

## Issues Paper 53 - Summary

### Ia Tangata

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**A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics**



## ABOUT THIS DOCUMENT

1. Te Aka Matua o te Ture | Law Commission has been asked to review the protections in the Human Rights Act 1993 for people who are transgender or non-binary or who have an innate variation of sex characteristics. Briefly:
  - (a) a person who is transgender is someone whose gender identity is different to the sex they were assigned at birth;
  - (b) a person who is non-binary is someone whose gender identity does not fit exclusively into the binary of male or female; and
  - (c) a person with an innate variation of sex characteristics is someone who was born with genetic, hormonal or physical sex characteristics that differ from medical and social norms for male or female bodies (although, in some cases, the variation may not be evident until later in life).
2. We are seeking feedback from the public on the issues in this review. We have published an Issues Paper which sets out our thinking so far and identifies possible options for law reform. In the Issues Paper, we identify 80 questions for feedback from the public.
3. This summary document explains briefly the content of each of the 18 chapters in the Issues Paper so that you can find

the information that is of most interest to you. The summaries we provide here are partial. If you are interested in a particular issue, you should consider reading the full chapter in the Issues Paper.

4. You can provide feedback on our consultation questions on our website. You do not have to answer all of them. Submissions must be received by **5pm on 5 September 2024**.
5. Alongside other evidence and analysis, the submissions we receive will help us to develop recommendations for law reform. We will deliver a report to the government by the end of June 2025. It will be up to the government to decide whether to accept any recommendations we make.
6. For information on how the Law Commission will use your submission, see the “Have your say” section at the front of the Issues Paper and the “Before you begin” section of the online submission form.

## INTRODUCTION (CHAPTER 1)

7. Chapter 1 explains the background to this review and what we are looking at. It also explains our process in this review so far and the next steps we will take.

### A review of anti-discrimination law

8. Our role in this review is to advise the government whether the current wording of the Human Rights Act adequately

protects people who are transgender or non-binary or who have an innate variation of sex characteristics and, if not, what amendments should be made.

9. The Human Rights Act is an anti-discrimination statute. It states when it is unlawful in Aotearoa New Zealand to treat someone differently from others based on their personal characteristics or attributes. Examples include refusing someone a job, a tenancy or access to a public facility because of their sex, race or religion.
10. Section 21 of the Act lists 13 personal characteristics or attributes it calls “prohibited grounds of discrimination”. These include things like sex, race, religious belief, disability and sexual orientation. To make a complaint about discrimination under the Human Rights Act, the way you were treated must be linked to one of these prohibited grounds.
11. Even if a person is treated worse than others based on a prohibited ground, it does not necessarily mean the treatment is unlawful. The Human Rights Act contains two sets of rules to determine when differences in treatment are unlawful — one applying to government and one to private individuals and organisations. These rules are how the Act distinguishes between fair and unfair differences in treatment, and weighs competing rights and interests.

12. Things people do in private (like in their own homes) are not usually covered by the Human Rights Act.
13. If you want to learn more about how the Human Rights Act works, you can read our [Beginners' Guide](#).

### Scope of the review

14. We are considering whether to recommend changes to the list of prohibited grounds of discrimination in section 21 of the Human Rights Act to clarify that being transgender or non-binary or having an innate variation of sex characteristics are covered. At the moment, section 21 of the Human Rights Act does not explicitly identify these characteristics as prohibited grounds of discrimination (although it is possible they are protected under the existing grounds of sex or disability).
15. If section 21 were to be amended, there might be a need for other reforms to the Human Rights Act. We are considering how to ensure the Act strikes an appropriate balance between the right to freedom from discrimination (as it applies to any new grounds) and other rights, interests and concerns.
16. For example, the Act contains many exceptions — circumstances in which it is lawful for a person or body to treat someone differently based on a prohibited ground. We need to consider the implications of adding new grounds for these exceptions.

## Limits on the scope of this review

17. There are several important limits on our review. First, our review is limited to the Human Rights Act. We are not reviewing other laws (except to consider the implications for other laws of any reforms that we recommend to the Human Rights Act).
18. This means we are not addressing all legal issues of concern to people in Aotearoa New Zealand that relate to gender, gender identity or innate variations of sex characteristics. To give just one example, this review only has indirect implications for access to gender-affirming health care (including puberty blockers).
19. Another important limit is that we have not been asked to conduct a general review of the Human Rights Act. We are only reviewing the protections in the Act for people who are transgender or non-binary or who have an innate variation of sex characteristics.
20. Finally, three provisions in the Human Rights Act are excluded from this review. They are sections 61 and 131 (which are about the incitement of racial disharmony) and section 63A (which is about conversion practices).
21. If you are unsure whether a particular issue falls within the scope of the review, we encourage you to read Chapter 1.

