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Submissions of the Lesbian Action Group[1]

Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD1386 of 2024

Giggle for Girls Pty Ltd (ACN 632 152 071) and another
Appellants

Roxanne Tickle
Respondent

Sex Discrimination Commissioner
Intervener

Lesbian Action Group
Intervener

A. The issue

1. Does the *Sex Discrimination Act 1984* (Cth) (**SD Act**) confer dedicated protection on members of the female sex? In words more pertinent to the provision at hand, s 7D(1)(a): do the words "men" and "women" in that provision refer to biological sex, or to persons who identify with a gender that corresponds to a biological sex? This appeal must resolve that issue, because the Appellants contend that the Giggle App is a special measure "between … men and women" under s 7D(1)(a).

2. The trial judge found below that the concept of "sex" in the SD Act is not confined to its biological meaning: **TJ[55]-[61]**. This finding was then used to refute the Appellants' contention that the Giggle App was a special measure intended to achieve "substantive equality … between men and women": **TJ[85]-[86]**.

3. The issue is to be resolved in this way: under the SD Act, the words "sex", "men" and "women" is language that is used to confer protection on the biological sexes. The SD Act has established other, equivalent, protections for those who have a "gender identity," such that "equal protection and equal benefit of the law"[2] is afforded to both the sex and the gender identity classes. The trial judge failed to apply this distinction. The Appellants' appeal must proceed on the premise that the Giggle App is capable of being classified as a special measure pursuant to s 7D(1)(a), as it was a service dedicated to the female sex class.

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1 Information about the Lesbian Action Group, its objects of association, and the basis for its intervention in this proceeding, can be found in the affidavit of Katherine Dennis affirmed 3 April 2025.

2 SD Act, preamble.

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4. If the above proposition is not right, then women cannot establish special measures for their exclusive benefit, to the exclusion of men who identify as women. That cannot be so. And, as will be explained, the practical ramifications to the operation of the SD Act are far broader, and far more unreasonable.

B. The approach to resolving the issue

5. There is no common law, top-down starting point, as the trial judge has uncritically accepted: **TJ[55]-[56]**. The actual starting point is that, in statutory law, legislation is gender neutral.[3] The next step is to observe (as the High Court has) that gendered language falls to be interpreted within its own statutory setting.[4] The meaning of "woman" in one statute does not inform the meaning of "woman" in another statute: cf. **TJ[56]**.

6. What must be observed next is the importance of what is being interpreted here: the SD Act. It is not legislation concerning a mere singular issue, such as marriage or social security legislation. It is legislation that regulates the most important facets of the Australian way of life in pursuit of formal and substantial equality between its participants. It does not do so at all costs, as the many reservations and exemptions within it demonstrate. Since the 2013 amendments, the SD Act has extended its pursuit from equality of the sexes, into the pursuit of equality for those who have a sexual orientation, a gender identity, or an intersex status.

7. The pursuit of equality for and between these groups generates conflict between differing interests, as this proceeding ably demonstrates. When this occurs, Gleeson CJ's dicta in *Carr v Western Australia* applies.[5] The conventional, purposive approach to construction is of limited assistance. It is the text of the SD Act, according to such principles of interpretation that are able to provide rational assistance in the circumstances, that controls the outcome of construction. That outcome must bring about a reasonable and coherent operation of the SD Act,[6] and, given its breadth, should also bring about one capable of being applied by the various stakeholders of differing sophistication who come into contact with it. Construction must proceed according to the presumption that the same meaning is given to the same words appearing in different parts of a statute, such that all provisions of the SD Act are consistent with one another.[7]

8. An appeal to the SD Act's beneficial purpose, if made, must be treated with caution. The focus here is on the specific meaning of words, and a beneficial label obscures the task of finding the

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3 *Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ). For the federal statutory presumption of gender neutrality, see *Acts Interpretation Act* 1901 (Cth), s 23(a).

4 *AB v Western Australia* (2011) 244 CLR 390, [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

5 (2007) 232 CLR 138, [5]-[7] (Gleeson CJ); applied in *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, [40] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

6 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan and McHugh J), 58 (Kirby J).

7 *The King v Jacobs Group (Australia) Pty Ltd* (2023) 97 ALJR 595, [23], [25] (Kiefel CJ, Gageler, Gordon, Steward, Gleeson and Jagot JJ).

meaning of those words.[8] Such an approach is also antagonistic to achieving equality that is envisaged by the SD Act itself: it is one thing to say that the SD Act is beneficial legislation; it is another to use that observation as a device to construe the SD Act so that it prefers one protected class over another, and in a way that undermines the protections afforded to members of the female sex.

