Te Aka Matua o te Ture
Law Commission

Te Whanganui-a-Tara, Aotearoa
Wellington, New Zealand

Ia Tangata

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

Summary of submissions from individual submitters

Contents

Introduction

1. On 11 August 2025, Te Aka Matua o te Ture | Law Commission submitted its report to the Minister of Justice to complete its review of protections in the Human Rights Act 1993 for people who are transgender or non-binary or who have an innate variation of sex characteristics.[1] The report was presented to Parliament on 4 September 2025.
2. Prior to the Final Report, the Law Commission carried out public consultation on the issues in the review. We published an Issues Paper in June 2024[2] and then entered a 10-week consultation period during which members of the public could make a submission through our website.
3. The Issues Paper explained the background to the review, discussed the legal issues, presented a preliminary view on the key question of whether section

---

1 Te Aka Matua o Te Ture | Law Commission *Ia Tangata: 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* (R150, 2025). References in this summary to "the Final Report" refer to this report while references to "the review" refer to the review as a whole.

2 Te Aka Matua o Te Ture | Law Commission *Ia Tangata: 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* (IP53, 2024). References in this summary to "the Issues Paper" refer to this document.

21 of the Human Rights Act should be amended and sought feedback on 80 consultation questions.

4. This document summarises the written feedback we received from individual members of the public on the Issues Paper. It does not summarise the submissions we received from organisations as these are proactively released on the Law Commission's website.

5. We did not ask submitters for demographic information and so this summary does not break down any of the feedback by demographic group.

6. We are grateful to everyone who took the time to share their views and perspectives with us as part of this review.

The feedback we received

7. We received a total of 737 submissions, including 74 from organisations. This count excludes duplicate submissions or subsequent submissions from the same person. If subsequent submissions from the same person contained new information, we added the new information into the first submission and counted it as one submission.

8. The submissions we received were primarily in response to the consultation questions we asked in the Issues Paper. Some submitters chose to give their feedback on the review in a general way, such as in response to a 'catch-all' question at the end of the online form.

9. The online form primarily contained free text boxes for submitters to explain their responses. For some

questions (such as those with a list of specific options) we gave submitters a tick box option to select the option with which they agreed, and then we asked them to explain their answer.

10. We received a spreadsheet from Kia Rangona te Kōrero | Free Speech Union containing 6,013 discrete pieces of feedback on the review.[3] People indicated their support for one or more of four paragraphs of form text supplied by the Free Speech Union and many supplemented their feedback with individual comments.

11. On the final day of the submission period, we received 631 emails to a Law Commission email address for a different review. The emails contained feedback relevant to the Ia Tangata review based on form text supplied by Voices for Freedom. We directed these emailers to our online submissions process.

Our analysis process

12. We read all the submissions we received and analysed submissions using the qualitative software NVivo. We used a coding framework to thematically categorise the responses to different questions. This analysis was then used to facilitate our policy process.

13. We read all the feedback forwarded to us by the Free Speech Union and analysed the themes it contained.

14. Although the emailers who wrote to us in response to the Voices for Freedom campaign had been directed to

---

3 The total of 6,013 does not count duplicate feedback from identical email addresses but includes feedback from people with the same first and last names.

our online submissions process, we read around a third of those emails to ensure we understood the perspectives of people in this cohort. Given these emails were mainly based on form text, we were confident after reviewing this sample that we had a good understanding of these perspectives. We received and considered a submission from Voices for Freedom itself, which reflected similar themes.

15. We did not undertake significant quantitative analysis of the submissions we received. This was for several reasons. First, as we explained in the Issues Paper and the Final Report, a Law Commission consultation is not a survey or referendum. It does not measure the level of public support for a particular policy option. There are many variables that influence whether individuals and organisations submit on a public consultation. These include whether they are aware of the consultation, how much they feel their interests are personally affected, the time and resources they have available to them, how easy or difficult they find it to engage with supporting materials and the extent to which advocacy groups are encouraging or supporting public engagement.

16. Second, the role of the Law Commission is not to search for a reform option with which everyone agrees nor even for the reform option supported by the greatest number of people. Rather, we wanted to hear people's views so we could understand better the reasons for and against particular reform options, and the practical implications of reform.

17. Third, we did not require verification of submitters' identities and so we could not be certain that we did not receive multiple submissions from the same person or submissions from overseas that would skew any quantitative analysis.

18. Fourth, it was often not possible to assess accurately a submitter's position on a particular topic. For example, sometimes submitters ticked a box indicating a particular position on an issue and then gave reasons that contradicted that position (suggesting they may have misunderstood the question). Further, many submitters answered questions with their views on other topics. While we still took these responses into account when considering the issue to which they related, it was not always possible to know for certain what submitters intended. Consequently, any count would be very approximate.

19. For all these reasons, we have taken a non-technical approach in this document to describing the level of support for particular perspectives. Where relevant, we give a general sense of the levels of support for different perspectives and for the different options we had proposed.

About this summary

20. This document is intended to sit alongside the Final Report. That report contains our research, analysis and recommendations for reform. We do not replicate that analysis here.

21. This document is organised to reflect the structure of the Final Report and so there are some differences between the structure of this document and the Issues Paper. That means we sometimes group questions differently to the way they were ordered in the Issues Paper.

22. We received many submissions that indicated significant misunderstandings about both the current law and the proposals in the Issues Paper. This may in part be due to the technical and legal nature of the questions and the proposals as well as, in some cases, inaccurate information that was being disseminated about the project by third parties. This summary does not comment on or correct any misunderstandings.

23. As noted above, we also received submissions that contained contradictory responses to some questions. For example, some submitters selected a particular option in response to a question but made comments making it clear they supported a different option. A common issue in this respect was that many submitters who indicated support for the "no reform" option in relation to the wording of particular exceptions made it clear from their reasons that they were really trying to communicate their view that there should be no reform of the Human Rights Act at all.

24. In situations such as these, we have done our best to reflect in this summary and in the Final Report what we believe to be submitters' actual views. Where necessary, we explain in relevant sections any misunderstandings or difficulties we had with interpreting submissions.

25. As noted, this document does not summarise the submissions we received from organisations as these are proactively released on the Law Commission's website. It summarises the submissions we received from individuals as well as other written feedback we received from individuals (via the spreadsheet from the Free Speech Union and in emails generated by the Voices for Freedom campaign). The feedback we received from organisations sometimes emphasised different themes, or was weighted towards different views, than the feedback we received from individuals.

26. Where we refer in this document to "submitters", we mean all the individuals from whom we received written feedback, including through our online submission process, via the spreadsheet received from the Free Speech Union and in emails from Voices for Freedom.

27. Due to the subject matter of this review, many submitters told us they did not want their names disclosed. As a result, we do not generally name individual submitters in the report or this summary. However, we make occasional exceptions where confidentiality has not been requested and the identity of the submitter is relevant (for example, because they have relevant expertise on the matter being discussed).

28. We do not refer to every point that we heard in feedback. We have paraphrased or summarised submissions for clarity, length and to be able to reflect the position of multiple submitters at once.

29. While we use the terminology used by submitters as much as possible, where needed for clarity, we use

terminology from the Final Report. More detail about the terminology we use is available in the Final Report itself.

30. We acknowledge that many people who engaged with us felt strongly about issues in this review and some people shared information that was personal or sensitive. Some of the views or information summarised in this document may be distressing to read and we encourage readers to take that into consideration.

Experiences of discrimination

31. Chapter Three of the Issues Paper detailed research on experiences of discrimination and ill treatment faced by people who are transgender, people who are non-binary and people who have an innate variation of sex characteristics, and on some issues of particular concern to people in these groups. At the end of the chapter, we asked:

> **Question 1**: Is there any other information about discrimination experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics that you think it is important for us to consider?

32. This section covers what submitters said in relation to:

(a) whether they agreed or disagreed with the chapter analysis;

(b) discrimination experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics; and

(c) the effect of discrimination experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics.

33. This section does not include what submitters said in relation to discrimination in particular areas of life, such as employment or accommodation, and does not cover feedback about types of discrimination experienced by Māori. These are summarised in later sections.

34. In the Final Report, we discuss in more detail the experiences we heard about from New Zealand's ethnic minority communities as well as people with disabilities. Most of what we heard on these topics was at consultation hui, in submissions from organisations and through our own research, so we do not cover it here.

