



## TICKLE V GIGGLE

**A 2024 decision of the Federal Court has established that “sex” is changeable, and that gender identity is a constitutionally valid ground of discrimination under Australian law.**

The case, *Tickle v Giggle*<sup>1</sup>, in finding that a trans woman, Roxanne Tickle, had been discriminated against by the women’s app Giggle<sup>2</sup>, clarifies some key concepts in relation to sex:

- Sex is not confined to a biological concept<sup>3</sup>
- Sex is not a binary concept, nor it is limited to the male or female sex<sup>4</sup>
- “In it’s contemporary ordinary meaning, sex is changeable.”<sup>5</sup>

The case also confirmed that gender identity is a constitutionally valid ground of discrimination under the Sex Discrimination Act 1984 (Cth) (SDA).<sup>6</sup>

### FACTUAL BACKGROUND

Roxanne Tickle (the Applicant) is a woman who was assigned male at birth. She took social, legal and medical steps to affirm her gender in June 2017 and was issued with a new birth certificate with a female gender marker by the Queensland Register of Births, Deaths and Marriages in September 2020.

Giggle for Girls Pty Ltd (Respondent 1) was an app for women established and owned by Sally

(Sall) Grover (Respondent 2). The purpose of the app was to be a safe, online social, messaging and dating space for women.

In February 2021, Ms Tickle downloaded the app and successfully registered as a member. In order to register, applicants had to provide their phone number and submit a ‘selfie’ photo, which was screened by AI technology to determine whether the applicants were female, or had the characteristics of being female.

In September 2021, Ms Grover manually checked Ms Tickle’s photo, and proceeded to block Ms Tickle’s access to the app.

Ms Tickle then sued the Respondents for unlawful discrimination in the provision of goods and services by reason of gender identity under s 22 of the SDA.<sup>7</sup>

### DIRECT AND INDIRECT DISCRIMINATION

The Applicant pleaded direct discrimination and indirect discrimination in the alternative.<sup>8</sup>

- For **direct discrimination**, the Applicant had to establish that the Respondents treated her less favourably by reason of her gender identity, when compared to a cisgender woman.
- For **indirect discrimination**, the Applicant had to establish that the Respondents imposed a condition or practice that had the effect of disadvantaging the Applicant because of her gender identity, or a

<sup>1</sup> *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960

<sup>2</sup> *Giggle for Girls Pty Ltd and it’s owner/founder, Sally Grover*.

<sup>3</sup> *Tickle v Giggle* [55]

<sup>4</sup> *Tickle v Giggle* [55]

<sup>5</sup> *Tickle v Giggle* [62]

<sup>6</sup> Sex Discrimination Act 1984 (Cth), s 5B

<sup>7</sup> Sex Discrimination Act 1984 (Cth), s 22

<sup>8</sup> Direct and indirect discrimination cannot be pleaded together, or both found to have occurred at once. They are mutually exclusive. *Tickle v Giggle* [46(d)] and *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; 256 FCR 247 at [14]-[16].



category of persons with the same gender identity.

In the judgment handed down on 23 August 2024, **Justice Bromwich made a finding of unlawful indirect discrimination** - that the condition imposed of women accessing the app having to be cisgender or have the appearance of being cisgender, had a disadvantaging effect on Ms Tickle and presumably any other trans women who were not able to “pass” as cisgender in accessing the app. The Respondents were ordered to pay Ms Tickle \$10,000 in damages and pay her legal costs.

Justice Bromwich said that the condition imposed was more reflective of a policy of direct discrimination, and that if the evidence had established Ms Grover’s awareness of Ms Tickle’s trans gender identity before blocking her access, then a finding of direct discrimination could have been made.

## SEX

Despite the Respondents contending that the categories of transgender and cisgender are false, that sex is immutable from birth, and that the only valid definitions of sex are ‘adult human males’ and ‘adult human women,’ Justice Bromwich was not convinced. He found:

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<sup>9</sup> Tickle v Giggle [63]

<sup>10</sup> Tickle v Giggle [see paras 55-62]

<sup>11</sup> See Tickle v Giggle [187]: “That gender identity is an “*other status*” that is subject to the non-discrimination obligation in Art 26 is affirmed by several communications from the Human Rights Committee, which is empowered under the Convention’s Optional Protocol to hear and provide views on allegations that States Parties have violated individuals’ rights under the ICCPR: see Human Rights Committee, *G v Australia*, Communication No. 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) at [7.2]; Human Rights Committee, *MZBM v Denmark*, Communication No. 2593/2015, UN Doc CCPR/C/119/D/2593/2015 (12 May 2017) at [6.6]; Human

**“The acceptance that Ms Tickle is correctly described as a woman, reinforcing her gender identity status for the purposes of this proceeding, and therefore for the purposes of bringing her present claim of gender identity discrimination, is legally unimpeachable.”<sup>9</sup>**

Further, and **crucially, he confirmed an expansive definition of sex, setting out that it goes beyond the binary, is not limited to categories of male and female, and is ultimately changeable.**<sup>10</sup>

## GENDER IDENTITY

The court confirmed that gender identity is a constitutionally valid ground of discrimination under the SDA. Justice Bromwich stated that gender identity discrimination under s 22 (provision of goods and services) and s 5B of the SDA, constitutes a valid implementation of Article 26 of the International Covenant on Civil and Political Rights (ICCPR), by way of the Commonwealth’s external affairs power in s 51(xxix) of the Constitution. Article 26 of the ICCPR creates an obligation for State parties to prohibit discrimination on a number of grounds, including ‘other status’, which is inclusive of gender identity.<sup>11</sup>

## COMMENTARY

The judgment is a win for equality, inclusivity, and for trans and gender diverse Australians.

Rights Committee, *Nepomnyashchiy v Russian Federation*, Communication No. 2318/2013, UN Doc CCPR/C/123/D/2318/2013 (23 August 2018) at [7.3]; Human Rights Committee, *Ivanov v Russian Federation*, Communication No. 2635/2015, UN Doc CCPR/C/131/D/2635/2015 (14 May 2021) at [7.12]; Human Rights Committee, *Alekseev v Russian Federation*, Communication No. 2757/2016, UN Doc CCPR/C/130/D/2757/2016 (9 June 2021) at [9.14]; Human Rights Committee, *Mikhailova et al v Russian Federation*, Communications No. 2943/2017, UN Doc CCPR/C/134/D/2943/2017 (29 August 2022) at [9.12]; Human Rights Committee, *Savolaynen v Russian Federation*, Communication No. 2830/2016, UN Doc CCPR/C/135/D/2830/2016 (23 January 2023) at [7.15].”



The law now upholds what should be common sense, that all women must be treated equally, regardless of gender identity.

### **APPEAL**

The Respondents are expected to file an appeal to the full Federal Court by 8 October 2024.

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