## SEX, GENDER AND SEX CHARACTERISTICS (CHAPTER 2)

22. In Chapter 2, we introduce the topics of sex, gender and sex characteristics. The purpose of this chapter is to provide context and background for later chapters, to explain some relevant concepts and to outline some different views about what they mean. We also explain the terminology we use in the Issues Paper.
23. We know there are different views about many of the concepts we introduce in Chapter 2. While some background understanding of these issues is necessary to give context to our review, we do not canvas all relevant perspectives in the chapter let alone seek to resolve them. As we explain in the chapter, we think it is unhelpful for the Law Commission to intervene in non-legal arguments except to the extent necessary to move forward with the review. We do, for example, need to settle working language that we can use to communicate clearly in our publications.
24. In Chapter 2, we discuss the concepts of sex and gender and the relationship between the two. We introduce the terms transgender and non-binary and explain some other terms that people use to describe themselves. We also explain the term innate variations of sex characteristics and related terms such as intersex. We discuss some different cultural perspectives on sex and gender, and we provide an

introduction to gender-critical perspectives on sex and gender.

## EXPERIENCES OF DISCRIMINATION (CHAPTER 3)

25. In Chapter 3, we outline the results of our research on the discrimination experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics. People in these groups can experience discrimination and unfair treatment in many aspects of their lives. We provide some brief history, summarise recent data, and explore some distinctive issues and concerns held by people in these groups.

### People who are transgender or non-binary

26. Until recently, living openly as transgender almost inevitably meant living on the margins of New Zealand society. Although being transgender was never illegal in Aotearoa New Zealand, laws and police practices were used to oppress people who were transgender.
27. There is recent evidence in Aotearoa New Zealand of changing attitudes to people who are transgender and non-binary. However, they continue to experience significant challenges across many areas of daily life. Discrimination can affect their access to employment, to housing and accommodation, and their ability to participate in education, sports and other activities.



28. People who are transgender or non-binary can experience higher levels of harassment, abuse and violence than others. There is also evidence of increasing levels of extreme anti-transgender content online.

### People with innate variations of sex characteristics

29. People with innate variations of sex characteristics have also experienced a history of marginalisation. For many centuries, people with innate variations of sex characteristics have been medicalised, dehumanised and subjected to violence and discrimination. During the second half of the twentieth century, the dominant approach to infants born with an innate variation of sex characteristics was surgical ‘correction’ of their genitals. This could involve multiple surgeries, as well as other highly invasive treatments. It was often kept secret from the person even into adulthood.
30. There is not much current data about rates of discrimination experienced by people with innate variations of sex characteristics. The information available suggests some people with these variations continue to experience high levels of discrimination in many aspects of life. Still today, people with an innate variation are sometimes made to feel they should be secretive or even ashamed about their variation. As well, we have heard that medical interventions on infants and children with an innate variation of sex

characteristics remain an issue of significant concern for many people in Aotearoa New Zealand.

Consultation question 1 relates to Chapter 3 of the Issues Paper.

## KEY REFORM CONSIDERATIONS (CHAPTER 4)

31. In Chapter 4, we outline and seek feedback on six key reform considerations that we think the Law Commission should bear in mind when proposing law reform in this review. We hope to use these to evaluate options for reform when preparing our Final Report.
32. We expect these considerations may point in different directions on some issues and we may need to make trade-offs between them.

### Coherence of the Human Rights Act

33. A statute should be coherent and make sense as a scheme. That poses some challenges for this review given we have not been asked to conduct a general review of the Human Rights Act.
34. We see it as outside the scope of the review for us to renegotiate key policy trade-offs embodied in the Act. Our

task is to identify those policy trade-offs and to consider how to apply them to the groups named in the reference.

### Core values underlying the Human Rights Act

35. We have identified four pairs of ideas that we think underlie the Human Rights Act: equality/fair play, dignity/self-worth, autonomy/privacy and limits/proportionality. We need to consider the way these ideas are advanced or affected by any proposed reform.

### Constitutional fundamentals

36. Law reform in Aotearoa New Zealand should be consistent with fundamental constitutional principles and values that underpin New Zealand's legal system. Those that are particularly relevant to this review are te Tiriti o Waitangi | Treaty of Waitangi (the Treaty), ngā tikanga and human rights in domestic and international law.

### Needs, perspectives and concerns of New Zealanders

37. We need to understand the needs, perspectives and concerns of all those interested in, or affected by, the review. This includes people who are transgender or non-binary or who have an innate variation of sex characteristics. It also includes all others in the community whose rights, interests and obligations would be affected by law reform in this area or who have relevant expertise or experience.

## Evidence-led law reform

38. Good law reform is evidence based. This is also an expectation of human rights law.

## Other principles of good law making

39. In Chapter 4, we also identify some other general principles of good law making that may be relevant to this review.

Consultation question 2 relates to Chapter 4 of the Issues Paper.

## THE PERSPECTIVES AND CONCERNS OF MĀORI (CHAPTER 5)

40. To improve our understanding of Māori perspectives on issues relevant to this review, we convened a wānanga (a gathering to discuss an issue or issues) of Māori pūkenga (experts). In Chapter 5, we summarise some key themes that emerged from the wānanga as well as from our preliminary research and other engagement. We acknowledge these views represent just some of the wide-ranging perspectives that Māori people will have on issues relevant to this review. We hope to hear about others through our consultation.

41. In Chapter 5, we discuss some themes about identity and belonging for Māori who are transgender or non-binary or who have an innate variation of sex characteristics. We also discuss what we know about the experiences of discrimination for Māori in these groups.
42. We describe some tikanga that have been shared with us because of their relevance to this review. These are whakapapa, mana, tapu, mauri and tiaki.
43. We explain our understanding of situations in te ao Māori where men and women have different roles or where sex is significant to differences in particular cultural practices, and we explore what this means for people who are transgender or non-binary or who have an innate variation of sex characteristics. We acknowledge in Chapter 5 that practices vary between different hapū, iwi and other Māori groups and that there is also no uniform response as to how people who are transgender or non-binary or who have an innate variation of sex characteristics are accommodated in these practices.