Whether submitters agreed or disagreed with the chapter analysis

35. A large number of submitters agreed with the analysis in Chapter Three. Submitters who agreed said the chapter was comprehensive, thorough and accurately covered experiences of discrimination faced by people who are transgender or non-binary or who have an innate variation of sex characteristics.

36. A few submitters said the chapter provided a firm basis for reform. Some submitters said the experiences of discrimination and ill treatment in the chapter matched what submitters had heard from others or experienced themselves.

37. Conversely, many submitters disagreed with the descriptions in the Issues Paper of experiences of discrimination. First, some submitters expressed concerns about the research being relied on in this

chapter. Specific criticisms included: that self-reported data about discrimination cannot be relied on as evidence for reform; that the chapter did not acknowledge the limitations of the evidence relied on; that it inappropriately relied on overseas material; and that the Commission should have contracted its own research.

38. Second, some submitters said people who are transgender or non-binary or who have an innate variation of sex characteristics do not face discrimination and ill treatment. Third, some submitters said the discrimination experienced by people in these groups is no worse than that experienced by other minorities. Fourth, a few submitters did not agree with the analysis in the chapter because they disagreed with the premise that transgender and non-binary identities are valid.

39. Finally, a few submitters said, if people in these groups face discrimination, it is of their own making.

Experiences of discrimination and ill treatment

40. This section summarises what submitters said in relation to specific experiences of discrimination and ill treatment faced by people who are transgender or non-binary or who have an innate variation of sex characteristics.

Having multiple marginalised identities

41. Some submitters discussed the compounding effect of having multiple marginalised identities such as being transgender and also part of one of New Zealand's ethnic minority communities. Some submitters thought

discrimination that is based on multiple characteristics is poorly provided for in the Human Rights Act. They said those people who are transgender or non-binary or who have an innate variation of sex characteristics and belong to other minority identities face compounding discrimination and deserve special attention in the review.

Identification and forms

42. A number of submitters said having identification documents that do not match their gender often presents opportunities for discrimination.
43. Many submitters mentioned the status of people born overseas who are transgender or non-binary or who have an innate variation of sex characteristics, and the fact that they may not be able to amend their registered sex on government-issued identification documents.
44. A handful of submitters said forms not having gender-neutral options was a type of discrimination they faced.

Reinforcing binary of male and female

45. A handful of submitters said the prevalence in society of the gender binary is a form of systemic discrimination they face. Submitters said the gender binary is embedded in law and society and can be extremely upsetting and exhausting for people who do not fit within the binary (such as people whose gender identity is non-binary).
46. A handful of submitters told us that spaces not having gender-neutral facilities is a form of discrimination they

face. They said gender-neutral spaces such as bathrooms and changing rooms are lacking in schools, workplaces and other public places.

Assault, harassment and violence

47. A large number of submitters said people who are transgender or non-binary or who have an innate variation of sex characteristics face abuse, harassment and violence. Many submitters said this type of behaviour is increasing in the light of online misinformation. Some submitters said they themselves or loved ones have been targets of harassment and intimidation.

48. A few submitters said they face "extreme" levels of anti-transgender hatred online. Social media was cited as a specific online environment where abuse and threats towards transgender people are present.

49. A handful of submitters observed that transgender and non-binary people face high levels of family and sexual violence compared to the general population.

Other experiences

50. A few submitters said churches and religious ministers perpetuate discrimination and ill treatment against people who are transgender or non-binary or who have an innate variation of sex characteristics.

51. A couple of submitters discussed the "distressing rise" in discrimination and misinformation being shared by the media, or expressed concern that transgender people are often portrayed in the media in demeaning ways.

Another talked about how the law needs to recognise that automated systems are capable of discrimination and harassment without human input. A couple of submitters said conversion practices against transgender and non-binary people still occur, despite criminalisation.

Ill treatment experienced by people who have an innate variation of sex characteristics

52. A few submitters specifically discussed discrimination and ill treatment experienced by people who have an innate variation of sex characteristics.
53. A handful of submitters discussed discrimination and ill treatment when people with an innate variation of sex characteristics access healthcare. Some submitters said unconsented surgical interventions are a form of discrimination that intersex people face.
54. A couple of submitters said intersex people are often made to feel they should be ashamed or be secretive about their variation.

Effects of discrimination and ill treatment

55. Submitters discussed the effects of discrimination and ill treatment on people who are transgender or non-binary or who have an innate variation of sex characteristics.
56. For example, some submitters discussed a variety of mental impacts stemming from the discrimination and ill treatment they experience. This included stress, anxiety and depression. Submitters said discrimination is isolating and distressing and takes a toll on their mental,

emotional and spiritual health. A couple of submitters said they are exhausted having to defend their right to exist.

57. A few submitters said they are afraid to go out in public, access public facilities, use public transport, seek healthcare and go online because of a fear of experiencing discrimination and ill treatment.

58. A couple of submitters said, when they do participate in society, they do so conditionally, such as by avoiding going into a city at night or checking that places or providers are "trans friendly" before accessing or using them.

59. A few submitters said they had missed opportunities they wanted because they were too anxious about experiencing discrimination and ill treatment.

60. Some submitters also detailed the effect of discrimination and ill treatment on others. For example, parents talked about how they were worried for their children who were transgender or non-binary or who had an innate variation of sex characteristics.

Key reform considerations

61. Chapter 4 of the Issues Paper proposed several key reform considerations to support the review's policy analysis. These were grouped into the following categories:

    (a) coherence of the Human Rights Act;

    (b) core values underlying the Human Rights Act;

    (c) consistency with fundamental constitutional principles and values;

    (d) needs, perspectives and concerns of New Zealanders;

    (e) evidence-led reform; and

    (f) other principles of good law-making.

62. In the Issues Paper, we asked:

> **Question 2**: Do you agree that we should treat the matters we discuss in this chapter as the key reform considerations for this review?

63. This section summarises what submitters said in relation to:

    (a) key reform considerations as a whole;

    (b) specific key reform considerations; and

    (c) additional considerations or other foundational issues.

64. Those submitters who gave feedback on the proposed key reform considerations were evenly divided between

those who said they agreed with the key reform considerations and those who indicated they did not agree. A small number of submitters indicated they agreed in part.

65. The most common reason given by those who said they did not agree was opposition to any reform of the Human Rights Act. Typically, these submitters did not mention key reform considerations in their reasons at all.

66. Where submitters gave substantive feedback about the proposed key reform considerations, it was generally positive, for example, expressing agreement with the proposed key reform considerations.

67. A small number of submitters gave specific feedback on one or more of the specific categories of key reform considerations. This was usually to comment on how they thought a particular consideration should be applied or whether they thought it supported or undermined the case for reform. This feedback is set out below.

Coherence of the Human Rights Act

68. No submitter said coherence of the Human Rights Act was an inappropriate reform consideration for the review. Several submitters identified the coherence of the Act as a reason for their view on certain topics, including feedback that:

(a) concepts like gender identity are unsettled or vague and so would lead to incoherence in the law;

(b) there is a lack of coherence between the Act and tikanga Māori; and

(c) the private/public divide reflected in the Human Rights Act (for example, in an exception for shared residential accommodation) should be reassessed.

Core values that underlie the Human Right Act

69. In the Issues Paper, we identified several core values that underlie the Human Rights Act. No submitter said these core values had been misidentified or that they should not be treated as key reform considerations. Legal experts including Professor Dean Knight, Dr Eddie Clark, Paulette Benton-Greig and Victoria Casey KC agreed that it was correct to have identified these as core values underlying the Act.

70. Of the small number of submitters who gave feedback on specific key reform considerations, several singled out one or more of these values as particularly important to the review (with dignity/self-worth being the most common).

Equality/fair play

71. While no submitters disagreed that equality is a core value underlying the Human Rights Act, a small number disagreed with our suggestion in the Issues Paper that the concept underlying some provisions in the Human Rights Act is substantive equality. Some submitters said this would be a "redefinition" of equality.

Dignity/self-worth and autonomy/privacy

72. No submitter disagreed that dignity/self-worth and autonomy/privacy are core values underlying the Human Rights Act. Of the small number of submitters who gave specific feedback on these values, several expressed views about whose dignity/self-worth or autonomy/privacy should be prioritised in this review. Some submitters thought the dignity/self-worth and autonomy/privacy of people who are transgender or non-binary or who have an innate variation of sex characteristics should be the focus. They said this was because these are marginalised communities that have suffered from the absence of reliable anti-discrimination protections.

