commissioner submissions at [61]-[77].

<sup>6</sup> 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.

<sup>7</sup> Commissioner submissions at [84]-[89].

<sup>8</sup> 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,<sup>9</sup> 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”;<sup>10</sup>

7.2 “sex is not a binary concept”;<sup>11</sup>

7.3 “sex can be changed”;<sup>12</sup>

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’”;<sup>13</sup> 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’”.<sup>14</sup>

#### **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”.

<sup>9</sup> Commissioner submissions at [20]-[46].

<sup>10</sup> Commissioner submissions at [25].

<sup>11</sup> Commissioner submissions at [30].

<sup>12</sup> Commissioner submissions at [31]-[36].

<sup>13</sup> Commissioner submissions at [39].

<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> Whatever prima facie discriminatory condition is imposed, as noted by the Commissioner, there must be some observable *corresponding* benefit sounding in equality.<sup>17</sup> Thus, while the respondents may lawfully argue that the a condition is necessary to achieve substantive equality as

---

<sup>15</sup> Defence at [5].

<sup>16</sup> See further Commissioner submissions at [53]-[54].

<sup>17</sup> 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**

**Georgina Costello KC**  
**Briana Goding**  
**Elodie Nadon**  
Counsel for the Applicant