44. We also acknowledge in Chapter 5 a key message we heard from pūkenga at the wānanga — that state law should not intervene on these questions of tikanga.

Consultation questions 3–5 relate to Chapter 5 of the Issues Paper.

## SHOULD SECTION 21 BE AMENDED? (CHAPTER 6)

45. In Chapter 6, we discuss whether the list of prohibited grounds of discrimination in section 21 of the Human Rights Act should be amended to clarify that people are protected from discrimination that is linked to the fact (or the discriminator's belief) that they are transgender or non-binary or they have an innate variation of sex characteristics. We reach a preliminary view that section 21 should be amended and seek feedback on it.
46. It is important to stress that this preliminary conclusion leaves open many issues about how the Act should balance other relevant rights, interests and concerns. We discuss those issues in later chapters.

## Should New Zealand law protect people from discrimination that is linked to one of these characteristics?

47. We identify six reasons that have been relied on in the past (both in Aotearoa New Zealand and overseas) to extend the protection of anti-discrimination laws to new characteristics.

These are:

- (a) people with the characteristic have experienced a history of discrimination, disadvantage, prejudice, stigma, vulnerability or stereotyping;
- (b) the characteristic is either immutable (that is, the individual has no power to change it), or is so closely tied to a person's identity that they should not be expected to hide or change it to avoid discrimination;
- (c) differential treatment based on this characteristic is particularly demeaning or harmful to human dignity;
- (d) protection from discrimination based on this characteristic is either required by, or consistent with, developments in international human rights law;
- (e) other countries with similar legal systems have extended protection from discrimination to this characteristic; and
- (f) the new ground reflects changing social attitudes.

48. We suggest in Chapter 6 that all six of these reasons support the conclusion that people who are transgender or non-binary or who have an innate variation of sex characteristics should be protected by New Zealand's anti-discrimination laws.
49. In Chapter 6 we also seek feedback on whether the Treaty has any implications for whether people should be protected from discrimination based on these characteristics.

### Should section 21 of the Human Rights Act be amended?

50. The government and Te Kāhui Tika Tangata | Human Rights Commission have said that people who are transgender or non-binary or who have an innate variation of sex characteristics are already protected from discrimination under the prohibited ground of sex. Based on overseas cases and commentary, it is also possible they are protected under the prohibited ground of disability (although we acknowledge that relying on this ground would not sit well with everyone).
51. We nevertheless reach the preliminary conclusion in Chapter 6 that section 21 of the Human Rights Act should be amended to extend more explicit protection to people who are transgender or not binary or who have an innate variation of sex characteristics. There has been uncertainty on this issue for a long time. The view expressed by the government and Human Rights Commission that protection



is already available has never been confirmed by a tribunal or court. We think it is unsatisfactory for this issue to remain unresolved. We also think it is unfair to expect individual litigants to bring cases to a court or tribunal to clarify this aspect of the law.

52. In Chapter 6, we discuss the uncertainty of the current law and other reasons for our preliminary conclusion. These include the effect of this uncertainty on access to justice.

Consultation questions 6 and 7 relate to Chapter 6 of the Issues Paper.

## OPTIONS FOR NEW GROUNDS (CHAPTER 7)

53. In Chapter 7, we consult on possible wording for an amendment to section 21 of the Human Rights Act.
54. We explain that prohibited grounds of discrimination can be asymmetrical or symmetrical. Asymmetrical grounds single out for protection a group that has experienced a history of disadvantage, discrimination or marginalisation. The existing ground of disability is an example. It is asymmetrical because people without a disability do not receive protection.
55. Symmetrical grounds single out characteristics held by everyone — not just those in a disadvantaged minority.

Examples include the existing grounds of sex, race and sexual orientation. These are symmetrical because everyone has a sex, race and sexual orientation.

56. In Chapter 7, we explain some advantages and disadvantages of these two approaches. We also set out some more specific options for amending section 21, and identify some advantages and disadvantages of each.

### **New grounds that use group descriptors to provide asymmetrical protection**

57. One option for extending asymmetrical protection is a new stand-alone ground (or grounds) that uses group descriptors to name the people being protected — for example, “being transgender”, “being non-binary” or “being intersex”.
58. Although this is a relatively straightforward way to achieve asymmetrical protection, there are some possible difficulties with this approach. For example, it might be difficult to settle on which group descriptors to list (because people have so many terms to describe themselves), group descriptors can become quickly out of date, and there might be difficult boundary questions about who falls within a particular group.

## **New asymmetrical grounds that do *not* use group descriptors**

59. A different way to extend asymmetrical protection would be to spell out the characteristics or attributes that are being protected without using group descriptors. For example, a new stand-alone ground could protect “people whose gender identity is different to their sex assigned at birth” or “a person with an innate variation of sex characteristics.” This language would date less quickly although, as we discuss in the chapter, there might still be some definitional issues about who qualifies for protection.