73. Other submitters highlighted the dignity/self-worth and autonomy/privacy of cisgender women and said these had not been sufficiently prioritised in the Issues Paper.

Limits/proportionality

74. No submitter disagreed with the description of limits/proportionality in the Issues Paper. However, submitters had different views on how to apply these values. Some submitters said any limits that are put on the anti-discrimination rights of people who are transgender or non-binary or who have an innate variation of sex characteristics need to meet a genuine need that could not be addressed in any other way.

75. Others expressed a concern that adding new grounds to section 21 of the Human Rights Act would have a disproportionate effect on other groups, particularly

cisgender women. Several submitters said the review should focus on the long-term impact of reform on society.

Constitutional fundamentals

76. In the Issues Paper, three constitutional fundamentals were identified as relevant to the review:

(a) tikanga;

(b) te Tiriti o Waitangi | Treaty of Waitangi; and

(c) human rights obligations in domestic and international law.

Tikanga and te Tiriti o Waitangi | Treaty of Waitangi

77. Only a small handful of submitters referred to tikanga in their feedback on key reform considerations (generally in tandem with the Treaty of Waitangi). Those that did agreed tikanga are important reform considerations. For example, one submitter said:

> The considerations of the Treaty of Waitangi and tikanga, in particular, are absolutely critical and fundamental for any legal changes in Aotearoa and help to ensure that proposed reforms will respect and incorporate our unique legal and cultural context.

78. Feedback on whether the Treaty of Waitangi should be a key reform consideration was divided. Some said the Treaty was a fundamental law reform consideration in Aotearoa New Zealand.

79. Other submitters said the Treaty of Waitangi has no relevance to the review. Most of these submitters said

the Treaty is irrelevant because it does not mention people who are transgender or non-binary or who have innate variations of sex characteristics. Some said these concepts or the concept of gender did not exist in 1840, some said te ao Māori does not recognise gender diversity and others thought the Treaty is too old to have relevance today.

80. Many of these submitters did not seem to object to the relevance of the Treaty of Waitangi to law reform generally but thought the Treaty did not support the proposed reforms to section 21 of the Human Rights Act.

Human rights obligations

81. No submitter disagreed that human rights obligations are an important consideration. Many submitters shared views about which rights and whose rights were most relevant and important. Some placed particular emphasis on the right of people to be free from discrimination that is due to their gender identity or sex characteristics.

82. Other submitters emphasised the rights of other groups in the community. In their feedback on key reform considerations and in other feedback, many submitters discussed the rights and freedoms in the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). Submitters referred most often to the right to freedom of expression but also, to a lesser extent, to the related freedoms of thought, conscience, religion, belief and association. Some submitters said the importance of these rights had been undervalued in the Issues Paper.

83. A few submitters referred to specific international instruments, most commonly, the Convention on the Elimination of All Forms of Discrimination against Women.

84. One submitter expressed a concern that there is pressure for reform from the United Nations. A similar sentiment was shared by a handful of people who provided general feedback on the review to the Free Speech Union.

Needs, perspectives and concerns of New Zealanders

85. No submitter disagreed that the needs, perspectives and concerns of New Zealanders should be a key reform consideration. However, submitters expressed different views on whose needs, perspectives and concerns should be prioritised. For example, some thought priority should be given to the needs, perspectives and concerns of people who are transgender or non-binary or who have an innate variation of sex characteristics. Others stressed the importance of understanding the needs, perspectives and concerns of other groups in the community, predominantly cisgender women.

Evidence-led reform

86. No submitter disagreed that law reform analysis should be grounded in evidence, and some submitters specifically said basing the review on evidence was important.

87. Submitters had a range of different perspectives about what evidence should be relied on and how it should be

prioritised. For example, some submitters expressed a concern that there are currently high levels of misinformation circulating about issues relevant to this review. Some submitters criticised particular evidence from the Issues Paper. For example, a few submitters had concerns about us relying on the laws of other countries.

Other principles of good law making

88. No submitter disagreed with the principles of good law making being used as key reform considerations. Some submitters underlined specific principles of good law making as important to the review, principally, accessibility and certainty.

89. Some submitters impliedly supported using principles of good law making by using the principles to explain their perspective on specific reform issues, such as suggesting that accessibility is a reason to reform section 21.

Additional considerations

90. Submitters made two suggestions for other matters that should be added to the list of key reform considerations. First, some submitters suggested that the key reform considerations should reflect more clearly the importance of safety and/or freedom from violence. For example, several submitters said it was important for the Law Commission to treat the safety of people who are transgender or non-binary or who have an innate variation of sex characteristics and the goal of protecting

them from harm as key considerations for the review. Conversely, some submitters mentioned safety as a key reason to justify exceptions to a protection from discrimination.

91. Second, several submitters suggested that the rights of cisgender women were so fundamental to the review that they should be treated as their own category of key reform consideration.

92. Although not explicitly framed as key reform considerations, many submitters identified two other issues that they thought we should treat as foundational to the review.

93. The first was the meaning of sex. Many submitters felt the review could not and should not proceed without a clear statement of the meaning of sex and said this should guide the review's analysis and recommendations. Some also considered that the failure to define sex in the Issues Paper indicated assumptions about this concept that should be articulated clearly.

94. Most of the submitters who held this view were opposed to reform of the Human Rights Act. These submitters considered that the starting point for the review must be that sex is biological, binary, immutable and objectively verifiable. Other submitters disagreed with this view of sex.

95. A second issue that some submitters considered to be foundational to the review was the validity of transgender identities and of concepts such as gender identity. Many submitters suggested the review should

take a particular approach to this issue, and some said our underlying assumptions needed to be stated more clearly.

96. Some who opposed reform of the Human Rights Act described gender identity as an "ideology", a "belief system" or "a new social construct", with some accordingly questioning the validity of transgender and non-binary identities. Some submitters said it was obvious from the Issues Paper that the Law Commission had ascribed to "gender ideology".

97. By contrast, some submitters who were supportive of reform saw the legitimacy of transgender and non-binary identities as an essential starting point for the review. For example, Victoria Casey KC stated:

> The starting point must be to acknowledge that trans, gender diverse and intersex people exist. They do: that is a matter of fact, not opinion or ideology up for debate.

The core case for reform

98. Chapter 4 of the Issues Paper explained six rationales that have been used in the past in New Zealand and overseas to determine if new grounds should be brought within the protection of anti-discrimination laws. The six rationales are that:

    (a) people with that characteristic have experienced a history of disadvantage, discrimination, prejudice, stigma or stereotyping;

    (b) the characteristic is immutable or is so closely tied to a person's identity that it can only be changed at unacceptable personal cost;

    (c) distinctions on that basis harm human dignity;

    (d) adding protection would be consistent with developments at international law;

    (e) other liberal democratic nations with whom we share a common legal heritage protect people from discrimination on this basis; and

    (f) reform is supported by changes in social norms.

99. We reached the preliminary conclusion in Chapter 4 that New Zealand law should protect people from discrimination that is due to them being transgender or non-binary or having an innate variation of sex characteristics.

100. We also discussed in Chapter 4 whether current law provides sufficient protection. We reached the preliminary conclusion that it does not and therefore that amendments to section 21 are necessary and desirable.

101. This section of the summary covers:

(a) What submitters said in relation to the rationales identified in the Issues Paper; and

(b) Some key reasons submitters gave for supporting or opposing reform of section 21. We have grouped these reasons into the following topics:

i. certainty;

ii. accessibility;

iii. the symbolic value of anti-discrimination law; and

iv. other concerns in relation to reform.

102. Some other reasons submitters gave for opposing or supporting reform of section 21 are discussed elsewhere in this summary.

Rationales underlying existing protections

103. This section summarises comments submitters made about the six rationales we identified in the Issues Paper and whether they were appropriate matters for us to consider when deciding which groups should be protected from discrimination under New Zealand law.

104. It was relatively uncommon for submitters to say anything explicit about whether they thought it was appropriate to rely on these rationales. However, submitters sometimes indicated what they thought about particular rationales when explaining why they

thought the Human Rights Act should or should not be amended.

A history of disadvantage

105. Few submitters commented specifically on whether a history of disadvantage and marginalisation was an appropriate matter to consider, although some submitters made arguments for or against reform based on an assumption that this consideration is relevant. No submitter explicitly disagreed this was an appropriate matter to consider.

106. As covered earlier in this summary, submitters had different views about whether people who are transgender or non-binary or who have an innate variation of sex characteristics face discrimination or have experienced a history of discrimination.

