

TICKLE V GIGGLE – NO LAUGHING MATTER

TICKLE V GIGGLE FOR GIRLS PTY LTD
(NO 2) [2024] FCA 960 (23 AUGUST 2024)
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ABSTRACT

At the time of writing, Supreme Courts in both the United Kingdom¹ and United States² are considering cases which raise the questions of ‘what is a woman’, and whether it is possible to change sex. This follows on from a US Presidential election in which Democratic Party support for extreme trans rights was a key distinguishing feature highlighted by the Trump campaign – a campaign which ultimately secured a landslide victory for the Republican Party. The Australian case of *Tickle v Giggle* is similarly destined to be remembered, not only for its amusing name, but also because of its significance in tackling these same questions. It is a case that records a truly extraordinary episode in the history of Australian jurisprudence, and for society generally. The Federal Court judgment in *Tickle v Giggle* holds that, for the purposes of discrimination law, sex is not confined to biology, is not binary in nature and can be changed – and that as a result, women must allow males who claim to be women into their previously safe spaces and services. The decision acknowledges Roxanne Tickle’s right to access the social media application, Giggle for Girls. Uncritically accepting caselaw recognising change of sex stretching back over 30 years, Bromwich J. effectively adopts the submissions of the Sex Discrimination Commissioner who appears amicus curiae. The court fails to accept the relevance of the expert and lay evidence filed on behalf of the Giggle team, or to reflect on the practical implications of this decision. Arguments as to the lawfulness of special measures to exclude men with the purpose of advancing women’s equality hold no sway as it is accepted by

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¹ For Women Scotland Ltd v The Scottish Ministers, For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent) - UK Supreme Court (accessed 9 December 2024).

² United States v. Skrametti, United States v. Skrametti - SCOTUSblog (accessed 9 December 2024).

Bromwich J. that Tickle is a woman – and therefore cannot be found to have been discriminated against as a male. Instead, Tickle is found to have been discriminated against on the ground of gender identity. It is not established that the Giggle team knew of Tickle’s gender identity and as a result there is no finding of direct discrimination. Instead, the Court finds that imposing a condition that individuals should appear visibly female constitutes indirect discrimination on the ground of gender identity. The test as to reasonableness is not applied and various constitutional arguments also fail to gain traction.

“Law is supposed to reflect reality and in reality this person is a male. So you can make a court believe something I suppose, but you are not going to make me believe it. So to be punished for acknowledging biological sex I think puts all Australians at risk of being punished for having human instincts.”

Sall Grover, Respondent in Tickle v Giggle case during interview following the decision on A Current Affair, 24 August 2024

The acceptance that Ms Tickle is correctly described as a woman . . . is legally unimpeachable.

Justice Bromwich, citing Australian Human Rights Commission, 5 December 2021, para 63

OVERVIEW

Having experienced sexual harassment and assault during her decade in Hollywood as a screenwriter, Sall Grover decided, with the support of her family, that it would be therapeutic to set up a social media app exclusively for women.³ The app was specifically designed to enable women to meet safely online and network free of male harassment. Shortly after its launch, the app, ‘Giggle for Girls’, was subjected to massive attack and sabotage by male users who attempted to register and posted multiple one-star reviews. Despite this Giggle managed to accumulate about 20,000 users by 2021.⁴

Roxanne Tickle had various genital surgeries in October 2019. In accordance with Queensland law, Tickle’s birth certificate was subsequently reissued with a

³ *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 [90].

⁴ *Tickle* (n1) [98].

female sex marker on 18 September 2020.⁵ In 2021 Tickle registered as a user with the Giggle app, having passed the Kairos AI gender detection system - only to be subsequently blocked and excluded some months later. This block resulted from a routine manual review of user profiles, likely conducted by Ms Grover herself as CEO of Giggle, during which Tickle was identified as male.⁶

Receiving no response to emails and calls to Grover,⁷ Tickle proceeded to lodge a complaint against Sall Grover and Giggle Pty Ltd with the Australian Human Rights Commission ('the Commission') on 5 December 2021. Tickle alleged discrimination on the ground of gender identity in the provision of goods and services (arising from the joint operation of sections 5B and 22 of the *Sex Discrimination Act 1984*).

As it became apparent that there was no prospect of conciliation, the Commission terminated the complaint, leaving Tickle with the option of taking the matter to the Federal Court, where the claim was heard by Justice Bromwich during a 3 day hearing of the matter in April 2024. After four months of deliberations, Bromwich J. delivered his judgment on 23 August 2024.