## **New grounds that provide symmetrical protection**

60. Alternatively, there could be a new stand-alone ground (or grounds) that provide symmetrical protection — protection that extends to everyone. The options we explore in the chapter are “gender”, “gender identity”, “gender expression” and “sex characteristics”. We discuss some advantages and disadvantages of each of these terms.

## **Extending symmetrical protection by clarifying the scope of the ground of sex**

61. Instead of adding new stand-alone grounds, another way to extend symmetrical protection might be to clarify the scope of the ground of sex.

62. An amended ground might be renamed “sex or gender” and could be given an expanded definition to include some or all of the terms we described above such as gender identity, gender expression and sex characteristics.
63. This option would acknowledge the interconnectedness between sex, gender and sex characteristics. However, it may also appear to conflate concepts that some people see as very different. It is not a common approach in countries with similar legal systems.
64. Later in the Issues Paper, we discuss several exceptions in the Human Rights Act that allow discrimination on the ground of sex. This option of an extended “sex and gender” ground might make applying those exceptions more complex.

### Clarifying the scope of the ground of sex alongside new stand-alone grounds

65. If new stand-alone grounds of discrimination are added to the Human Rights Act 1993, the ground of sex could be amended to clarify the circumstances in which it would continue to apply. We explore this possibility, discuss some options for how the ground of sex could be defined, and identify some difficulties associated with each of these options.

Consultation questions 8–11 relate to Chapter 7 of the Issues Paper.

## INTRODUCTION TO PART 2 (CHAPTER 8)

66. Chapters 8 to 15 of the Issues Paper discuss Part 2 of the Human Rights Act. This Part of the Act says when it is unlawful for private individuals and organisations to discriminate (unless they are exercising government functions, in which case, they fall under a different Part).
67. In Chapter 8, we explain how Part 2 works, our approach to reviewing it and some recurrent challenges we have encountered when analysing options for amending Part 2. This is a useful chapter to read if you want to understand how the Human Rights Act regulates the lives of private individuals.

### How Part 2 works

68. Part 2 sets out ‘areas of life’ that are regulated — things like employment, accommodation, and provision of goods and services. Within each area of life, Part 2 describes the actions that are unlawful if they are taken “by reason of” a prohibited ground of discrimination.
69. Part 2 also sets out numerous exceptions — where different treatment linked to a prohibited ground is lawful even though

it falls within a regulated activity. Many exceptions only apply to one or some of the prohibited grounds. For example, they might allow for differences of treatment in certain circumstances based on a person's sex.

### **Our approach to reviewing the Part 2 areas of life**

70. Several of the Part 2 chapters discuss the protections in the Human Rights Act that relate to a particular area of life. In Chapter 8, we explain our approach to reviewing these areas of life.
71. In each of these Part 2 chapters, we first explain the protections from discrimination that are available in the particular area of life. We seek feedback on whether these protections are sufficient to capture issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. We ask whether there are any practical concerns or implications we need to understand about what these protections would cover if new prohibited grounds of discrimination are added to the Act. We also ask whether any new exceptions would be desirable to ensure the Act appropriately balances relevant rights and interests.
72. A significant focus for us in these Part 2 chapters is reviewing the existing exceptions that attach to each area of life. These exceptions are key mechanisms by which the Act balances the equality rights of particular groups with other

rights, interests and concerns that Parliament has deemed to be important.

73. We are mainly interested in the exceptions that currently allow for differences in treatment based on a person's sex. We want to understand whether reform of any of these exceptions is desirable to reflect any new prohibited grounds of discrimination we might propose. In the Part 2 chapters, we explain our understanding of the scope and rationale of each of these exceptions and we identify options for reform of each exception. We deliberately consult on a wide range of options to encourage a full range of feedback. We do not generally express a preference for any particular option, although we do try to identify some implications of adopting each of them.

### Recurrent issues and challenges

74. In Chapter 8, we also highlight some of the recurrent issues or challenges we have encountered when reviewing the Part 2 areas of life. These are uncertainty about the scope of any sex exception that is not explicitly amended to reflect any new grounds, the difficulty of using uniform language to amend the exceptions, issues of proof, privacy issues, and challenges posed by the gender binary. We pose consultation questions on some of these issues.

Consultation questions 12–14 relate to Chapter 8 of the Issues Paper.

## EMPLOYMENT (CHAPTER 9)

75. In Chapter 9, we discuss the protections in Part 2 of the Human Rights Act that relate to employment and some closely related contexts (business partnerships, industrial and professional associations and qualifying bodies). We also identify implications of the review for the Employment Relations Act 2000.

### Scope of protection

76. The key employment protection in the Human Rights Act is section 22. It states that, if a job applicant or employee is “qualified for work of any description”, it is unlawful to do any of the following by reason of a prohibited ground of discrimination:

- (a) refuse or omit to employ someone;
- (b) offer someone less favourable terms of employment, conditions of work, benefits or opportunities;
- (c) terminate someone’s employment or subject them to detriment; or
- (d) cause an employee to retire or resign.



77. There is also a provision that applies to application forms and inquiries (such as referees).
78. As we explained above (under Chapter 8), in this chapter, we ask questions about the scope of these protections and whether amendment is desirable.

