

Article Information

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Service: Discrimination

An inclusive interpretation: The Federal Court analyses gender identity discrimination

In a significant decision of the Federal Court of Australia, Justice Bromwich has considered the issue of gender discrimination for the first time since the *Sex Discrimination Act 1984 (Cth) (SD Act)* was amended in 2013. In *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 (*Tickle*), a transgender woman brought proceedings against Giggle for Girls Pty Ltd (*Giggle*), and its Chief Executive Officer Sally Grover, for unlawful exclusion from its 'women-only' Giggle application.

What Happened?

The Giggle application was marketed as a digital women-only space where women could communicate in respect of matters such as employment opportunities, emotional support, and general friendship.

Despite being marketed as a women-only space, in practice, males were downloading and using Giggle. Following numerous complaints that males had been causing disturbances on the platform, third-party artificial intelligence (AI) was implemented to screen potential users. Prior to being granted access to Giggle, users would upload a photograph of themselves which AI could review and use to determine whether the user appeared to be female or male. The AI technology purportedly detected the gender of each face with 94% accuracy, granting access to those whom appeared female. In addition to the AI screening, the images of those who had been granted access were reviewed by Ms Grover and other employees. Collectively, this made access to the Giggle application conditional upon the user being a cisgender woman or having cisgendered female characteristics, as determined on review of the user's photograph. Cisgender refers to a person whose gender identity corresponds with the sex registered to them at birth.

Roxane Tickle identifies, and is legally recognised, as a woman. In 2018, the Queensland Register of Births, Deaths and Marriages reissued her birth certificate with the name she now uses. In 2020, following sexual reassignment surgery and in accordance with the requirements of the *Births, Deaths and Marriages Registration Act 2003 (Qld) (BDMR Act)*, Roxanne Tickle was reissued her birth certificate with a female sex marker. Subsequently, in or around February 2021, Ms Tickle downloaded Giggle and was granted full access to the application. However, in September or early October 2021, various application functions had been disabled and she received a 'User Blocked' message when attempting to purchase premium features. Following various inquiries into the issue, many of which Sally Grover failed to respond to, Ms Tickle lodged an application alleging unlawful gender identity discrimination under the *SD Act*.

The Proceedings

In her application, Ms Tickle alleged that in preventing her from using the Giggle application, the Respondents engaged in either direct or indirect discrimination on the basis of gender identity. To establish direct discrimination, the Respondents must have prevented Ms Tickle from using the application by reason of her gender identity. To establish indirect discrimination, the Respondents must have imposed a condition that had, or was likely to have, the effect of disadvantaging Ms Tickle relative to another who has a different gender identity.

It was asserted that the Respondents imposed a condition on the use of the Giggle application that required a person to be a cisgender woman or be determined as having cisgendered female physical characteristics on review of their photograph. Contrary to sections 5B and 22 of the *SD Act*, Ms Tickle alleged that she was treated less favourably than cisgender women in being denied access to the Giggle application because she is a transgender woman.

In addition to opposing the application on constitutional grounds, the Respondents denied engaging in any unlawful discrimination by way of either direct or indirect gender identity discrimination.

To establish the direct discrimination claim, the Respondents must have been aware of Ms Tickle's gender identity. The Judge held that the evidence did not support the allegation that the Respondents were aware of Ms Tickle's gender identity at the time she was removed from the Giggle application. The claim of direct discrimination therefore failed on this basis.

However, ignorance as to Ms Tickle's gender identity was no defence to the indirect discrimination claim. The imposed condition of needing to appear cisgender effectively disadvantaged transgender woman, and in particular Ms Tickle. The Respondents did not deny that that the basis for Ms Tickle's exclusion from the Giggle app was that she was perceived to have a male appearance and therefore male at birth.

While the Respondents attempted to rely on the applicability of the special measures exception in section 7D of the *SD Act*, they were unsuccessful in doing so.

Subsequently, the Court held that the Respondents indirectly discriminated against Ms Tickle when she was prevented from using the Giggle application, and awarded remedies accordingly.

The Meaning of 'Sex'

Ms Tickle alleged that she was unlawfully discriminated against (directly and indirectly) as a transgender woman, on the basis that she was treated less favourably than a cisgender woman. Ms Tickle alleged gender identity discrimination on the specific basis that she is a transgender woman, and thus a woman.

As Ms Tickle asserted that she was female, she did not allege that she had been discriminated against on the basis of sex. Accordingly, the case concerned the application of section 5B of the *SD Act*, rather than section 5.

However, Ms Tickle noted in her submissions that there is no barrier to a transgender woman being a woman for the purposes of sex discrimination claims. While this was not a point that required determination for the purpose of these proceedings, Justice Bromwich accepted various propositions in relation to the proper construction of section 5 and the term 'sex'.

In the course of the judgment, it was said that the meaning of the term 'sex' was not confined to biological concepts. Specifically, Justice Bromwich stated that 'sex' is not limited to the male or female physical traits that a person possesses at birth. Rather, it is a broad concept that encompasses non-binary status and can be changed.

While the determination of sex may involve consideration of biological and physical characteristics, it also requires reference to how the individual is legally and socially recognised. Justice Bromwich said that this interpretation accords with the 2013 amendments to the *SD Act*. The amendments introduced the gender identity discrimination provisions, and substituted all references to "the opposite sex" for "a different sex". Additionally, the amendments repealed the definitions of "man" and "woman", which had referenced members of the male and female sex. The Explanatory Memorandum explained that the purpose of these amendments was to prevent the narrow interpretation of 'man' and 'woman', ensuring that transgender women, for example, could access protections from discrimination. Justice Bromwich said that this reinforced the interpretation of 'sex' as a fluid and changeable concept.

Key Takeaways

Whilst the outcome in this case centred upon the issue of gender identity discrimination, the Court did provide some useful broader commentary on the interpretation of the term 'sex'. In suggesting that 'sex' is a fluid and changeable concept, Justice Bromwich has left open the possibility that the protection afforded to transgender men and women under section 5 of the *SD Act* is not limited to protection from discrimination on the basis of their sex assigned at birth. It is yet to be seen whether this interpretation will be endorsed unconditionally, or whether it will be limited to circumstances where a transgender person has undergone reassignment surgery and obtained legal recognition accordingly.

In any case, businesses should give careful regard to this decision to ensure that its practices remain consistent with relevant discrimination laws.

Please note that on 1 October 2024, Giggle and Ms Grover filed a Notice of Appeal. Accordingly, this decision will be reconsidered by the Full Federal Court sometime next year.