C. The text of the SD Act

9. An examination of the whole of the text of the SD Act confirms that dedicated protection to members of the female sex exists when the language "sex", "men" and "women" are used. The special measure in s 7D(1)(a) relied upon by the Appellants falls to be interpreted accordingly.

10. ***Definitions and legislative machinery.*** The classes of protected persons under the SD Act are denoted by reference to a sex, identity, orientation, status, or by gender-neutral nomenclature.[9] The differing language used to define each of these classes, in and of itself, suggests that there are different classes of persons singled out for protection. The different choices in language for each device also suggests that there are different interests between these classes.

11. There are two 'statuses': "intersex status" and "marital or relationship status."[10] Designating intersex persons as having a "status" conforms to the ordinary understanding that the intersex community does not comprise a third sex. The definition of "intersex status", itself, relies upon the binary biological meaning of a sex: by defining it by reference to "male" and "female" "physical, hormonal or genetic features."[11] This definition, in turn, suggests that there remains a sex class for the purposes of the SD Act, and this class comprises males and females.

12. The definition of "sexual orientation," too, relies on the word "sex."[12] The definition conforms to the ordinary understanding that sexual attraction is oriented towards a biological sex.[13] "Sexual orientation" is not oriented towards an "identity" or a "status". As the UK Supreme Court in *For Women Scotland* observed: "a person with same sex orientation as a lesbian must be a female who is sexually oriented towards (or attracted to) females, and lesbians as a group are females who share the characteristic of being sexually oriented to females."[14] As people are not sexually oriented towards "identity" or a "status", "[p]eople are not sexually attracted towards those in

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8 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, [32]-[33] (French CJ, Kiefel, Bell and Keane JJ).

9 "Person" and "employee" are the primary methods of the lattermost device. See for e.g. SD Act, ss 4A, 7A (discrimination on the grounds of family responsibilities), s 6 (discrimination on the ground of marital or relationship status).

10 SD Act, s 4 (meaning of "intersex status" and "marital or relationship status").

11 SD Act, s 4 (meaning of "intersex status").

12 SD Act, s 4 (meaning of "sexual orientation").

13 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 483 (Lockart J): "[h]omosexuals are persons who are sexually attracted to persons whom they know are of the same biological sex of themselves." See too *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [205]-[207] (the Court).

14 *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [206] (the Court).

possession of a certificate."[15]

13. "Gender identity" is a composite phrase. It eschews the language of "sex" and also "status". Its definition all but confirms that it is concerned with the outward identity of a person, and that no binary biological concept is intended to be conveyed by it. It also confirms the corollary: that "sex" under the SD Act *is* binary and biological. A person's gender identity relates to appearance, mannerism or other characteristic, and that is so regardless of the person's designated sex at birth.[16] "Sex" must therefore be different from "identity." The legislature could have defined this class as having a "sex identity", but it did not.

14. ***The discrimination protection definitions*.** With the protected classes so defined, the SD Act goes on to define discrimination on the ground of sex (s 5), sexual orientation (s 5A), gender identity (s 5B), intersex status (s 5C) and marital or relationship status (s 6). Each of these provisions is crafted in near exact terms, and no class is afforded lesser protection.

15. Importantly, s 7 (pregnancy discrimination) and s 7AA (breastfeeding discrimination) confer protections on a "woman" who is pregnant or who is breastfeeding. The use of "woman" in these sections makes it abundantly clear that a sex class subsists, and that a "woman" under the SD Act has its biological meaning. Women, not men, give birth. Women, not men, breastfeed. A transman – that is, a member of the female sex who has a male gender identity – is capable of giving birth and capable of breastfeeding, and is protected by these provisions. They are protected by these provisions by virtue of their female sex. Holding otherwise would result in a troubling lacuna, and an objectively unintended one given the reliance on a woman's biological sex in both provisions.

