PiperAlderman

Article Information

Authors: Ben Motro, Sophia Bianchini
Service: Discrimination, Employment & Labour, Employment Disputes & Litigation
Sector: Employment Relations

Re-examining the prohibition of gender identity discrimination

The Full Federal Court has provided further guidance on gender identity discrimination. In the appeal decision Giggle for Girls Pty Ltd v Tickle [2026] FCAFC 64 (Tickle (No 2)), the Court clarified the framework for establishing less favourable treatment on the ground of gender identity, charting a clearer path for claimants whilst prompting renewed debate about legislative reform.

Overview of the facts

Giggle for Girls Pty Ltd (**Giggle for Girls**) owned and operated an application that was marketed as a women-only space (**Giggle App**). Following complaints that males were causing disturbances, third-party artificial intelligence (**AI**) was implemented, combined with manual review of AI acceptances, to screen the photographs of potential users. This effectively made access to the application conditional upon appearing to be a cisgender woman or having cisgender female characteristics.

Roxxane Tickle (**Ms Tickle**), who identifies and is legally recognised as a woman, was granted access to the Giggle App in February 2021 but was blocked following review by Sally Grover (Chief Executive Officer of Giggle for Girls) (**Ms Grover**) in September or early October 2021. Ms Tickle lodged an application alleging unlawful gender identity discrimination under the *Sex Discrimination Act 1984* (**SD Act**), advancing assertions of direct and indirect discrimination.

First instance decision

At first instance, Ms Tickle was unable to establish direct discrimination under the SD Act. The primary Judge held that this was primarily because the evidence did not substantiate that Ms Grover was aware of Ms Tickle's gender identity as a transgender woman. Rather, Ms Grover excluded Ms Tickle because she had the appearance of a cisgender man.

However, Justice Bromwich held that the condition imposed for the use of the Giggle App, being that Ms Tickle was required to have the appearance of a cisgender woman, constituted unlawful *indirect* discrimination in connection with the provision of a good or service. Ms Grover and Giggle for Girls unsuccessfully sought to argue that the Giggle App was a special measure pursuant to section 7D(1)(a) of the SD Act (which, if successful, would have meant that any discrimination would not have been unlawful).

Grounds of appeal

Following the first instance decision, Ms Grover and Giggle for Girls lodged an appeal, alleging that the primary Judge erred in:

- upholding the claim of indirect discrimination;
- finding that "sex" is not a purely binary concept confined to biological gender at birth; and
- finding that the Giggle App was not a "special measure" pursuant to section 7D of the SD Act.

Ms Tickle filed a cross-appeal on the basis that the primary judge erred in:

- failing to hold that Ms Tickle's exclusion from the Giggle App, and the subsequent refusal to readmit her, constituted *direct* discrimination;
- in the alternative, failing to also make a finding of indirect discrimination regarding the refusal to readmit Ms Tickle

to the Giggle App; and
- the award of damages.

Direct, rather than indirect, discrimination

As the primary Judge noted (and as accepted by the Full Court on appeal), the concepts of direct and indirect discrimination are mutually exclusive. That is, it can be either, but not both.

Although the primary Judge was prepared to accept that Ms Tickle was unlawfully discriminated against on an *indirect* basis by the imposition of an unreasonable condition, the Full Court unanimously rejected this reasoning and held that Ms Tickle was unlawfully discriminated against on a *direct* basis.

Firstly, the Full Court considered that although there was a condition imposed upon all potential participants of the Giggle App, it was a condition that sought to directly exclude all persons who were not born as a woman (such as transgender women). Indeed, Ms Grover was explicit in saying that she would not be prepared to allow transgender women to access the Giggle App, on the premise that she does not recognise transgender women as women. The Court said that:

"…the purported condition was not facially neutral but overly discriminatory and therefore not capable of being a "condition" for the purposes of indirect discrimination."

Secondly, the Full Court rejected the primary Judge's reasoning that there could be no direct discrimination unless Ms Grover knew of Ms Tickle's gender identity (as opposed to simply believing Ms Tickle looked, and therefore was, a man).

The Court considered that a person's "gender identity" is defined by the SD Act in terms of a person's "*identity, appearance or mannerisms or other gender-related characteristics*". That is, gender identity is defined not simply by how someone identifies, but "*extends to how the person looks or behaves*".

Further, although direct discrimination on the ground of gender identity requires a person to act "*by reason of*" their gender identity, this does not mean that one must show that a person had the "*subjective intention or motive*" to act in that way. To mandate actual knowledge would be to require an aggrieved person to have disclosed their gender identity to the perpetrator, or otherwise burden them with proving such knowledge, both of which would undermine the statutory object of eliminating gender identity discrimination.

Accordingly, it was sufficient that Ms Grover was "*subjectively motivated by Ms Tickle having characteristics appertaining to, or imputed to, transgender women*", amidst her exclusion of non-cisgender women from the Giggle App.

Finally, in establishing that Ms Tickle had been subject to direct discrimination, the Full Court held that for the purposes of section 5B(1) of the SD Act, the relevant comparator for Ms Tickle's differential treatment was a cisgender female, rather than a cisgender male.

An essential element of direct discrimination is that the aggrieved person was treated less favourably than, in circumstances that are the same or are not materially different, another person who has a different gender identity. Accordingly, the Court needed to determine the appropriate comparator to Ms Tickle, who did not exhibit the same gender identity attributes.

Giggle for Girls and Ms Grover argued that the proper comparator was a cisgender man. On this argument, Ms Tickle would have been unable to establish that she was treated less favourably, as a cisgender man would have similarly been excluded from the Giggle App.