COURT FINDS INDIRECT DISCRIMINATION

Justice Bromwich found that it was not established by the evidence that Ms Grover was aware of the applicant's status as a transgender person at the time the decision was taken to block Tickle's use of the app. Accordingly, Justice Bromwich found that direct discrimination on the ground of gender identity was not proven.⁸ Her lack of knowledge of Tickle's gender identity was a complete answer to the claim of direct discrimination.⁹

Instead, Bromwich J. reasoned that Ms Grover had imposed a condition 'of needing to be appear to be a cisgendered female in photos submitted to the Giggle app' and that this 'had the effect of disadvantaging transgender women who did not meet that condition, and in particular Ms Tickle.'¹⁰ Bromwich J. constructs the condition himself using terminology ('cisgendered') expressly rejected by the respondents and accordingly at odds with the evidence given. On this basis, Bromwich J. made a finding of indirect discrimination – despite observing that this provision had not been properly pleaded by Tickle's legal representatives.

⁵ *Tickle* (n1) [88].

⁶ *Tickle* (n1) [110–117], [125–126].

⁷ *Tickle* (n1) [118–122].

⁸ *Tickle* (n1) [133].

⁹ *Tickle* (n1) [49].

¹⁰ *Tickle* (n1) [134], [47–48].

Both the language and reasoning adopted by Bromwich J. demonstrate an uncritical embrace of the gender identity ideology propagated by both Tickle and the Sex Discrimination Commissioner. For example, Bromwich J. acknowledges at the outset that the term ‘cisgender’ does not appear in the discrimination legislation and is opposed by the respondents, and yet proceeds to use this term no less than 30 times in his judgement, without additional reflection.¹¹

COURT FAILED TO APPLY REASONABLENESS TEST

Throughout the judgment, Bromwich J. makes fair criticism of the pleadings and conduct of the proceedings by both parties’ legal representatives. Specifically, he complains that Tickle’s pleadings do not coherently distinguish between direct and indirect discrimination,¹² but also notes that the respondents failed to identify this shortcoming or to object to the amendment of the pleadings in this regard.¹³ Despite this failure to correctly plead section 5B(2), the Judge independently of the parties works to correct this deficiency in the pleadings and evidence, to ultimately support his finding of indirect discrimination.¹⁴

However, the court is less helpful when it comes to repairing the shortcomings of the respondents’ case. A claim of indirect discrimination enlivens section 7B which provides a defence where a ‘condition, requirement or practice is reasonable in the circumstances.’ Pursuant to section 7C, the burden of satisfying this reasonableness test rests on the respondents.¹⁵ No doubt because they had perceived the case as one of direct discrimination, the respondents failed to plead a section 7B defence and did not rely upon it in their submissions.¹⁶ Bromwich J. does not provide the same level of guidance and latitude to the respondents to assist their case, despite the fact that they could have won the case by default had he taken an equally rigid approach to the failures of Tickle’s legal team.

The evidence in the proceedings provided ample basis for the argument that the condition of excluding males did not result in any real disadvantage to Tickle, who had in fact conceded in evidence that he made little use of the app, which he found boring¹⁷. Furthermore, the multiple affidavits tendered into evidence by the respondents, which were dismissed in what some might consider a cavalier fashion

¹¹ *Tickle* (n1) [4].

¹² *Tickle* (n1) [41].

¹³ *Tickle* (n1) [43].

¹⁴ *Tickle* (n1) [46].

¹⁵ *Tickle* (n1) [36].

¹⁶ *Tickle* (n1) [37].

¹⁷ *Tickle* (n1) [113].

by Bromwich J., provided extensive support for a finding that the condition imposed was proportionate and reasonable to ensure reliably safe single sex spaces for women, free of male harassment.

SPECIAL MEASURES DO NOT PROVIDE A SHIELD

Instead of pleading section 7B, the respondents relied heavily on section 7D of the *Sex Discrimination Act 1984* (Cth) which provides an exception from the discrimination provisions for special measures intended to achieve substantive equality. This section enacts Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and makes provision for affirmative action provisions or 'temporary measures' – in other words, discriminatory provisions that are designed to help disadvantaged groups achieve substantive equality.¹⁸

However, although Bromwich J. accepts that the Giggle app may constitute a special measure for the exclusion of 'cisgender' men, he does not accept its use as a shield to guard against claims of discrimination on other grounds, such as gender identity.¹⁹ Since Bromwich J. accepts that trans women fall into a category of woman, he cannot countenance the respondent's argument that Tickle was excluded because, and only because, he was a male.