## Exceptions

79. In Chapter 9, we outline nine exceptions relating to employment. These exceptions currently allow different treatment based on sex in the following circumstances:
- (a) where the duties will be performed wholly or mainly outside Aotearoa New Zealand and they are ordinarily only carried out by a person of a particular sex because of that country's laws, customs or practices (section 26);
  - (b) where, for reasons of authenticity, being a particular sex is a genuine occupational qualification for the role (section 27(1));
  - (c) where the position is for domestic employment in a private household (section 27(2));
  - (d) where the position needs to be held by one sex to preserve "reasonable standards of privacy" (section 27(3)(a));
  - (e) for employer-provided accommodation, where it is not reasonable to expect the employer to provide

accommodation for people of a particular sex (sections 27(3)(b) and 27(5));

- (f) where the position is for a counsellor on highly personal matters such as sexual matters or the prevention of violence (section 27(4)); and
- (g) where the position or qualification is for the purposes of an organised religion and is limited to one sex to comply with that religion's doctrines, rules or established customs (sections 28(1) and 39(1)).

80. As we explained above (under Chapter 8), we seek feedback on whether reform of any of these exceptions is desirable to reflect any new prohibited grounds of discrimination we might propose.

Consultation questions 15–32 relate to Chapter 9 of the Issues Paper.

## **GOODS, SERVICES AND PUBLIC PLACES (CHAPTER 10)**

81. In Chapter 10, we discuss the protections in Part 2 of the Human Rights Act that relate to access to places and vehicles and to provision of goods, services and facilities.

## Scope of protection

82. Section 42 of the Human Rights Act makes it unlawful to refuse someone access to or use of any place, vehicle, or facility that members of the public can access or use by reason of a prohibited ground of discrimination. It also makes it unlawful to require someone to leave or stop using such a place, vehicle or facility by reason of a prohibited ground. It applies to places like supermarkets, gyms and restaurants, to transport such as charter buses and taxis, and to the facilities within these places or vehicles.
83. Section 44 makes it unlawful to refuse to provide a person with goods, facilities or services by reason of a prohibited ground of discrimination.
84. As we explained above (under Chapter 8), in this chapter, we ask questions about the scope of these protections and whether amendment is desirable.

## Exceptions

85. In Chapter 10, we outline three exceptions relating to goods, services, facilities and public places. These exceptions currently allow different treatment based on sex in the following circumstances:
- (a) where courses or counselling involve highly personal matters such as sexual matters or violence prevention (section 45);

- (b) where the nature of a skill varies depending on whether it is exercised in relation to men or women (section 47); and
  - (c) in insurance, where the different treatment is based on actuarial or statistical data relating to life expectancy, accidents or sickness (section 48).
86. As we explained above (under Chapter 8), we seek feedback on whether reform of any of these exceptions is desirable to reflect any new prohibited grounds of discrimination we might propose.
87. (We discuss some further exceptions relating to these areas of life in Chapters 13 and 14).

Consultation questions 33–42 relate to Chapter 10 of the Issues Paper.

## **LAND, HOUSING AND ACCOMMODATION (CHAPTER 11)**

88. In Chapter 11, we discuss the protections in Part 2 of the Human Rights Act that relate to land, housing and accommodation. We also identify implications of the review for the Residential Tenancies Act 1986.

## Scope of protection

89. Section 53(1) of the Human Rights Act sets out five activities that are prohibited when done by reason of a prohibited ground:
- (a) refusing or failing to dispose of land or accommodation to someone;
  - (b) disposing of land or accommodation on less favourable terms;
  - (c) different treatment of someone who is seeking land or accommodation;
  - (d) denying someone the right to occupy any land or accommodation; and
  - (e) terminating someone's interest in any land or right to occupy any accommodation.
90. Examples of activities prohibited by section 53(1) include: refusing to sell or lease a house to someone, to sublet them a room or to book them a room in a hotel; charging someone a higher rent than others; subletting a room on less favourable conditions than are available to others; and evicting someone or terminating their lease.
91. As we explained above (under Chapter 8), in this chapter, we ask questions about the scope of these protections and whether amendment is desirable.

## Exceptions

92. In Chapter 11, we outline one exception relating to land, housing and accommodation. This exception currently allows shared accommodation such as hostels to be limited to people of the same sex (section 55).
93. As we explained above (under Chapter 8), we seek feedback on whether reform of this exception is desirable to reflect any new prohibited grounds of discrimination we might propose.
94. There is also a broad exception in section 54 of the Human Rights Act for residential accommodation that is to be “shared with the person disposing of the accommodation”. This would include, for example, flatmates and boarders. We are not able to review this exception as it applies to all prohibited grounds and reflects an underlying policy trade-off that we do not think we can revisit given the limited scope of our review.

Consultation questions 43–48 relate to Chapter 11 of the Issues Paper.

## EDUCATION (CHAPTER 12)

95. In Chapter 12, we discuss the protections in Part 2 of the Human Rights Act that relate to educational establishments,

including vocational training bodies. We also identify implications of the review for the Education and Training Act 2020.