16. ***Special measures to achieve substantive equality*.** The structure of s 7D (special measures) must be noted next. Akin to ss 7A and 7AA, subsections (c), (d) and (e), use the word "women" when addressing special measures relating to pregnancy, potential pregnancy and breastfeeding. Section 7D then separately addresses special measures with respect to gender identity, intersex status and sexual orientation, in (aa), (ab), and (ac). Given that setting, the special measure provision in (a) concerning "men and women" cannot be interpreted differently from the special measures in (c), (d), and (e) so as to result in there being different types of women for different types of special measures. The presumption against that interpretation is strong.[17]

17. ***The application of the discrimination protections to areas of public life.*** Divisions 1 and 2 of Part II of the SD Act pick up and apply the above concepts of discrimination to various fields of public life: work, education, goods and services, accommodation, land dealings, clubs, the administration of commonwealth law and programs, and requests for information.[18] These provisions afford an equal protection to the defined classes by using a common textual formula.

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[15] *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [204] (the Court).

[16] SD Act, s 4 (meaning of "gender identity").

[17] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21, [25] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ).

[18] SD Act, ss 14-27.

Discrimination is prohibited "on the ground of … sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities." This textual device ensures that each protected class is afforded no lesser protection. This device, in turn, confirms the futility of diluting the distinction between the sex and gender identity classes.

18. Reservations to this textual device exist in particular situations where the legislature has considered it warranted. The majority of these reservations are reserved for the "sex" class, and appear in:

    (a) Section 21(3) (education): educational institutions can discriminate by conducting education for the single "sex". This allows, for example, the ability of a parent to send their daughter to an all-girl school.

    (b) Section 23(3)(c) (accommodation): charitable accommodation providers can discriminate by providing accommodation for persons of one "sex". This allows, for example, for the operation of domestic violence shelters and rape crisis centres that are dedicated to women.

    (c) Section 25(3) and (4) (clubs): clubs can discriminate by offering membership to the one "sex", or limit benefits to a single "sex" if such benefits cannot be enjoyed simultaneously by "both men and women". This allows, for example, the opportunity for lesbians to gather together to share in their culture and to find partners.[19]

    (d) Section 27(2) (requests for information): requestors of information have a defence if their request is for medical information that concerns a medical condition experienced "by persons of that sex only." This allows, for example, medical practitioners to obtain information from female patients in the screening or diagnosing cervical cancer.

19. The nature of these sex-based reservations to the prohibition against discrimination not only confirms the SD Act's continuation of dedicated protections for the sex class, but also the importance of maintaining the distinction.

20. ***The prohibition on sexual harassment.*** Division 3 of Part II prohibits sexual harassment across the same fields of public life, using two definitional devices: "sexual harassment" and "harassment on the ground of sex."[20] Both definitions, in turn, depend upon a non-exhaustive consideration of circumstances that can include the victim's sex, sexual orientation, gender identity, or intersex status. The definitions are then used to prohibit harassment in most of the same fields of public life in a similar fashion to Div 2.[21] The structure of both definitions again confirms the SD Act's equal protection to each class, and, in turn, the futility of confusing the boundaries drawn between the

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[19] Albeit a haphazard and highly limited opportunity, because the definition of "club" only extends to an association of less than 30 persons, who also sell or supply liquor, that also have gathered for specified purposes: see s 4 (definition of "club").

[20] SD Act, ss 28A and 28AA.

[21] SD Act, ss 28B-28L.

sex and gender identity classes.[22]

21. ***Exemptions*.** It is the exemptions in Div 4 of Part II where the distinction between sex and gender identity becomes most prominent, and where it becomes most important.

    (a) Section 30 permits "sex" discrimination in the form of genuine occupational requirements where they relate to the fitting of clothing, the entry into spaces whilst people are in a state of undress, body searches, entry into lavatories, the provision of accommodation, artistic performance, or the physical attributes possessed by a sex.

    (b) Section 31 permits discrimination against a "man" on the ground of "his sex" that necessarily arises from privileges that are given to a "woman" in connection with her pregnancy, childbirth or breastfeeding.

    (c) Section 32 permits discrimination in the provision of services the nature of which can only be provided to members of "one sex".

    (d) Section 34(2) permits discrimination engaged in by an educational institution in the form of providing accommodation to students of "one sex".

    (e) Section 35(1) permits discrimination on the basis of "sex" in residential care facilities that involve the care of children.

    (f) Sections 41 to 41B permit discrimination on the basis of "sex" in insurance and superannuation products that is drawn from actuarial and statistical data.

    (g) Section 42 permits discrimination on the grounds of "sex, gender identity or intersex status" from competitive sporting activity where strength, stamina or physique is relevant.