Interestingly, Bromwich J. does not seem to consider whether there could be a claim made for a special measure on behalf of 'cisgender' women to exclude those who identify as trans women. This is perhaps because these 'cisgender' women are regarded as the more advantaged group, even though in reality their spaces and services are entirely excluded from funding and acceptance if they do not agree to embrace gender identity ideology.

For some inexplicable reason section 32 of the *Sex Discrimination Act 1984* (Cth) was not pleaded and receives no mention in the judgment. This section states that the discrimination provisions do not apply to: *the provision of services the nature of which is such that they can only be provided to members of one sex*. One would think that this provides specific protection of the kind needed by the respondents, but of course this provision is rendered inoperable by Bromwich's finding that Tickle is a female.

COURT FOUND SEX IS CHANGEABLE

Bromwich J. uncritically accepts submissions of the Sex Discrimination Commissioner that:

¹⁸ *Tickle* (n1) [83].

¹⁹ *Tickle* (n1) [85–86].

- i). First, sex is not confined to being a biological concept;²⁰
- ii). Second, sex can refer to a non-binary status and can be changed;²¹
- iii). Third, determination of sex can take account of legal and social recognition;²² and
- iv). Fourth, the sex discrimination provisions in section 5 must now be read in the context of amendments to the Sex Discrimination Act in 2013 that added gender identity protection provisions.²³

In contrast, Bromwich J. finds the expert reports relied upon by the respondents as to the immutable nature of sex, from both scientific and philosophical perspectives (namely evolutionary biologist Colin Wright and academic Kathleen Stock respectively), to be of no use to the respondent's case.²⁴ He also rejects journalist and author Helen Joyce as an expert, despite her credentials - having authored the book *Trans: When Ideology meets Reality* - on the basis that she has no formal qualifications of relevance. Bromwich J. states: 'she is entitled to her opinion, but it is of no assistance to the respondents' case, or to this Court.'²⁵ Perhaps we should be grateful for this small concession in a context where the authorities are increasingly indicating that there is no entitlement to an alternative opinion on this subject, and that dissent can constitute hate speech.

The respondents also tendered fourteen affidavits of lay opinion, often on the crucial importance of female spaces, and these were similarly dismissed by the court as having no bearing on the matter. There was no cross-examination of any of the respondents' experts or lay witnesses.

Instead, Bromwich J. relies on case law going back over 30 years which he states has broadened the concept of sex, leading him to claim 'the acceptance that Ms Tickle is correctly described as a woman . . . is legally unimpeachable'.^{26,27} Strangely Bromwich J. does not enter into his own detailed analysis of the case law in question, despite it being at the crux of the case. He simply accepts that the submissions of the Sex Discrimination Commissioner's propositions are 'grounded in logic and long-standing authority' and we are left curious as to whether he has an independent view on the authorities cited. Generally, jurisprudence requires courts to formulate

²⁰ *Tickle* (n1) [55].

²¹ *Tickle* (n1) [56].

²² *Tickle* (n1) [57].

²³ *Tickle* (n1) [58].

²⁴ *Tickle* (n1) [137–144].

²⁵ *Tickle* (n1) [147].

²⁶ *Tickle* (n1) [63].

²⁷ *Tickle* (n1) [216–220].

decisions made upon their own analysis of (for example) case law, and to form their own opinion. This opinion can be based in a review of expert opinion, or take expert opinion into account, but does not simply adopt expert opinion as its own.

Bromwich J. cites the 2013 amendments to the *Sex Discrimination Act 1984* (Cth) which not only introduced protections for gender identity but also removed the definitions of ‘man’ and ‘woman’. These ‘overt and deliberate’ changes also replaced all references in the legislation to ‘*opposite sex*’ with ‘*different sex*’ and were accompanied by an Explanatory Memorandum with commentary which Bromwich J. cites as fortifying his conclusion.²⁸

This decision may well cause many to reflect on the wisdom of Dickens when he wrote: ‘the law is an ass’. It seems that according to the Sex Discrimination Commissioner and Bromwich J. legal recognition is governed by the Red Queen phenomenon (‘it is because I say it is’) rather than scientific and biological reality (constituted by chromosomes). On this reasoning, the change on a birth certificate to state that a baby was born female, not male, is tantamount to a miraculous physiological transformation. One can only wonder if Bromwich J. would also accept the Earth as flat, if that were the conclusion to be drawn from unchallenged legal precedent. Mark Twain said ‘Never let the truth get in the way of a good story’. It can perhaps equally be said: ‘Never let reality get in the way of a good legal fiction.’