### Scope of protection

96. Section 57(1) prohibits the following actions if done by reason of a prohibited ground of discrimination:
- (a) refusing or failing to admit a student;
  - (b) admitting a student on less favourable terms;
  - (c) denying or restricting a student's access to any benefits or services; and
  - (d) excluding a student or subjecting them to any other detriment.
97. There is a similar provision that applies to vocational training bodies (section 40).
98. As we explained above (under Chapter 8), in this chapter, we ask questions about the scope of these protections and whether amendment is desirable.
99. There are a large number and variety of educational establishments in Aotearoa New Zealand including schools, early childhood centres and tertiary institutions. However, we explain in Chapter 12 that the role for section 57(1) in regulating these establishments may be quite limited. This is because Part 2 of the Human Rights Act does not apply to people or organisations when they are exercising

government functions. The provision of education is, in many situations, a government function. This means a different Part of the Human Rights Act applies instead. We discuss that Part (which is called Part 1A) in a later chapter.

## Exceptions

100. In Chapter 12, we outline two exceptions relating to educational establishments. These currently allow different treatment based on sex in the following circumstances:

- (a) where single-sex schools (or any other educational establishments) refuse to admit students of a different sex (section 58(1)); and
- (b) where educational establishments hold or provide courses or counselling on highly personal matters such as sexual matters or violence prevention (section 59).

101. As we explained above (under Chapter 8), we seek feedback on whether reform of these exceptions is desirable to reflect any new prohibited grounds of discrimination we might propose.

Consultation questions 49–57 relate to Chapter 12 of the Issues Paper



## EXCEPTIONS FOR SEX-SEPARATED FACILITIES (CHAPTER 13)

102. In Chapter 13, we discuss two exceptions in Part 2 of the Human Rights Act that allow private individuals or organisations to provide the public with separate facilities for each sex in certain circumstances “on the ground of public decency or public safety”. These are sections 43(1) and 46.
103. These exceptions apply when private people or organisations (such as businesses) provide facilities to the public. They do not apply to facilities provided by government or by people or bodies exercising a government function (such as local councils).
104. We think the most common applications of these exceptions would be to facilities in places like cafés, restaurants, shops and gyms. Because of how the exception is worded, we think these exceptions mainly apply in situations where someone would be partially or fully unclothed such as bathrooms, changing rooms and saunas.
105. In Chapter 13, we explore the rationales of “public decency” and “public safety” that underlie these exceptions.
106. We also explore some of the differing perspectives that people in the community have on this issue. We understand that access to single-sex bathrooms and changing rooms is an issue of particular concern for some people (including,

but not limited to, people who are transgender or non-binary).

## The potential of unisex facilities

107. In the chapter, we explore the potential of well-designed unisex facilities to advance the public policy rationales of public decency and public safety while furthering the aims of anti-discrimination law. We ask whether the Human Rights Act has any role to play in promoting a move towards unisex facilities.

## Should these exceptions be amended?

108. We want to understand whether the exceptions in sections 43(1) and 46 should be amended to reflect any new grounds we propose. We identify four broad reform options to encourage a wide range of feedback. Although we do not express a preference for a particular option, we try to explore the implications of each. The options are:

- (a) retain the exceptions in their current form;
- (b) clarify in the Act that it is lawful to use a single-sex facility aligned with your gender identity;
- (c) clarify in the Act that service providers can exclude people from single-sex facilities that do not align with their sex assigned at birth; or

- (d) clarify in the Act that service providers can exclude people from single-sex facilities that do not align with their sex recorded on their birth certificate.

109. We suggest that, if the third or fourth option is adopted, it may be worth considering additional reforms to mitigate the potential risks of these options for people who are transgender or non-binary. We give the examples of changing the threshold for the exception or a requirement to provide unisex facilities.

### Single-sex facilities in schools and workplaces

110. We explain in Chapter 13 that the exceptions in sections 43(1) and 46 attach to the protections in the Human Rights Act that apply to access to places and vehicles and to provision of goods, services and facilities. There are no equivalent exceptions for single-sex facilities in employment and education. We invite feedback on the implications of reform in these contexts.

Consultation questions 58–63 relate to Chapter 13 of the Issues Paper.

### COMPETITIVE SPORTS (CHAPTER 14)

111. In Chapter 14, we discuss an exception in Part 2 that allows people of one sex to be excluded from participating in a

competitive sports activity in which the strength, stamina or physique of competitors is relevant (section 49(1)).

112. We identify four rationales for this exception: custom (although this is no longer sufficient to explain the exception on its own); fair competition; safety; and participation.

113. We discuss current practice at the international and domestic level with respect to participation of athletes who are transgender or non-binary or who have an innate variation of sex characteristics in single-sex sports. We explore some of the differing perspectives that people in the community have on this issue. We understand this is an issue of particular concern for some people (including, but not limited to, people who are transgender or non-binary).

114. We set out our understanding of the evidence that currently exists on this issue — in particular, on the extent to which transgender women may have a physical advantage when competing against cisgender women, and the extent to which any advantage may be mitigated by gender-affirming hormone therapy.