Immutability/unacceptable personal cost

107. Submitters who commented on this rationale generally considered that the first element of the rationale (immutability) was an appropriate matter to consider. However, not all submitters considered that the second element of this rationale (characteristics closely tied to a person's identity) was relevant. Some of those who disagreed explicitly with the second element thought some existing grounds in section 21 of the Human Rights Act (such as religious belief, ethical belief and employment status) should not be protected because they are not immutable.

108. While many people agreed in their feedback that this rationale supports reform, many others disagreed. Some said they considered that being transgender or non-binary is a voluntary choice and that, if people in these groups face discrimination, it is of their own making. Conversely, others said people do not choose to be transgender or non-binary, or that a person's gender identity and expression is closely tied to their personal identity.

109. No submitter disagreed that having an innate variation of sex characteristics is immutable. Some submitters were opposed to people who have an innate variation in sex characteristics being treated the same as transgender or non-binary people, generally referring to ideas of immutability when doing so.

Distinctions that harm human dignity

110. Only a few submitters commented directly on whether the impact on human dignity was an appropriate matter to consider. Several mentioned human dignity in passing when explaining why they considered reform was appropriate.

111. Some submitters who supported reform of section 21 mentioned dignity as part of their reasons. For example, Professor Dean Knight said reform of section 21 was important to ensure people who are transgender or non-binary or who have an innate variation of sex characteristics are protected and "may flourish in society with dignity".

112. Some submitters talked about the impact of discrimination in terms that are equivalent to dignity. For example, some submitters who are transgender or non-binary or who have an innate variation of sex characteristics said being deemed unworthy by society takes a widespread toll on them and that the discrimination they experience is humiliating and dehumanising. Some people referred to the psychological impact of routine discrimination and how they live their lives in constant fear of ill treatment.

113. A few submitters who opposed reform said they did not think discrimination against people who are transgender or non-binary was harmful to human dignity or did not think it was demeaning.

Consistency with international law

114. Many submitters referred to international law as a reason to amend or not amend section 21 of the Human Rights Act.

115. Several submitters who supported reform referred to the international position when explaining their views. For example, submitters said protection was the internationally consistent position or that explicit protection was something Aotearoa New Zealand should do as a good global citizen.

116. Some submitters were more specific, referring, for example, to submissions made by advocacy groups to New Zealand's Universal Periodic Report on Human Rights and to the International Labour Organization.

117. Some submitters referred to international law as a reason not to amend the Human Rights Act, most commonly mentioning the Convention on the Elimination of All Forms of Discrimination against Women. These submitters said the proposed reform conflicted with this convention.

Consistency with other liberal democratic nations

118. Of those submitters who supported reform, few mentioned explicitly the approach taken by other liberal democratic nations. Of those submitters who opposed reform, some questioned whether Aotearoa New Zealand should follow other countries. For example:

(a) some submitters said the impact of discrimination protections in other comparable societies has been negative (often referring to the Federal Court of Australia decision in *Tickle v Giggle for Girls Pty Ltd (No 2)*);[4]

(b) some said different countries, not only 'Western' ones, should be used as points of comparison.

Changing social norms

119. Some submitters indicated they thought changes in social attitudes were relevant when deciding whether to extend protection to new groups. There were different views among submitters about whether the law has a role in leading social change or should follow it.

---

4 *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296.

120. Some submitters argued that reform of the Human Rights Act is needed to keep up to date with societal changes. For example, submitters said such a reform would:

(a) adapt to changing social norms and needs;

(b) modernise the Human Rights Act;

(c) align with the preferences of New Zealanders; or

(d) reflect the increasing appreciation of the difference between sex and gender.

121. Other submitters who supported reform said the law needs to drive social change. A handful observed that there does not need to be a social norm of accepting transgender, non-binary and intersex people to warrant protecting them, and that widespread prejudice heightens the need for protection.

122. Other submitters linked their opposition to reform to insufficient social consensus. Some of these submitters said they thought most New Zealanders would be opposed to reform. A few submitters made comments suggesting they thought law reform either could not or should not be the driver of social change.

123. No submitter commented on changing social norms as a reason to extend or not extend protection to people with an innate variation of sex characteristics.

Whether reform is necessary and desirable to provide adequate protection

124. In Chapter 4 of the Issues Paper, we asked:

> **Question 6**: Do you have any feedback on our preliminary conclusion that an amendment to section 21 of the Human Rights Act 1993 is necessary and desirable to ensure adequate protection from discrimination for people who are transgender or non-binary or who have an innate variation of sex characteristics?

125. More submitters answered this question than any other. Many submitters also made comments in their answers to other questions that were, in substance, a response to this question. Some submitters gave their view on overall reform as their response to multiple questions.

126. Individual submissions that we received through our online submission process were very evenly balanced between opposition and support for reform of section 21, with slightly more submitters supporting reform. A handful of submitters were not clear or only partially supported reform.

127. The feedback contained in the spreadsheet from the Free Speech Union (largely based on form text made available on the Free Speech Union's website) was also focused, in substance, on this question of reform of section 21. People who provided feedback this way opposed reform, primarily due to concerns about free speech (which we discuss further below).

128. The feedback in the emails we received as a result of the Voices for Freedom campaign (based, again, on form text) also expressed general opposition to reform of the Human Rights Act.

129. We discuss some of the main reasons submitters gave for supporting or opposing reform here. Where relevant, additional reasons given by submitters for supporting or opposing reform (including relating to the implications for other rights and freedoms) are discussed elsewhere in this summary.

Certainty of the law

130. Many people were concerned that the current position (being lack of explicit protection in section 21 for these groups but the possibility that protection is available through the existing grounds of sex and disability) is too uncertain. Some said it is risky to rely on the existing grounds or on a 2006 Crown Law opinion stating that the ground of sex protects transgender people. Some were concerned about potential gaps in coverage. Some said the need to bring test cases to clarify the scope of protection puts an unfair burden on affected communities and individual litigants.

131. Other submitters took the contrary view. Some said section 21 already gives sufficient protection. A few submitters specifically said the sex ground already covers transgender and non-binary people and people with an innate variation of sex characteristics.

132. Some submitters thought an amendment would undermine the certainty of the law. These submitters said adding a ground of gender identity (or similar) would decrease legal certainty because the concept is vague and contested, could change over time, is subjective and will be confusing. Some submitters also expressed concern that, because gender identity is a matter of self-identification, people might be liable for discriminating against a person they did not realise was transgender.

Accessibility

133. Several submitters said one problem with relying on the existing grounds of sex and disability is that these grounds do not accurately describe the real basis on which people in these groups generally experience discrimination.

134. Submitters also said there was currently confusion, uncertainty, and ambiguity with respect to the rights of people who are transgender and non-binary. Warren Lindberg MNZM, a former Human Rights Commissioner, said his experience is that the "common understanding" of the ground of sex is that it is about the "range of concerns from women against discrimination from men" and so people who are transgender or intersex do not have confidence they are covered.

135. A few submitters said legal clarity was generally beneficial, for example, so people could understand their rights and so businesses, services and institutions would be clear about their responsibilities.

Symbolic value of anti-discrimination law

136. Many submitters referred to the symbolic value of the law. Submitters said changing the law would send a message and have an important expressive function. For example, in addition to providing legal remedies, the Human Rights Act communicates acceptable and unacceptable conduct.

Other concerns in relation to reform

137. There were a variety of other reasons submitters gave for opposing reform. Some of these reasons are summarised in later sections. Reasons that are not summarised elsewhere are as follows.

138. Some submitters said their reason for opposing reform is their view that sex is biological, binary and immutable.

139. Some submitters opposed reform because they were concerned about the compliance burden or about the government intruding inappropriately into their lives.

140. A few submitters expressed concerns about the negative impact of reform on society. These submitters suggested, for example, that reform might increase social and political polarisation, heighten social tensions, increase discrimination or reinforce sex stereotypes.

141. Some submitters opposed reform because they thought adding new grounds would mean the law would then need to protect various other (currently unprotected) groups. Some submitters thought this would result in absurd categories of protection.

142. Some submitters said people who are transgender or non-binary should not be singled out or prioritised over other groups and some were opposed to the law prioritising a minority group over the majority. Relatedly, some submitters said they opposed reform because everyone is already covered by the Human Rights Act.