GENDER IDENTITY PROVISIONS NOT SUPPORTED BY CEDAW

The respondents argued that Tickle was excluded on the ground of sex rather than gender identity. Bromwich rejected this argument, accepting Tickle’s claim to be one of discrimination on the ground of gender identity pursuant to section 5B and not discrimination as a male pursuant to section 5 of the *Sex Discrimination Act 1984* (Cth).²⁹ Bromwich J. finds that Tickle is not claiming to have been treated less favourably than a man, but to have been wrongly treated *as if* a man.

A key defence of the respondents was to challenge the constitutional authority for the 2013 amendments to the *Sex Discrimination Act 1984* (Cth) which introduced section 5B and the protection of gender identity. The respondents argued that CEDAW does not extend its protections to gender identity only sex,³⁰ and therefore these amendments are not supported by the external affairs head of power under the Australian Constitution.³¹

²⁸ *Tickle* (n1) [60–61].

²⁹ *Tickle* (n1) [51].

³⁰ *Tickle* (n1) [157–161].

³¹ Article 51(xxix) Australian Constitution The Australian Constitution – Parliament of Australia (aph.gov.au) accessed 21 September 2024.

However, Bromwich J. finds that CEDAW is not engaged at all because that convention does not extend to protecting one category of women from discrimination by other women.³² Bromwich J. concludes that he does not need to make a finding on the meaning of sex or the definition of woman according to CEDAW, because Tickle is not claiming under the sex discrimination provisions supported by CEDAW.

Ironically, Bromwich does accept as authoritative the case of *AB v Registrar of Births, Deaths and Marriages* [2007] FCAFC 140; 162 FCR 528 in its interpretation of CEDAW and its statutory construction that the relevant provisions should be read as applying only to cases involving less favourable treatment of women, and should not extend to protecting men.³³ Unfortunately, this finding becomes academic in the light of later amendments to the *Sex Discrimination Act 1984* (Cth) and Bromwich's other conclusions.

Bromwich J. finds that the gender identity provisions are instead supported by the broadly worded Article 26 of the International Covenant on Civil and Political Rights ('ICCPR'). Article 26 protects against discrimination on various grounds including 'other status'.³⁴ Bromwich is convinced that gender identity falls under 'other status' and dismisses the respondents' arguments that Article 26 is too general and vague to be relied upon in support of this enactment.³⁵

Bromwich J. further finds that despite its failure to return a profit, Giggle Pty Ltd is indeed a trading corporation and the discrimination claim under the gender identity provisions is therefore also supported by Article 51(xx) of the Australian Constitution,³⁶ rendering the arguments in relation to the external affairs power somewhat redundant.

STATE LAWS ALLOWING CHANGE OF SEX ON BIRTH CERTIFICATE FOUND VALID

The court also rejects the respondents' second argument that there is an inconsistency between the Federal *Sex Discrimination Act 1984* (Cth) and state laws allowing for a change of sex markers on birth certificates, which could ground a claim of invalidity pursuant to Article 109 of the Australian Constitution.³⁷ Part 4 of the

³² *Tickle* (n1) [54].

³³ *Tickle* (n1) [178].

³⁴ *Tickle* (n1) [62].

³⁵ *Tickle* (n1) [156].

³⁶ Article 51(xx) of the Australian Constitution The Australian Constitution – Parliament of Australia (aph.gov.au) accessed 21 September 2024.

³⁷ *Tickle* (n1) [197–204].

Queensland *Births, Deaths and Marriages Registration Act 2023* (Qld) provides for (figurative) change of sex, enabling Tickle to have a new birth certificate issued with a female sex marker. The judge observes that there are no longer any definitions of man and woman contained in the *Sex Discrimination Act 1984* (Cth) and even if there were, the Commonwealth cannot, and does not intend to impose its definition of sex on state legislatures. The *Sex Discrimination Act 1984* (Cth) is not intended to be exhaustive and explicitly preserves the operation of state laws.³⁸ Bromwich J. rejects the argument that state laws are hampering the protection of women's sex-based rights and observes that any impairment in this regard would be caused by the 2013 amendments to the *Sex Discrimination Act 1984* (Cth). He concludes that federal and state legislation are co-existing harmoniously.³⁹

NO LAUGHING MATTER

Having dispensed relatively quickly and with remarkably little angst with complex constitutional and philosophical considerations about the nature of sex (and engaging not at all with physiological and biological science), Bromwich J. proceeds to spend over 10 pages on detailed legal analysis in relation to the assessment of damages.⁴⁰ This is despite the fact Tickle put on no expert evidence to quantify the loss claimed for exacerbation of a pre-existing psychiatric condition⁴¹ and generally failed to provide specifics or justify seeking the amounts of \$100,000 in general damages and \$100,000 in aggravated damages.