22. These exemptions can be compared to others which do not depend on "sex" for their definition, concerning charitable bodies, religion, religious educational institutions, voluntary bodies, and acts done with statutory authority.[23] As none of these exemptions necessarily turns on the female condition, none of them is defined by reference to the concept of "sex".

D. The trial judge has erred

23. The reasoning below, however, practically means that there is no longer a distinction between the sex and gender identity classes.

24. The conclusion that a biological man who identifies as a woman is a "woman" under the SD Act has innumerable unintended consequences. Schools are to admit biological boys into all-girl

[22] It is only the protection against hostile work environments that is sex specific: see s 28M. The provision does not expressly refer to sexual orientation, gender identity or intersex status in its terms. This does not deny the potential for sexual orientation, gender identity or intersex status to become relevant in any given case of a hostile working environment, noting the breadth of the protection in s 28M and the potentiality for any relevant circumstances that might bring about such hostility.

[23] SD Act, ss 36-40.

schools (s 21(3)). Charitable accommodation providers are to admit biological men into domestic violence shelters and rape crisis centres (s 23(3)(c)). Lesbians are to admit biological men into their clubs (s 25(3)). Employers are to allocate the duties of clothing fitting, body searches, and entering into a women's lavatory to biological men (s 30). The artistic performance of a woman is to be depicted by a biological man (s 30). Biological men are to be afforded privileges in connection with their pregnancy, childbirth and breastfeeding (s 31). Biological boys are to reside in the girl's dormitory at school (s 34(2)). Vulnerable or disabled girls residing in residential care are to be cared for by biological men (s 35(1)). Actuarial data applied favourably to women in insurance or superannuation policies are to be applied to biological men (ss 41-41B). "Sex only" medical conditions are unable to be identified, and both men and women are affected by cervical cancer (s 27(2)). Each of these propositions varies in impossibility, irrationality or unreasonableness. None of them can be said to be the product of a reasonable interpretation of the words of the SD Act.

25. The chain of reasoning relied upon by the trial judge at **TJ[55]-[62]** is wrong, at every turn. Contrary to **TJ[55]**, there is no single, uniform meaning of the word "woman" that encompasses a transwoman.[24] Dictionary definitions are against that proposition.[25]

26. State and territory birth registration legislation does not alter matters: cf. **TJ[55]**. This legislation, as the High Court observed in *Norrie*, effects a legal deeming.[26] An altered birth certificate issued to a transgender person deems that person to be a member of the certified sex "for the purposes of" but "subject to" the legislation of the state or territory in question. This is an almost uniform stipulation.[27] None of this legislation effects a legal deeming that is capable of being applied to the SD Act (and such an attempt would be ineffective in any event). Deeming provisions, by their nature, are interpreted strictly, and only for the purpose for which they are created.[28] The only purpose in s 58(1) of the *Births, Deaths and Marriages Registration Act 2023* (Qld) is to deem Ms Tickle's sex "for the purposes of, but subject to, a law of the State" of Queensland. This deeming provision does not permit the conclusion drawn at **TJ[62]**.

27. Contrary to **TJ[56]**, this Court in *SRA* did not find that "sex can refer to a person being male, female, or another non-binary status"; nor did it find that that phrase "encompasses the idea that a person's sex can be changed". The Court in *SRA* concluded that the words "woman" and "female"

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[24] *Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 469 (Black CJ), 485 (Lockart J).

[25] Macquarie Dictionary Online (Pan MacMillan Australia, 2025), definition of "woman"; Oxford English Dictionary (online, 2025) definition of "woman".

[26] *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [19] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[27] *Births, Deaths and Marriages Registration Act 1995* (NSW), ss 32I; *Births, Deaths and Marriages Registration Act 1996* (Vic), s 30G(3); *Births, Deaths and Marriages Registration Act 2023* (Qld), s 58(1); *Births, Deaths and Marriages Registration Act 1988* (WA), s 36S; *Births, Deaths and Marriages Registration Act 1999* (Tas), s 28D(1); *Births, Deaths and Marriages Registration Act 1996* (NT), s 28H; *Births, Deaths and Marriages Registration Act 1997* (ACT), s 29D(1). The deeming is cast in different language in South Australian legislation: *Births, Deaths and Marriages Act 1996* (SA), s 29U.