143. Some submitters suggested all references to prohibited grounds should be removed from the Human Rights Act.

Te ao Māori, tikanga and te Tiriti

144. This section summarises what submitters said in relation to:

(a) Māori perspectives on gender and experiences of discrimination;

(b) the implications of the Treaty of Waitangi for reform; and

(c) the implications of tikanga for reform.

145. Submitters commented on these points in response to several different consultation questions from several parts of the Issues Paper.

Māori perspectives on gender identity and discrimination

146. In the Issues Paper, we asked:

> **Question 3**: Are there Māori perspectives on the issues in the review you would like to share with us?
>
> **Question 4**: Do you have any feedback on the tikanga we have identified and how we have described them?
>
> **Question 5**: Are there other tikanga that are relevant to this review?

147. In the Issues Paper, we set out our understanding from preliminary engagement (including from a wānanga we had held) that many Māori who are gender diverse or who have an innate variation of sex characteristics do not see these features as centrally defining of their identity and consider their identity as Māori to be more important. Some submitters agreed with this, with some emphasising the holistic and interwoven nature of Māori identity. For example, some people told us that many takatāpui see their sex, sexuality and gender as innately intertwined with their Māoritanga or said their takatāpui identity is not a gender identity but a blend of sex, gender and spirituality.

148. Some submitters shared perspectives about or experiences of discrimination experienced by Māori who are transgender or non-binary or who have innate variations of sex characteristics, or are part of the rainbow community. As noted earlier, some submitters said holding multiple minority identities can heighten discrimination and that the discrimination experienced by Māori who are transgender or non-binary or who have an innate variation of sex characteristics is often compounded by racism. One submitter said:

> There is a special kind of violence bestowed upon our Māori Rainbow community when you are meet with te ao Pākehā and get discriminated for simply being.

149. Some submitters said the disadvantage and discrimination experienced by Māori who are gender diverse or who have an innate variation of sex characteristics is a result of the disruptive effects of

colonisation. Other submitters objected to this characterisation of pre-colonial Māori society.

150. None of the submissions we received from people who told us they were Māori explicitly disagreed with the tikanga identified in the Issues Paper or how they were described, and some submitters explicitly agreed these tikanga were relevant.

151. Some submitters said discrimination against people who are transgender or non-binary or who have an innate variation of sex characteristics is an attack on the mauri, tapu and mana of those people, their whānau and their community. Other things that submitters said in relation to mauri, tapu and mana included:

(a) the mana, mauri and tapu of takatāpui is relevant across the whole review, not just in Māori settings, as Māori exist in every setting;

(b) tapu recognises the intrinsic value and sacredness of each person, informing legal perspectives on human dignity and the inalienable rights of all individuals; and

(c) to fuel a young person's mauri means to recognise and support their evolving sense of self, including their gender identity.

152. Another Māori submitter also emphasised the importance of wairua to the review, saying:

> I was raised with the understanding that our wairua comes to us through our tipuna, and that it's our wairua and not our tinana that our tipuna know us by. It's our wairua and not our tinana that leaves a path for our

mokopuna. For me, limiting ourselves to the form we're born in is a Western idea.

153. Other tikanga that submitters said might be relevant to the treatment of people who are transgender or non-binary or who have an innate variation of sex characteristics include manaakitanga, whanaungatanga, kaitiakitanga, aroha and utu.

154. Finally, many submitters made two general points. First, submitters cautioned against state regulation of tikanga in any form. Second, several submitters emphasised the need to recognise that tikanga and kawa differ between iwi, hapū and whānau.

Implications of te Tiriti

155. In the Issues Paper, we asked:

> **Question 7**: Do you have any feedback on the implications of te Tiriti o Waitangi | Treaty of Waitangi for whether people who are transgender or non-binary or who have an innate variation of sex characteristics should be protected from discrimination?

156. Some submitters said amendments to section 21 of the Human Rights Act are required for consistency with the Treaty of Waitangi. Others said the Treaty has no relevance — mainly for reasons outlined earlier (in the discussion of key reform considerations).

157. Some submitters commented on specific articles of the Treaty of Waitangi.

Article 2 — tino rangatiratanga

158. Some submitters considered that amendments to section 21 of the Human Rights Act are required to comply with article 2 of the Treaty of Waitangi. Submitters who thought this gave three closely related reasons. First, several submitters said takatāpui and takatāpuitanga are a taonga over which Māori have tino rangatiratanga.

159. Second, some submitters said Māori who are gender diverse or who have an innate variation of sex characteristics have a right to tino rangatiratanga over their own identities.

160. Third, some submitters said Māori who are gender diverse or who have an innate variation of sex characteristics deserve to have these identities recognised and protected through an understanding held by their ancestors. Many of these submitters said gender fluidity was normal in te ao Māori prior to colonisation, and pointed to colonisation as disrupting this.

161. Other submitters did not agree with this characterisation of pre-colonial Māori society. Some said "transgenderism" is a new concept and diverse ideas about gender have not always formed part of Māori society. Some said the absence of carvings, waiata and mōteatea is evidence of this.

Article 3 — guarantee of equality

162. Some submitters said article 3 of the Treaty requires reform of section 21, although submitters did not generally explain their reasons. As discussed above, some submitters talked about experiences of discrimination of people who are both Māori and gender diverse and said holding multiple minority identities can exacerbate the impact of discrimination.

163. Conversely, some submitters considered that article 3 is only about equal treatment of Māori and British subjects and is not a guarantee of equity relevant to the review.

Whether reform would interfere with tikanga

164. In the Issues Paper we asked:

> **Question 73**: Do you agree that amendments to section 21 of the Human Rights Act 1993 along the lines we are exploring in this Issues Paper may make little difference in practice to the potential for state law to interfere with sex-differentiated tikanga activities?

165. Possibly due to the technical legal nature of this question, the most common response to this question was that submitters said they were unsure. The next most common response was agreement with the preliminary view we had expressed in the Issues Paper that amending section 21 would not significantly alter the balance between state law and tikanga.

166. Some submitters shared their understandings about the roles that could be played by gender-diverse people in

sex-differentiated tikanga activities. For example, one submitter said:

> The kaaranga is widely understood to be performed only by women who have given birth. While some hapuu might sanction men who believe in gender identity performing these duties, others will see it as a serious breach of protocol. The kai kaaranga is the physical representation of the mana of the waahine – sacred, and fertile. The bringer of life – that is the mana to give birth.

167. Another submitter shared their experience growing up in a small rural settlement. They said:

> Growing up I never saw a gender non-conforming Māori person permitted to adopt the opposite sex role in any sex-differentiated cultural practice. I don't deny that in other whānau, hapū or iwi this may have been different.

168. Again, some submitters stressed that tikanga and kawa differ between hapū and iwi and said these differences needed to be recognised.

169. Many submitters said state law should not interfere with tikanga and with the tino rangatiratanga of Māori. Many also said it should not interfere with sex-differentiated tikanga activities.

170. Very few submissions commented on analysis in the Issues Paper of the implications of the Human Rights Review Tribunal's decision in *Bullock v the Department of Corrections*, which held that expecting a Department of Corrections employee to participate in a poroporaki (leaving ceremony) at which tikanga was being observed

in a role that aligned with her sex was sex discrimination.[5] Some submitters said they agreed with this analysis. Others commented that they thought amendments to section 21 would create conflict in marae kawa or increase the chance of conflict but did not give examples of how this would occur. Others raised concerns about amendments having unintended consequences.

171. Several submitters indicated that the relationship between tikanga and the Human Rights Act raises broader issues than those relating to anti-discrimination protections for people who are transgender or non-binary or who have an innate variation of sex characteristics.

172. In the Issues Paper, we expressed the view that it was unlikely Māori would use the Human Rights Act to challenge tikanga activities. One submitter with relevant expertise, Professor Claire Charters, thought this underestimated the number of Māori who might try to rely on the Human Rights Act or the NZ Bill of Rights Act if a Māori entity discriminates against them. Professor Charters thought the Issues Paper focused too exclusively on tikanga. She suggested there might be a growing number of Māori who might want to explore the potential for Part 1A of the Human Rights Act to apply to the activities of Māori governance entities more generally.

---

5 *Bullock v Department of Corrections* [2008] NZHRRT 4.

173. Professor Charters suggested that we should consider in this review the broader potential (beyond issues of tikanga) for Part 1A of the Human Rights Act to interfere with the tino rangatiratanga of Māori governance entities. Professor Charters gave the examples of entities providing social, health and educational services under co-governance arrangements or where powers are being exercised under Treaty settlement legislation.