### Should the exception be amended?

115. We want to understand whether section 49(1) should be amended to reflect any new grounds we propose. We identify six broad reform options to encourage a wide range of feedback. Although we do not express a preference for a

- particular option, we try to explore the implications of each. The options are to:
- (a) retain the exception in its current form;
  - (b) amend the exception to clarify that it does not allow an organisation to exclude people from a competitive sporting activity on the basis of their gender identity or the fact they have an innate variation of sex characteristics;
  - (c) amend the exception to allow people to be excluded from a competitive sporting activity on the basis of their gender identity or the fact they have an innate variation of sex characteristics if strength, stamina or physique is relevant to that activity;
  - (d) add a new exception that allows organisations to exclude people from competitive sporting activities on the basis of their gender identity or the fact they have an innate variation of sex characteristics in any circumstances;
  - (e) amend the exception so it only applies to women's sport; and
  - (f) extend the exception to new grounds of discrimination, but it would only apply where required to meet policy objectives such as: securing fair competition (having regard to the level of the sport and the public interest

in participation); ensuring physical safety of participants; and complying with international rules.

Consultation question 64 relates to Chapter 14 of the Issues Paper.

## OTHER ISSUES IN PART 2 (CHAPTER 15)

116. In Chapter 15, we examine issues arising under three subparts at the end of Part 2 of the Human Rights Act 1993 that do not sit within any particular area of life. These subparts are called “Other forms of discrimination”, “Special provisions relating to superannuation schemes” and “Other matters”.

### Other forms of discrimination

117. This subpart in Part 2 identifies some specific types of conduct as unlawful discrimination. In Chapter 15, we explain how this subpart works.

### *Sexual harassment*

118. We outline and seek feedback on one of the current “Other forms of discrimination” —section 62, which is about sexual harassment. Sexual harassment is:

- (a) asking a person for sexual contact where there is an (implied or overt) promise of preferential treatment or threat of detrimental treatment; or
- (b) subjecting a person to language, visual material or physical behaviour of a sexual nature that is “unwelcome or offensive” and is either repeated or so significant that it has a detrimental effect on them in an area of life.

119. Anyone can take a claim of sexual harassment regardless of their sex, gender identity or sex characteristics.

120. We explain that we are interested to receive feedback on whether there are any issues with the wording of section 62 that may be relevant to this review.

### *Should there be any new ‘other forms of discrimination?’*

121. In Chapter 15, we also ask whether there should be new provisions added to this subpart to address issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. We discuss two specific possibilities.

*A protection from harassment that is directed at someone because they are transgender or non-binary or they have an innate variation of sex characteristics.*

122. We explain that this option might be desirable if current laws are insufficient to protect people from these forms of

harassment. We also identify some potential difficulties with adding such a provision in this review given there is no harassment provision relating to most other grounds of discrimination.

### A provision clarifying the circumstances in which medical interventions on children and young people with an innate variation of sex characteristics are allowed

123. In Chapter 5, we acknowledge this is a matter of deep concern to many people who have an innate variation of sex characteristics. We also identify some potential difficulties in using the Human Rights Act to regulate this issue.

### Special provisions relating to superannuation schemes

124. This subpart in Part 2 contains some provisions about superannuation schemes. These include an exception making it lawful for superannuation schemes to treat people differently in certain circumstances by reason of their sex (in section 70(2)). We discuss the scope and the likely rationale of this exception and seek feedback on whether it should be amended to reflect any new grounds we propose.

### Other matters

125. We outline and seek feedback on one provision in this final subpart in Part 2 of the Human Rights Act. Section 74 confirms “for the avoidance of doubt” that it is not a breach of Part 2 of the Human Rights Act to provide preferential



treatment because of “a woman’s pregnancy or childbirth” or “a person’s responsibility for part-time or full-time care of children or dependants”.

126. We seek feedback on whether it would be desirable to reword section 74 to clarify that it applies to anybody who is pregnant or who is giving birth, regardless of their gender identity.

Consultation questions 65–71 relate to Chapter 15 of the Issues Paper.

## **DISCRIMINATION BY PUBLIC ACTORS (CHAPTER 16)**

127. In Chapter 16, we discuss the implications of this review for Part 1A of the Human Rights Act, which sets out rules that apply to government departments and to people and bodies exercising government functions. We also discuss the implications of this review for section 19 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).
128. Section 19 of the NZ Bill of Rights contains a right to freedom from discrimination “on the grounds of discrimination in the Human Rights Act 1993”. Under the NZ Bill of Rights, discrimination will be unlawful if it cannot be “demonstrably justified”.

129. Part 1A of the Human Rights Act applies the same tests. It reflects a policy decision that the discrimination obligations imposed on government should be identical under both statutes.
130. It is outside the scope of this review for us to recommend any reforms to the NZ Bill of Rights. This means it would also be difficult for us to recommend reforms to Part 1A.
131. We nevertheless need to understand the potential implications of any amendments we propose to section 21 of the Human Rights Act for Part 1A and the NZ Bill of Rights. In Chapter 16, we explore the potential implications of this review both for policy development and for the resolution of discrimination complaints against the government.
132. We explain that, while Part 2 of the Human Rights Act has detailed and specific provisions, Part 1A and the NZ Bill of Rights take a more fluid and context-specific approach. The outcome of any case will be determined by a court or tribunal based on a broad and contextual assessment of all relevant rights and interests.
133. Some key features of this type of litigation include:
- (a) Plaintiffs have to prove their treatment was based on a prohibited ground, which generally involves a comparison with someone in a similar situation who does not have the particular characteristic.

- (b) Cases are determined based on the facts before the court and in the light of the evidence.
- (c) The court or tribunal needs to balance the right to be free from discrimination against other relevant rights and interests to decide whether a limit is demonstrably justified.