[28] *FCT v Comber* (1986) 10 FCR 88, 96 (Fisher J); *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, [55] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

in the *Social Security Act 1947* (Cth) included a reference to a post-operative transwoman, but did not go as far as extending to a pre-operative transwoman.[29] Black CJ stressed (as the High Court would later also find[30]) that his conclusion was one of construction of the statutory text before him.[31] He did not have benefit of the "gender identity" definition that is now usefully supplied in the SD Act. Nor did his Honour have the benefit of the "gender identity" definition when he would later observe in *AB* that: "*there being no contrary intention*, the applicant [a post operative transwoman] is a woman within the meaning of the [SD Act] (our emphasis)."[32]

28. Contrary to **TJ[57]**, the determination of sex under the SD Act does not "take into account a range of factors, including biological and physical characteristics, legal recognition and how they present themselves and are recognised socially". Nowhere in the SD Act can one find support for this sweeping statement. In truth, it is the definition of "gender identity", not the phrases "sex" and "woman", that brings into account the matters that are referred to by his Honour in this paragraph. "Gender identity", it is to be recalled, is primarily defined by reference to three matters: identity, mannerisms and characteristics.[33]

29. The principle expressed in the *Commissioner of Stamps* has the opposite effect from that described in **TJ[58]-[59]**. The addition of sexual orientation, gender identity and intersex protections by the 2013 Amendments produced clearly identified classes for protection, each of which can now be devised according to the terms of the SD Act as amended. The amendments avoided the need to strain for meaning in the initial limited text, and, as the judgments in *SRA* and *AB* exemplified, a straining of meaning was liable to produce incomplete results. With the 2013 Amendments so enacted, the classes of those protected are clear, there are equal and distributive protections, and no piecemeal result of the kind wrought by *SRA* and *AB* is possible. There is thus no need to read sex-based protections in the way his Honour did.

30. The removal of the definitions of "man" and "woman" in s 4 by the 2013 Amendments is suggests a change in meaning (**TJ[59]**), but this places far too much reliance on what a definition in a statute does. Definitions are drafting devices, not substantive enactments of law. Definitions are read into substantive enactments for the purpose of construing the substantive enactment.[34] As has been demonstrated in Part C above, the 2013 Amendments did nothing to change the substantive enactments that protected members of the female sex.

31. The passage of the explanatory memorandum relied upon at **TJ[60]** is wrong. As has been explained above, gender identity discrimination is provided on the same terms as sex

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29 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 474 (Black CJ), 493-494 (Lockart J), 496 (Heerey J).

30 *AB v Western Australia* (2011) 244 CLR 390, [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

31 *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 473-474 (Black CJ).

32 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, [4] (Black CJ).

33 SD Act, s 4 (meaning of "gender identity"). The words "identity", "mannerisms" and "characteristics" are not further circumscribed by definition in the SD Act.

34 *Qantas Airways Limited v Transport Workers Union of Australia* (2023) 278 CLR 571, [80] (Gordon and Edelman JJ); *Kelly v The Queen* (2004) 218 CLR 216, [103] (McHugh J).

discrimination under the SD Act. No "protections" are capable of being denied to a transwoman on a distributive reading of the protections in the SD Act. This is not the first time the explanatory memorandum misrepresented the law.[35] Nor is it the first time such a misrepresentation has been made by the department responsible for administering a discrimination statute.[36] The words of an explanatory memorandum do not displace the meaning of the statutory text, nor are they a substitute for the text.[37] **TJ[60]** offers no clarity as to precisely how the explanatory memorandum was capable of assisting construction for the purposes of s 15AB(1)(a) or (b) of the *Acts Interpretation Act 1901* (Cth).[38] In any event, its weight diminishes given the competition of interests and the resulting importance of the text, as s 15AB(3)(a) recognises.

E. The Lesbian Action Group's interpretation of the SD Act conforms to CEDAW

32. An interpretation of the SD Act that retains dedicated protection for members of the female sex is consistent with the treaty which it seeks to enact, the *Convention for the Elimination of All Forms of Discrimination Against Women* (**CEDAW**).[39] CEDAW is scheduled to the SD Act, and a stated object of the SD Act is to give effect to certain provisions of it.[40] Thus, the Court's task is to endeavour to adopt a construction of the SD Act that conforms to CEDAW.[41]

33. As was noted by this Court in *AB*, CEDAW is a convention that is concerned to eliminate discrimination *against women*; it is not concerned with discrimination per se.[42] Most relevantly, Art 4(1) of CEDAW provides that the "[a]doption by States Parties of temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention…". Article 4(1) has been statutorily enacted in s 7D(1)(a), and both are referring to the male and female sex classes.

