Form 59
Rule 29.02(1)

Affidavit

No. NSD1386 of 2024

Federal Court of Australia

District Registry: NSW

Division: Administrative and Constitutional and Human Rights

GIGGLE FOR GIRLS PTY LTD and another

Appellants

ROXANNE TICKLE

Respondent

Affidavit of: **Dr Reuben Kirkham**

Address: [redacted]

Occupation: Company Director

Date: 4 April 2025

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1	Affidavit of Dr Reuben Kirkham in support of application for the FSU to be granted leave to intervene, affirmed on 3 April 2025.		
2	Annexure "RK-1", being copy of the FSU's 'About Us' webpage.		

I, Reuben Kirkham, company director, affirm:

1. I am a director of the Free Speech Union of Australia Pty Ltd (**FSU**) and I am authorised to make this affidavit on its behalf.

2. I make this affidavit in support of the FSU's application to intervene or for it to be appointed *amicus curiae*.

Filed on behalf of (name & role of party) Free Speech Union of Australia Pty Ltd, Applicant
Prepared by (name of person/lawyer) Kyle Kutasi, Solicitor
Law firm (if applicable) Solve Legal
Tel [redacted] Fax
Email [redacted]
Address for service [redacted]
(include state and postcode)

3. I make this affidavit based on my own knowledge and belief, except where otherwise indicated, in which case I state the source of the knowledge. I believe the contents of this affidavit to be true.

4. I am a computer scientist with expertise on issues on the boundary of law and technology, including the operation of online communities.

The Free Speech Union

5. The FSU is a non-profit organisation founded in 2023 to defend the free speech rights of Australians, as part of what is now an International Association of Free Speech Unions.

6. The FSU is non-partisan and non-political, focusing on universal free speech rights while condemning speech that incites violence. A statement of the FSU's mission and values has been extracted from our webpage and is annexed hereto and marked "**RK-1**".

7. Part of our work is strategic litigation. For example, the FSU represented the applicant in *Baumgarten v eSafety Commissioner* [2025] ARTA 59, which was the first proceeding referred to the Guidance and Appeals Panel of the Administrative Review Tribunal on the basis that it raised an issue of significance to administrative decision-making. The FSU is involved in a range of other free speech cases that are currently proceeding across Australia.

8. In addition to litigation, we also run public campaigns in relation to legislation. For example, the FSU ran a successful campaign against the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024*, and has been active in trying to challenge other legislation which our members consider undermine the interests of minority groups and have a negative impact on free speech. We regularly comment across a range of different platforms and media, including by giving interviews on national television.

Online communities and the provision of "services"

9. The FSU's interest in the present appeal is the serious impact that the decision below has on the establishment and operation of online communities for people of a particular sex, sexual orientation, gender identity or intersex status. Such communities provide an important platform for the exercise of the free speech rights the FSU seeks to uphold.

10. The *Sex Discrimination Act 1984* (**SDA**), from its commencement, has recognised the legitimacy of single-sex "clubs", narrowly defined as associations of not less than 30 members with physical premises at which liquor is served, by excluding them, by section 25(3) of the SDA, from the prohibition on discrimination in the admission of, or provision of services to, club members.

11. The Explanatory Memorandum to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, which became the amending Act the subject of the constitutional challenge maintained by the appellants in this appeal, recognised the right to freedom of association protected by Article 22 of the International Covenant on Civil and Political Rights, and acknowledged that the freedom was limited by the prohibition in s 25 of the SDA on discrimination in the admission of, or provision of services to, "club" members. The Explanatory Memorandum justified the extension of the prohibition to the new grounds of discrimination by noting that the narrow definition of "club" restricted the prohibition to "public" rather than "private" clubs.

12. Freedom of association is also protected by section 39 of the SDA, which permits a "voluntary body", being an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, to engage in conduct which would otherwise be discriminatory in connection with the admission of, or provision of benefits, facilities or services to, members of the body.