174. Professor Charters' starting point was that any regulation by state law of te ao Māori breaches Māori self-determination and tino rangatiratanga and is illegitimate. She referenced both the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples. She also referred to practice in other countries such as the Indian Civil Rights Act 1968 (in the United States), under which jurisdiction over discrimination issues is exercised exclusively by tribal courts.

Possibilities for specific reform

175. In the Issues Paper, we asked:

> **Question 74**: If new prohibited grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should additional amendments be made to the Act to ensure the reform does not widen the circumstances in which state law can interfere with the ability of Māori to live in accordance with tikanga?

176. Submitters could tick one of the following options for question 74:

(a) there should be no reform (option 1);

(b) the Human Rights Act should not apply to some or all marae-based activities (option 2);

(c) there should be an exception that lists specific tikanga activities that are exempt from scrutiny under the Human Rights Act (option 3);

(d) there should be a more general exception for differences in treatment that are required by tikanga (option 4); and

(e) there should be amendments to the composition and process of the Human Rights Review Tribunal when it considers matters of tikanga (option 5).

177. Submitters could also specify another option.

178. The most common option submitters chose was no reform (option 1). Most submitters who preferred this

option provided no explanation for why. Some appeared to be motivated by general opposition to reform of the Human Rights Act as part of this review.

179. Options 4 and 5, respectively, were the next most popular. Reasons given by submitters who supported option 4 were:

(a) it would provide flexibility to address diverse practices and enable Māori to define what the exception should cover as tikanga evolves;

(b) marae, hapū and iwi should have sovereignty over matters related to tikanga;

(c) te ao Māori and tikanga values should be in legislation to bridge a gap between Pākehā and Māori gender minorities; and

(d) any exception should include a reasonableness test.

180. Of those submitters who supported option 5, few provided any explanation or comment. Those who did said Māori are tikanga experts.

181. Many submitters selected "another option". Some of these submitters said the state should not interfere with tikanga. One submitter said upholding Te Tiriti means that these decisions are for Māori to make.

182. Few submitters supported the other options. A handful supported option 2, for example, because they thought marae were analogous to private domestic spaces and so needed similar exceptions.

183. Conversely, some submitters who selected "another option" expressed the view that tikanga are not relevant

to issues of discrimination under the Human Rights Act or that allowing for the application of tikanga was itself racial discrimination.

Other rights and freedoms

184. Chapter 6 of the Final Report discusses the implications of the proposed reform for people's speech, belief and association. This section summarises what submitters said about these issues.

185. In the Issues Paper, we had asked one question that related specifically to how a reform should regulate people's speech. This was question 75, which asked:

> **Question 75**: If new grounds are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should there be a provision in Part 2 about misgendering and deadnaming?

186. Some of the feedback summarised below was received in response to that question. However, submitters also gave us relevant feedback in response to many other consultation questions, and in relation to many different topics canvased in the Issues Paper.

187. For example, many people told us about their concerns about the potential impacts of reform on free speech in response to question 6 (which asked whether adding new grounds to section 21 of the Human Rights Act is necessary and desirable). The four form text paragraphs that provided the basis for the feedback we received via

a spreadsheet from the Free Speech Union all focussed on the impact of reform on freedom of expression.

188. Because of this, we have summarised submitters' feedback on these issues thematically rather than grouping the feedback under particular consultation questions.

Concerns about the harmful impacts of speech

189. Many submitters had concerns about the harmful impacts of hostile speech on people who are transgender or non-binary. Submitters mentioned concerns of this kind in relation to various areas of life regulated by the Human Rights Act. For example:

(a) Some submitters discussed students being misgendered, deadnamed or outed at schools or universities, as well as facing other bullying and harassment.

(b) Some submitters talked about experiences that people who are transgender or non-binary face at work.

190. Some submitters said the right to freedom of speech needs to be carefully balanced, with one submitter stating it should not become a "Right to Cause Harm".

191. In response to the consultation question about misgendering, submitters said misgendering can be "abusive", "psychologically harmful", "significantly contribute to the marginalisation of trans people" and put people who are transgender or non-binary at risk.

192. One submitter described misgendering as a "core part" of the abuse people who are transgender or non-binary face, one said harm resulting from misgendering is comparable to physical assault and another said misgendering is the same "in terms of awfulness" as sexual harassment they had experienced. Some submitters said misgendering can be a form of bullying. Some said it can be a barrier to health care. Others said it can sometimes result in people being outed, which may turn them into a target.

Opposition to or concern about reform linked to rights and freedoms

193. Many submitters were concerned about the impact of reform of section 21 on rights and freedoms protected by the NZ Bill of Rights and at international law. Submitters often expressed these concerns at a high level of generality. However, some submitters mentioned specific rights and freedoms they were concerned about. Most commonly, submitters referred to freedom of speech (or expression) but they also raised concerns linked to:

(a) freedom of thought, conscience, religion and belief;

(b) manifestation of religious belief;

(c) freedom of association; and

(d) freedom from discrimination on the basis of political opinion and religious belief.

194. Concerns related to these rights and freedoms were a common reason that submitters gave for opposing

reform of section 21 altogether. Submitters also shared concerns of this kind in relation to specific contexts, such as schools, workplaces and government agencies.

Whether proposed reform could breach the NZ Bill of Rights

195. In the Issues Paper, we discussed the implications of the NZ Bill of Rights for the proposed reform of section 21 of the Human Rights Act. We explained that:

(a) The rights in the NZ Bill of Rights (including freedom of expression) are not absolute. There can be limits so long as they are authorised by law and "demonstrably justified in a free and democratic society".

(b) It is possible that a court or tribunal might conclude, in particular circumstances, that an instance of persistent misgendering and deadnaming amounted to discrimination. However, this could only happen if the behaviour was sufficiently serious to justify limiting the right to freedom of expression in all the circumstances. A finding of this kind would most likely arise in institutional settings that involve a power imbalance and in which there are professional obligations to moderate one's conduct and language towards others. Other factors that might be relevant might include the persistence of the behaviour, whether it was intentional and any other hostile or discriminatory treatment that took place alongside it.

(c) In circumstances of that kind, it is already possible to complain about misgendering or deadnaming under

other existing complaints mechanisms. Therefore, we wondered in the Issues Paper whether adding new grounds to the Human Rights Act would increase at all the potential for complaints of this kind to be made.

196. Submitters who commented on this part of our analysis were generally legal experts. Professor Graeme Austin, Dr Eddie Clark, Professor Dean Knight and Professor Paul Rishworth KC all indicated agreement that limits on misgendering or deadnaming could be a demonstrably justifiable limit on the rights in the NZ Bill of Rights if the behaviour was sufficiently serious. Most of these legal experts noted their express agreement, and none disagreed, with the proposition that behaviour falling below this seriousness threshold could not be held to constitute discrimination under New Zealand law.

197. Some of these legal experts agreed, and none disagreed, that misgendering of sufficient seriousness to constitute discrimination could already be caught by current laws. For example, Professor Paul Rishworth KC and Dr Eddie Clark agreed specifically with this suggestion.

Concerns about the Human Rights Act interfering with speech

198. A large number of submitters gave feedback on freedom of speech and what people should or should not be entitled to say about issues relating to gender. This included feedback from people who were worried about

the impact of the reform on their right to say what they like.

199. All of the form text paragraphs supplied by the Free Speech Union expressed free speech concerns (focusing on different topics) and all four asked the government not to amend the Human Rights Act.

200. Many submitters were concerned that people might be penalised for expressing gender-critical opinions or ideas. Submitters said they were worried that law reform would stifle open debate and the exchange of ideas (including in workplaces and schools), that people would be penalised for questioning the concept of gender (such as facing adverse workplace consequences) or that gender-critical views would be branded hate speech.

201. Some submissions (modelled on form text supplied by Voices for Freedom) stated:

> There will be a clear chilling effect on society as people bite their tongues for fear of breaching ambiguous provisions as the scope of permissible speech narrows.

202. Many submitters were concerned about people being penalised for referring to someone using names, pronouns and other details that are consistent with their "biological sex". Submitters said requiring someone to affirm another person's gender is "compelled speech", intrudes on matters of conscience and requires people to deny what they "see and know to be true". One submitter said:

> Making it illegal to misgender or deadname, effectively is forcing people to falsify their own views, beliefs and facts. This is one of the worst violations of speech rights possible.