34. CEDAW is not concerned with transwomen: its terms unmistakably deal with the discrimination experienced by the female sex. Stipulations concern the female biological condition: reproduction (Art 11(f)), pregnancy and confinement (Arts 4(2), 11(2a), 11(2d), 12(2)), family planning (Arts 10(h), 12(1), 14(2b)), and the spacing of children (Art 16(1)(e)). Other stipulations concern the female social condition as experienced internationally: sex trafficking and prostitution (Art 6), equal

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35 *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, [72] (Gageler J).

36 *Purvis v New South Wales* (2003) 217 CLR 92, [90]-[92] (McHugh and Kirby JJ).

37 *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, [70] (Gageler J); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).

38 Cf. *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, [68]-[72] (Gageler J).

39 Opened for signature on 1 March 1980, 1249 UNTS 13 (entered into force on 3 September 1981).

40 SD Act, s 3(a).

41 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ).

42 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, [14] (Black CJ), [81], [88] (Kenny J), [121] (Gyles J). At TJ[162]-[180], the trial judge records a series of troubling arguments advanced below about the effect of CEDAW Committee guidance and reports have on the force of *AB*. These arguments are misguided. None of this material is relevant to the construction of the SD Act, nor CEDAW, in this Court: *Maloney v The Queen* (2013) 252 CLR 168, [24] (French CJ), [134] (Crennan J), [173]-[176] (Kiefel J), [235] (Bell J). In any event, the CEDAW Committee has confirmed that CEDAW's reference to sex is biological: CEDAW Committee, General Recommendation 28 on the core obligations of States Parties under article 2 of the CEDAW, UN Doc CEDAW/C/GC/28 (16 December 2010), paragraph 5.

remuneration (Art 11(1d)), maternity leave and child-care (Art 11(2), forced marriage (Art 16(1)(b)), child marriage (Art 16(2)), franchise and participation in public life (Art 7), and equal legal capacity (Art 15(2)-(4)). Nowhere can one find the parties to CEDAW contemplating and accommodating the unique needs and interests of transwomen.

35. The SD Act must remain reasonably capable of being considered appropriate and adapted to implementing CEDAW, and must avoid being characterised as substantially deficient in its implementation.[43] A construction that undermines sex-based protections that are afforded to women conflicts with the objects and the terms of CEDAW, whilst one that maintains a sex distinction does not.

F. Conclusion

36. Sex-based protections are critical to a sensible and equal operation of the SD Act. For lesbians in particular, undermining them denies autonomy, dignity and safety. There remains "dangers in a male capable, or giving the appearance of being capable, of procreation being classified by the law as a female,"[44] despite the best intentions of gender ideology. It is the lived experience of lesbians to be confronted by autogynephilic[45] men seeking lesbian attention, as a means of generating sexual gratification for themselves. It is now commonplace for lesbians to be pressured into having sex with transwomen, and to face risk of social isolation if they do not agree with that very concept.[46] This is unacceptable.

37. Returning to s 71D(1)(a), the appeal must proceed on the basis that the Giggle App is intended to be used by women (members of the female sex) to the exclusion of Ms Tickle (a member of the male sex). A text-driven, consistent and coherent construction of the SD Act produces this result. Construing the SD Act in this way properly accommodates the needs of members of the female sex, and does not diminish any protection afforded to Ms Tickle and the broader transgender community by the SD Act. This community, like members of the female sex, can establish their own special measures: s 7D(1)(ab).

7 JULY 2025

LEIGH HOWARD
DR MEGAN BLAKE

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[43] *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 487, 489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Acts Interpretation Act* 1901 (Cth), s 15A.

[44] *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 495 (Lockart J).

[45] Autogynephilia is the condition of a man becoming sexually aroused by the idea or image of himself as a woman: Diagnostic and Statistical Manual of Mental Disorders (5th ed, 2013) 702-704.

[46] C Lowbridge, "The lesbians who feel pressured to have sex and relationships with trans women", BBC Online, 26 October 2021 <https://www.bbc.com/news/uk-england-57853385> (accessed 4 July 2025). The Court in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 at [207] notes evidence of the "chilling effect" on lesbians who are no longer using lesbian-only spaces because of the presence of transwomen.