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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 Women² (**CEDAW**) as its primary object: see s 3 (a) of the SDA and the Schedule to the SDA³.

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.

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 interpretation⁷ 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

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 meaning⁹, and that this meaning was not viewed as ambiguous.

11. To the extent to which any weight can be given to it¹⁰, 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

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 sex¹³, 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 sense¹⁴, 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.

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 ICCPR¹⁵.

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 Constitution¹⁷, 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

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 Condition²¹ 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 result²². 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.

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 pregnant²⁷ 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

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" unmistakably 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 difference²⁹. It effectively allows men in places where men should not go³⁰ (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.

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 genitalia³¹, 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 identity³³, 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

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 Commissioner³⁴.

36. The purposive construction for which the Commissioner contends³⁵ 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 corporation³⁶.

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 sources³⁸ suggest that a corporation’s purpose is relevant to its characterisation as a trading or financial corporation³⁹. Purpose is identified from the corporation’s constitution, annual reports, and other objective evidence.

41. Examining these documents⁴⁰, 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

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 Garrahan, *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 profit⁴¹. 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.

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 on⁴⁴ 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

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 SDA⁴⁵, 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 SDA⁴⁶ 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 goal⁵². 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 Mimiéte 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 App⁵⁴ 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

B. K. Nolan

A. Costin

Counsel for the Respondents

Katherine Deves, Alexander Rashidi Lawyers

Solicitors for the Respondents

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