203. Some submitters were concerned about the impact of reform on religious beliefs. Some submitters referred to particular religious beliefs about sex and gender, including that some religions reject the idea that gender is separate from biological sex. Others commented on the need for religious organisations to maintain their beliefs about sex.

204. One submitter said:

> Some people have religious beliefs which they will live and die by, and it is not right to infringe upon their rights just to exalt the rights of these groups above all others… The Human Rights Act must not fail to protect the existing groups (eg protections on the basis of religion, sex, race, etc) in its attempt to cater to new groups as well. Because this is creating a serious and undeniable conflict of interests all within the same document.

205. Many submitters worried that people would be jailed for misgendering or that some other significant penalty would automatically attach to misgendering, even when accidental.

206. Submitters also raised practical concerns less focused on rights and freedoms such as that legal consequences for misgendering will cause resentment or lead to linguistic confusion.

Concerns about the Human Rights Act interfering with acts of conscience

207. Some submitters raised concerns about acts of conscience or said their freedoms or beliefs should entitle them to refuse someone a service in certain circumstances. For example, a few submitters said their freedoms entitled them to refuse to serve someone, including to refuse to serve a person who is transgender or non-binary.

208. Some submitters raised the specific example of a baker not wishing to make a cake for a transgender person.

209. Some submitters expressed particular concern about healthcare providers. Some were concerned about healthcare providers being held in breach of the Human Rights Act for discussing the risks and benefits of treatment with a patient, or for expressing professional opinions or concerns on issues of sex and gender.

Freedom of association

210. Some submitters had concerns about the ability of cisgender women to determine who can participate in women-only networks and associations (in person or online). Some submitters had concerns that reform of section 21 would not allow cisgender women to exclude people who were not assigned female at birth. Some were concerned about the ability to run events restricted to women assigned female at birth.

211. Many submitters mentioned the decision of the Federal Court of Australia in *Tickle v Giggle for Girls Pty Ltd (No 2)* relating to a woman-only social networking platform.[6]

212. Some submitters also raised concerns about an Australian Tribunal decision in which the Lesbian Action Group was declined a temporary exemption from Commonwealth anti-discrimination law to hold a public event for "lesbians born female".[7]

213. Submitters with these concerns said women need to be able to define for themselves who can participate in women-only spaces and communities. Some mentioned the need for safe spaces for women who have experienced male violence. Some expressed a particular concern about being able to control who can attend lesbian-only events.

A specific reform in relation to misgendering and deadnaming

214. As noted earlier, in the Issues Paper, we asked whether there should be a specific reform in relation to misgendering and deadnaming (question 75). Submitters could tick one of the following options for question 75:

(a) the Act should provide that misgendering and deadnaming are unlawful under Part 2 (option 1);

---

6 *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296.

7 *Lesbian Action Group v Australian Human Rights Commission* [2025] ARTA 34.

(b) the Act should provide that misgendering and deadnaming are never unlawful under Part 2 (option 2);

(c) the Act should specify the situations in which misgendering and deadnaming are unlawful under Part 2 (option 3); and

(d) there is no need for reform (option 4).

215. Submitters could also specify "another option".

216. We suggested in the Issues Paper that there were significant difficulties with each of the first three options, and that it may well be preferable to leave misgendering and deadnaming to be regulated under existing provisions in the Human Rights Act. We were nevertheless interested to hear submitters' views.

217. Each of options 1 to 4 received significant levels of support from individual submitters.[8]

Option 1: provide that misgendering and deadnaming are unlawful

218. Option 1 was the most popular with individual submitters. Many submitters did not give reasons for their preference. Of those who gave a reason for supporting option 1, many submitters gave reasons that align more closely to option 3 (specify the situations in which misgendering and deadnaming are unlawful). For

---

8 By contrast, submissions from organisations were heavily weighted towards option 4.

example, submitters said only intentional or persistent misgendering and deadnaming should be captured.

219. Submitters supporting option 1 discussed the harm caused by misgendering and deadnaming, for example, that it contributes to the marginalisation of transgender people and puts them at risk.

Option 2: provide that misgendering and deadnaming are never unlawful

220. Submitters who supported option 2 were concerned about protecting the right to freedom of expression and the right to freedom of thought, conscience and belief. These submitters were concerned about the negative impact the other options might have on these rights and freedoms.

Option 3: specify the situations in which misgendering and deadnaming are unlawful

221. Some submitters who supported option 3 did not give reasons. Of those that did, a handful supported the law being specific about when misgendering and deadnaming is unlawful and thought this would mean a better balance of rights.

222. Submitters who supported option 3 suggested various thresholds for when misgendering should be unlawful. Some common ones were if the behaviour is "persistent", "deliberate" or "intended to cause harm".

Option 4: no reform

223. Some submitters who supported option 4 said the existing provisions in the Human Rights Act are sufficient. A large number of submitters preferred option 4 on the basis that the other options would violate rights and freedoms.

224. A handful of submitters who supported option 4 queried whether misgendering and deadnaming cause harm. Other submitters said misgendering and deadnaming should be considered harassment and therefore there was no need for reform.

Another option

225. Few submitters suggested a separate option. Some submitters who ticked "another option" gave reasons consistent with option 3, identifying circumstances in which they thought misgendering or deadnaming should be prohibited. A few suggested the issue could be addressed under other regimes, such as under the Health and Safety at Work Act 2015, a hate crime regime or the Privacy Act 2020.

226. Several submitters suggested it might be possible to model a provision on sections 62 or 63 of the Human Rights Act, which are about sexual and racial harassment, or to incorporate misgendering into those existing harassment provisions.

Wording of new grounds

227. Chapter 7 of the Issues Paper suggested options for the wording of any new prohibited grounds of discrimination in section 21 of the Human Rights Act. This section summarises what submitters said in relation to:

(a) a ground to protect people who are transgender or non-binary;

(b) a ground to protect people who have an innate variation of sex characteristics; and

(c) any amendment to the existing ground of sex.

A ground to protect people who are transgender or non-binary

228. In the Issues Paper, we asked:

> Question 8: Which of the options discussed in this chapter do you think is best for protecting people who are transgender or non-binary?

229. Submitters could tick one of the following options for question 8:

(a) Asymmetrical option 1: A stand-alone ground (or grounds) that uses group descriptors (such as "being transgender or non-binary").

(b) Asymmetrical option 2: A stand-alone ground (or grounds) that uses descriptive language to identify

who is covered by the ground (such as "a person whose gender is different to their sex assigned at birth").

(c) Symmetrical option 1: A stand-alone ground (or grounds) that describes general characteristics held by everyone in the community (such as gender, gender identity or gender expression).

(d) Symmetrical option 2: Amending the ground of sex to become "sex or gender" and defining it to include characteristics such as gender identity and gender expression.

230. Of the four options presented in the Issues Paper, the option of a stand-alone symmetrical ground (symmetrical option 1) was the most popular with submitters by some margin. A combined sex or gender ground (symmetrical option 2) was the next most popular. Some submitters supported a symmetrical option but did not express a preference for which.

231. Some submitters who preferred a symmetrical approach were concerned that an asymmetrical approach would 'other' people who are transgender or non-binary by setting them apart as different.

232. Submitters who preferred a symmetrical approach also said specific terms people use to describe themselves are rapidly evolving. For example, the term 'transsexual' was often used in the past but is now regarded as outdated and offensive by some people.

233. Some submitters were concerned that cases brought in reliance on an asymmetrical ground such as "being

transgender or non-binary" might get tied up in legal arguments because people would have to establish that they fell within the relevant description.

234. A handful of submitters thought asymmetrical options might not sufficiently cover people from diverse cultural backgrounds, or that asymmetrical options privilege people who exist within a "Western paradigm". For example, we were told that Pacific indigenous terms such as fa'afafine have complex cultural nuances that do not track neatly onto the Western concept of gender identity. We also heard that not all Pacific peoples who are gender diverse use these traditional terms

235. As noted, a stand-alone symmetrical ground was more popular than a combined sex and gender ground. Key reasons these submitters preferred a stand-alone ground were because it reflected that sex and gender were different, it would mean each ground could be considered separately and would make exceptions simper and clearer. Submitters also thought a stand-alone ground would be more visible and explicit than a combined ground.