The respondents can be grateful that by rigid application of section 46PO(3), which Bromwich J. finds limits his consideration to acts preceding the complaint being lodged with the Commission⁴², and following a tortured analysis distinguishing other cases⁴³, he ultimately declines to make any award of aggravated damages. Instead the court orders payment to Tickle by the respondents of general damages only in the sum of \$10,000. Although Bromwich J. takes a dim view of Ms Grover's conduct in court when she laughed at an offensive caricature of the applicant, he determines that compensation for this slight to Tickle's feelings is adequately covered in the award of general damages.⁴⁴

³⁸ *Tickle* (n1) [202].

³⁹ *Tickle* (n1) [203–204].

⁴⁰ *Tickle* (n1) [216–277].

⁴¹ *Tickle* (n1) [222].

⁴² *Tickle* (n1) [212].

⁴³ *Tickle* (n1) [232–251].

⁴⁴ *Tickle* (n1) [276].

While considerably less than Tickle’s ambit claim, this is arguably a grossly excessive sum for findings of modestly hurt feelings and the loss of access to a social media app, of which, as noted, Tickle admitted having made minimal use.⁴⁵ Since Bromwich J. recognises this was a case brought on principle rather than due to any lasting hurt or disadvantage⁴⁶, he could very well have acceded to the respondents’ submission that an award of damages be nominal.

Due to a complete lack of evidence and precedent upon which to base an assessment of the quantum of damages, Bromwich J. instead relies upon ‘instinctive synthesis’ to make his award and after ‘considerable thought and reflection’ reaches into a hat and pulls out \$10,000.⁴⁷ It is to be wondered whether that thought and reflection included considering that \$10,000 is the maximum ‘recognition payment’ available to women in NSW who are primary victims of sexual assault resulting in serious bodily injury, involving multiple offenders or an offensive weapon, or a sexual assault, sexual act, or attempted sexual assault involving a series of related acts.⁴⁸

Perhaps it was Ms Grover’s laughter in court⁴⁹ that convinced the Bromwich J. that this offensive and belittling behaviour should result in an award commensurate with the amounts paid to victims of violent sexual crime? However, this would be arguably inconsistent with the statement made by Bromwich J. at the outset of his considerations on damages, that the court has power only to compensate the applicant, not to punish the respondents.⁵⁰

In any case, the award of costs against the respondents will be far more punishing than the compensation to be paid to Tickle, and these costs are awarded by the court despite not having been originally sought in the applicant’s pleadings and are only partially capped.⁵¹ Indeed, a general cap on costs of \$20,000 was floated at an earlier stage by the applicant, but was unfortunately rebuffed by the respondents’ legal representatives.

⁴⁵ *Tickle* (n1) [226–227].

⁴⁶ *Tickle* (n1) [228].

⁴⁷ *Tickle* (n1) [229–230]. United Kingdom readers may be curious as to this approach, bearing in mind *R v Chan Fook* [1994] 1 WLR 689 and generally on expert evidence as required to substantiate a claim for pain and suffering.

⁴⁸ NSW Victim’s Services: Recognition Payment <<https://victimsservices.justice.nsw.gov.au/how-can-we-help-you/victims-support-scheme/recognition-payment.html>> accessed 1 September 2024, accessed 29 September 2024.

⁴⁹ *Tickle* (n1) [276].

⁵⁰ *Tickle* (n1) [216].

⁵¹ *Tickle* (n1) [283].

Sensibly Bromwich J. declines to order a forced and insincere apology⁵² or to order Tickle's reinstatement to the now defunct social media app⁵³. The wording of the declarations to be made in Tickle's favour are at the time of judgement yet to be finalised after consideration of proposed wording by the parties.⁵⁴

IMPLICATIONS

Bromwich J. now has the very dubious honour of being the first judge to decide that it is possible to change sex, in a context where the result of his decision is to directly destroy any prospect of women and girls continuing to enjoy safe single sex spaces and services. While some might consider the reasoning in *Tickle v Giggle* to be less than serious, the implications of this decision are indeed no laughing matter.

⁵² *Tickle* (n1) [278–280].

⁵³ *Tickle* (n1) [282].

⁵⁴ *Tickle* (n1) [215].