13. The above provisions of the SDA were not relied on by the appellants or referred to by the primary judge. The respondent pleaded, and the appellants admitted, that the Giggle App, being "a digital application that can be downloaded for use on various electronic devices including mobile phones and tablets", was "a service, in so far as it relates to entertainment and/or recreation, and/or an available facility for the purposes of section 22 of the SDA."

14. The FSU is concerned that, because of the parties' approach, the primary decision established that the operation of an online community constitutes providing a service, or making a facility available, such that restricting membership of such communities to people of a particular sex, sexual orientation, gender identity or intersex status constitutes unlawful discrimination. In doing so, the primary decision undermined the protection which the SDA affords to the freedom of association, and to the freedom of political communication which is facilitated by such communities and which the FSU seeks to uphold.

15. Online communities are necessarily established using the services of commercial operators like internet service providers and social media platforms such as Facebook, Reddit, and indeed Giggle. It is therefore no answer to say that an online community may be established as a "voluntary body" within the meaning of section 39 of the SDA. On the authority of the primary judgment, a social media platform which hosts such a community, by facilitating the advertisement of that community to the public, admission of new members, and private communication between members, may unlawfully discriminate in the provision of services. The requirement that any such platform or internet service provider itself be constituted as a voluntary body to fall within the

exemption in section 39 of the SDA imposes a significant burden on the freedom of association and political communication in Australia.

16. The FSU notes with further concern that this construction of the SDA appears to be supported by the intervener below, the Sex Discrimination Commissioner (Court Book pp 530 – 531). Similar views were expressed by the Administrative Review Tribunal, in circumstances where the Australian Human Rights Commission appeared as respondent but did not make detailed submissions, in *Lesbian Action Group and Australian Human Rights Commission* [2025] ARTA 34 [146] – [147].

17. The FSU seeks to assist the Court by making submissions about the proper construction of the SDA, and in particular the concept of "services" in section 22 of the SDA, in circumstances where the Court would otherwise be unassisted by any contradictor.

Activist litigation in the absence of "lasting hurt or disadvantage"

18. The FSU is also concerned that the respondent's case proceeded to trial, and resulted in an award of compensatory damages, in circumstances where "it was brought on a point of principle rather than due to any lasting hurt or disadvantage" and the respondent "was not really all that interested in actually using the Giggle App" [228]. Many of the FSU's members are concerned that they could be subject to vexatious litigation because of the primary judgment, which was widely reported.

19. Because the appellants did not participate in conciliation before the Australian Human Rights Commission, the Commission terminated the respondent's complaint under s 46PH(1B)(b) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRCA**). Consequently, the Court was not required to grant leave under s 46PO(3A)(a) of the AHRCA for the respondent to commence these proceedings and did not consider whether, as the FSU would contend, the respondent's complaint was "trivial" or "lacking in substance" by reason of the absence of any lasting hurt or disadvantage or intention to actually use the Giggle App.

20. The FSU is concerned that any small business or associated individual can be subject to a "test case" and exposed to the cost of litigation, merely because an applicant seeks to advance a "point of principle". Discrimination law has a profoundly important social function, and the FSU opposes its use as a vehicle for political activism that can have a chilling effect on free speech.

21. The FSU seeks to assist the Court by making submissions about the proper construction of:

    (a) the SDA, including the concepts of "treat[ing] … less favourably" in s 5B(1) and "disadvantage" in s 5B(2), and

(b) the AHRCA, including the scope of the Court's discretion to make "an order declaring that the respondent has committed unlawful discrimination" or "an order requiring a respondent to pay to an applicant damages by way of compensation" in s 46PO(4),

with a view to establishing the principle that relief of the kind granted in the primary judgment is inappropriate in cases brought on a point of principle rather than due to any lasting hurt or disadvantage.

22. The FSU does not intend to agitate any of the issues on appeal that have been propounded by any of the existing parties.