Consultation question 72 relates to Chapter 16 of the Issues Paper.

## CROSS-CUTTING ISSUES (CHAPTER 17)

134. In Chapter 17, we discuss three cross-cutting issues that have implications for both Parts 1A and 2 of the Human Rights Act. These are:

- (a) the potential impacts of any reforms we propose on the ability of Māori to live in accordance with tikanga;
- (b) misgendering and deadnaming; and
- (c) some examples of binary language in the Human Rights Act.

### Potential for interference with tikanga

135. We explained in Chapter 5 that there are a range of different approaches emerging within te ao Māori to the roles that Māori who are transgender or non-binary or who have an

innate variation of sex characteristics can fulfil in activities that are sex-differentiated according to the tikanga of a particular Māori group. The approach that is taken can vary depending on factors such as the tikanga of the particular hapū or marae, the mana of the individual, the particular practice at issue and the reasons that underlie the tikanga.

136. In Chapter 17, we explore whether there is a risk of law reform along the lines that we explore in this Issues Paper widening the circumstances in which state law can interfere with tikanga. We set out some reasons why we think this is not especially likely. However, we also consult on some potential options to address any such risk. These are:

- (a) there should be no reform; or
- (b) the Act should not apply to some or all marae-based activities; or
- (c) there should be an exception that lists specific tikanga activities that are exempt from Human Rights Act 1993 scrutiny; or
- (d) there should be a more general exception for differences in treatment that are required by tikanga; or
- (e) there should be amendments to the composition and process of the Human Rights Review Tribunal when it considers matters of tikanga.

137. We acknowledge that, given the limited scope of our review, it might be difficult for us to recommend that new exceptions

of this kind should apply to different treatment based on any of the existing prohibited grounds of discrimination.

### Misgendering and deadnaming

138. Chapter 17 explores the potential impacts of this review for the regulation of misgendering and deadnaming. Misgendering involves referring to a person who is transgender or non-binary by the wrong gender (for example, using pronouns for them that correspond with their sex assigned at birth). Deadnaming is referring to a person who is transgender or non-binary by a name they no longer use and that draws attention to their sex assigned at birth.
139. The regulation of misgendering and deadnaming requires care because it engages the right to freedom of expression in the NZ Bill of Rights. It is possible other rights would also be engaged.
140. There are several existing provisions in the Human Rights Act that could be engaged by misgendering or deadnaming. We think a New Zealand court or tribunal could hold that misgendering or deadnaming was in breach of the Act, but only if the behaviour and its consequences were sufficiently serious that penalising the behaviour was a justified limit on freedom of expression.
141. We identify three options for a specific provision on misgendering and deadnaming in the Human Rights Act but also identify some difficulties with those options. Given the

difficulties we identify (and given we think the right to freedom of expression would already need to be taken into account), we think it may well be preferable to leave misgendering and deadnaming to be regulated under the existing provisions in Part 1A and Part 2.

## Binary language in the Human Rights Act

142. Many provisions in the Human Rights Act use the binary phrases “him or her”, “his or her” or “he or she”. We seek feedback on whether these instances of gendered language should be replaced with the gender-neutral phrase “they or them”.

Consultation questions 73–76 relate to Chapter 17 of the Issues Paper.

## OTHER MATTERS (CHAPTER 18)

143. In Chapter 18, we discuss Parts 1, 3 and 4 of the Human Rights Act. We also consider the consequential implications of this review for other laws (especially laws that refer directly to the Human Rights Act).

### Part 1 of the Human Rights Act

144. Part 1 of the Human Rights Act states the membership, powers and functions of the Human Rights Commission

(and of some associated officers). The Human Rights Commission has broad powers to advocate for and promote human rights in Aotearoa New Zealand. We have not heard of any specific issues raised by these provisions but we invite feedback.

### **Parts 3 and 4: access to justice and dispute resolution**

145. Parts 3 and 4 of the Human Rights Act deal with the resolution of disputes. The Human Rights Commission can offer a range of services to help resolve disputes. If the parties are unable to resolve the dispute, a claim can be lodged with Te Taraipiunara Mana Tangata | Human Rights Review Tribunal.

146. We explain that the Human Rights Commission has received very few complaints of discrimination by people who are transgender or non-binary or who have an innate variation of sex characteristics. We are interested to understand better whether there are barriers to access to justice for these groups that we should address in this review.

### **Implications of this review for other laws**

147. There are references to the Human Rights Act in several other New Zealand statutes as well as in some codes and rules. We already asked about some of these in earlier chapters. In Chapter 18, we ask about those we have not yet discussed.

148. We explore the implications of reform for the following Acts, codes or rules that refer to the Human Rights Act's prohibited grounds of discrimination:

- (a) the Films, Videos, and Publications Classification Act 1993;
- (b) the Terrorism Suppression (Control Orders) Act 2019;
- (c) the Corrections Act 2004;
- (d) the Code of Health and Disability Services Consumers' Rights 1996; and
- (e) the Lawyers' Conduct and Client Care Rules 2008.

149. We also ask about some other statutes that refer generally to the Human Rights Act or that protect people based on a list of group characteristics similar to the list of prohibited grounds in section 21.

Consultation questions 77–79 relate to Chapter 18 of the Issues Paper.

Consultation question 80 is a general question for feedback about other issues or options we have not identified.