In contrast, Ms Tickle argued that the appropriate comparator was a cisgender woman, and that the criterion of less favourable treatment would be made out because a cisgender woman would not have been excluded from the Giggle App as she was. That is, because cisgender women typically do not exhibit male traits and characteristics, a cisgender woman would have been (and indeed, were) permitted to use the Giggle App.

Therefore, in the context of determining the appropriate comparator, the question arose as to whether Ms Tickle was considered to be a "man" or a "woman". It is important to note that "sex" is the subject of a separate prohibition against discrimination in section 5 of the SD Act, and was not pleaded by Ms Tickle. Ms Tickle was excluded on the ground of her appearance, "*with or without regard to her designated sex at birth*". However, in determining who the relevant comparator was, the Court considered the concept of "sex" within the SD Act, noting the varying arguments made by the parties as to what "sex" Ms Tickle was.

With reference to amendments to the SD Act in 2013, the Court said that there was a strong suggestion that Parliament intended to recognise sex as a changeable concept. The Court also considered the ordinary usages of "woman" and

"female", particularly in circumstances where a person had undergone gender affirming surgery, before concluding that Ms Tickle was a "woman" within the ordinary meaning of that expression. This approach was said to be consistent with the intention of the 2013 amendments, which sought to overcome the "*discriminatory mischief*" which arose from the "*treatment of transgender people in accordance with their assigned sex at birth, rather than their gender-related self-identification*".

Justice Perry further reasoned, in any event, that a cisgender male would not be the appropriate comparator as they would not be subject to "*circumstances that are the same or are not materially different*". Unlike a transgender or cisgender woman, a cisgender man would not be seeking access to the Giggle App "*on the basis of a bona fide purpose or belief that he was entitled to be admitted*" pursuant to his "*self-identification as a woman*". In the proceedings, those were held to be the relevant "circumstances" for the purposes of establishing unfavourable treatment under the SD Act.

Reliance on "special measures" exceptions not accepted

Ms Grover and Giggle for Girls sought to rely upon section 7D(1)(a) of the SD Act to justify any exclusion of Ms Tickle, as a transgender woman, from the Giggle App. They argued that this constituted a special measure taken for the purposes of achieving substantive equality between *men and women*.

The difficulty with this proposition, if accepted, was that it would have led to the impairment of equality by a different group or subgroup. The Court adopted an example given by the Sex Discrimination Commissioner (who appeared as a friend of the Court), that this would allow a women-only swim class to exclude lesbians, or perhaps a landlord concerned about women being locked out of the rental market to reserve certain high-demand apartments for female tenants, but exclude all breastfeeding women.

The Court also considered that the particular exception contained within section 7D "*only really works in the context of an Act prohibiting discrimination on a single ground or a closely related set of grounds*". Put another way, a special measure to achieve equality between men and women could theoretically permit men to be disadvantaged as compared with women in the context of a claim for unlawful *sex* discrimination. However, it cannot similarly be used to avoid liability for discrimination against persons for breach of *gender identity* discrimination provisions, which are contained under a different head of discrimination.

Accordingly, the Full Court held that Ms Tickle was treated less favourably than a cisgender female would have been treated, in the same or similar circumstances, by reason of characteristics, being male facial features, which appertain to or are imputed to transgender women. Ms Tickle was awarded $12,000 in general damages, and aggravated damages in the sum of $8,000 for Ms Grover's "*gratuitous, disrespectful and unnecessary*" conduct.

Response to this decision

Strictly speaking, this case should not be controversial, as it merely reflects the broad intent of the legislation which was sought to be achieved by changes to the SD Act in 2013.

Despite this, Federal opposition leader Angus Taylor has pledged to amend the SD Act, including by changing the SD Act so that the terms "man" and "woman" are defined strictly by reference to the sex of an individual at birth. These changes would, if made, be reinforced by:

- introducing a definition of "sex" which explicitly references a person's sex chromosomes and biological features present at birth, and excludes psychological, social, chosen, or subjective experiences of gender identity;
- amending the definition of "gender identity" to provide that it is self-classified and to remove reference to "*designated sex at birth*";
- amending the definition of "intersex status" so it refers to variations within the male or female categories; and
- reinstating references to "*opposite sex*" rather than "*different sex*".

On 25 May 2026, Nationals MP Alison Penfold introduced the *Sex Discrimination Amendment (Sex-based Rights) Bill 2026*, which she described as reflecting the "biological reality". In her second reading speech, Ms Penfold said:

The Federal Court ruling in Giggle v Tickle that sex is changeable exposed what many Australians already knew was a serious and growing problem in our law—women's sex based protections are no longer clearly guaranteed.

In addition to the changes foreshadowed by Mr Taylor, the Bill also seeks to introduce a new section 32A to provide an explicit protection for services, activities and spaces exclusively for women (such as accommodation, prisons, women's shelters, lavatories, sanitary facilities or changing rooms).

Whilst the expressed purpose for these legislative changes is to restore sex-based language and protect women-only

spaces, there is a real risk that these changes would erode transgender rights.

Key Takeaways

Although this case occurred in the context of the provision of a service, this case is nevertheless an important reminder for employers regarding how the courts will apply the test for direct discrimination in the context of gender identity discrimination.

Specifically, it means that subjective evidence about what a person knew about a person's gender identity will not be relevant. Simply being aware of someone's characteristics (being characteristics which may be imputed to or generally appertain to someone of a particular gender identity) may result in an employer engaging in unlawful direct discrimination.

The facts of this case are fairly unique, in that Ms Grover was clear in her intent to never permit transgender persons to use her Giggle App. However, it does serve as a useful reminder to employers to ensure that their employees receive appropriate training.

Disclaimer: This publication is for general information only and is not legal advice. You should seek specific legal advice for your own circumstances.