236. Conversely, a key reason some submitters preferred a combined sex or gender ground over a stand-alone symmetrical ground was that they said it better reflected the relationship between sex and gender and the experiences of people who are transgender or non-binary. Some people who supported a combined ground said requiring people who are transgender to rely on the ground of "gender identity" rather than sex would be

regressive and would bolster arguments in wider society that sex and gender are entirely separate. Other submitters were concerned that the overlap between stand-alone grounds such as sex and gender would result in complainants having to rely on more than one ground.

237. Some submitters were concerned that, if gender-related grounds are stated separately, the ground of sex might be interpreted narrowly and the sex exceptions used to exclude people who are transgender.

238. Although asymmetrical approaches were less popular, some submitters did support them. Some submitters who preferred an asymmetrical approach were concerned that some people would not realise they were protected by a symmetrical ground (such as "gender identity") because it does not refer specifically to the disadvantaged groups who need protection. Some submitters were concerned that people from advantaged groups might use a symmetrical ground to bring trivial claims that might, in some cases, further disadvantage minority groups.

239. More submitters preferred a descriptive asymmetrical approach over a group descriptor asymmetrical approach. Submitters who preferred the descriptive approach thought it provided broader coverage and thought it would be inclusive, future-proof and clear. Submitters who supported a group descriptor approach thought it would be broad and avoid issues with definitions but would still clearly identify the groups who are being discriminated against.

Specific wording

240. The vast majority of submitters who preferred stand-alone symmetrical grounds thought "gender identity" should be one of them.

241. By contrast, relatively few submitters suggested a stand-alone ground of "gender". Of those that did, some suggested the ground should be defined to include gender identity and expression or to refer to specific gender identities.

242. Of those submitters who did prefer a ground of "gender", the main reasons were that they thought it was broader than gender identity and because they thought it would avoid the implication that gender is something you 'identify as' rather than simply 'are'. Other submitters said, while gender identity might not be a perfect term, it provides the best available option for extending protection.

243. Some submitters were opposed to a ground of "gender" because they saw the word as having negative connotations. For example, a small number of submitters referred to gender as a social construct or as a means of oppressing women.

244. Of those submitters who suggested wording for stand-alone symmetrical grounds, most thought "gender expression" should be protected in some form.[9]

---

9 The key options that submitters identified for protecting gender expression were: listing gender identity and gender expression as separate stand-alone grounds;

Submitters gave examples of people who might benefit from the express protection of gender expression, including people who are early in their transition and cisgender people who have non-conforming gender expression.

245. Conversely, a few submitters had specific concerns about a gender expression ground, for example, because they said it did not have a shared or common meaning.

246. Another suggestion made by some submitters was that the grounds need to cover the different potential relationships between a person's gender identity and their sex assigned at birth. A few suggested that the term "gender modality" be included within a ground. Some submitters were concerned in this respect about protections for people who detransition or retransition. One submitter commented that the right to detransition should be respected as much as the right to transition and was concerned about the free speech rights of those who detransition.

247. Some of the submitters who supported an asymmetrical ground provided specific wording. For asymmetrical option 1, these included: transgender and non-binary; being transgender, non-binary or otherwise gender diverse; takatāpui; transgender/transsexual; and gender reassignment. For asymmetrical option 2, suggestions included the following:

---

having a combined ground of gender identity and gender expression; or defining gender identity to include gender expression.

248. A person whose gender or gender identity is different from their sex assigned at birth.

249. A person whose gender differs to their sexual characteristics or is outside of the binary.

250. A person whose gender is not congruent with their primary or secondary sex characteristics.

251. Someone who is not cisgender.

Another option

252. A few submitters made additional suggestions for grounds. For example, one person (who submitted on behalf of herself and an anonymous group) proposed a ground of "third gender", while another submitter suggested a ground that protected those who "sit alongside" men and women. Some submitters suggested a combination of approaches.

253. Some submitters suggested the Human Rights Act should be amended to address intersectional discrimination, which is discrimination that occurs because of the interaction of multiple characteristics.

A ground to protect people who have an innate variation of sex characteristics

254. In the Issues Paper, we asked:

> Question 9: Which of the options discussed in this chapter do you think is best for protecting people who have an innate variation of sex characteristics?

255. Submitters could tick one of the following options for question 9:

(a) Asymmetrical option 1: A stand-alone ground (or grounds) that uses group descriptors (such as "being intersex").

(b) Asymmetrical option 2: A stand-alone ground (or grounds) that uses descriptive language to identify who is covered by the ground (such as "a person who has an innate variation of sex characteristics").

(c) Symmetrical option 1: A stand-alone ground (or grounds) that describes general characteristics held by everyone in the community (such as sex characteristics).

(d) Symmetrical option 2: Amending the ground of sex to become "sex or gender" and defining it to include sex characteristics.

256. A symmetrical ground was more popular among submitters overall, although people who had an innate variation of sex characteristics preferred a range of different approaches.

257. Some submitters expressed concern that an asymmetrical ground might require people to prove they have an innate variation of sex characteristics.

258. Some people with innate variations of sex characteristics said they liked asymmetrical protection but were concerned it would put them at risk of further discrimination by singling them out for "special treatment".

259. Some submitters thought it was important for a ground to reflect people with innate variations of sex characteristics as a distinct group.

260. Some submitters supported use of the term 'intersex', saying it was short, clear, well recognised, generally accepted and able to capture a variety of innate variations. However, overall, a ground that uses the term 'intersex' was the least popular option among those submitters who expressed a view. Some submitters referred to the term 'intersex' as outdated, polarising or pejorative.

261. Some people were concerned that a symmetrical ground of "sex characteristics" could be used by advantaged groups in a way that trivialises the protection or harms people with innate variations of sex characteristics.

262. In terms of wording, a few submitters suggested a ground of "sex characteristics, including innate variations of sex characteristics". Many preferred either a combined "sex, gender and sex characteristics" ground or a combined ground of "sex and sex characteristics" without including gender.

263. Some submitters who preferred the wording "sex characteristics" commented that people with innate variations of sex characteristics are not the only ones who experience discrimination because of their sex characteristics. Examples given by submitters included cisgender women with masculinised features, people who have had surgery on sex characteristics (including women who have had hysterectomies or mastectomies) and people who have experienced changes in sex characteristics due to other medical treatments.

264. Some submitters suggested other options for how an (asymmetrical) ground could be worded. A few submitters suggested the ground of "variation of sex characteristics". Some submitters suggested the ground of disability could be amended to clarify that it covers innate variations of sex characteristics.

Implications for exceptions of a combined sex and gender ground

265. In the Issues Paper, we also asked:

> Question 10: If there were a combined "sex and gender" ground, do you have any feedback on how the Human Rights Act 1993 could make it clear when an exception relating to this ground applies?

266. In response to this question, some submitters said exceptions could specify which parts of the "sex or gender" ground were relevant to a particular exception. Some submitters thought each exception could specify that the respective exception can only be relied on

where necessary to advance the exception's underlying policy rationale.

267. Some submitters preferred the approach of referring to sex or gender in exceptions without providing specific legislative guidance as to which aspects of the ground are engaged by an exception. Some thought this would then lead to exceptions being assessed on a case-by-case basis or resolved by the courts as needed.

Defining the ground of sex

268. In the Issues Paper, we asked:

> **Question 11**: If new stand-alone grounds of discrimination are added to the Human Rights Act 1993, should the ground of sex be amended to clarify the circumstances in which it would continue to apply?

269. In the related discussion in the Issues Paper, we discussed potential options such as defining sex as 'biological sex' or defining sex with reference to birth certificates.

270. There was no support from submitters for defining the ground of sex by reference to a person's birth certificate. Some submitters did not favour this option because they were worried about people missing out on protection. Others opposed it because they thought it would result in a definition of sex that was too wide.

271. Feedback on defining the ground of sex to mean biological sex was very divided. Many submitters strongly supported defining the ground of sex to mean

biological sex. Submitters who held this view said sex is binary, biological and immutable and the Human Rights Act should reflect this. Some submitters gave suggestions for how a biological definition of sex could be worded such as by referring to gametes or sex characteristics. A number of submitters thought defining the ground of sex to mean biological sex would protect the rights of cisgender women by clarifying who can access single-sex services and facilities.

272. Many other submitters were opposed to the ground of sex being defined to mean biological sex or being defined at all. A key concern from these submitters was that defining sex as biological would make any gender identity protections ineffective because sex exceptions in the Human Rights Act could be applied in a way that allows for the exclusion of transgender people. Some submitters said the meaning of sex is contested and there is debate about which biological markers are relevant. Submitters also commented that sex is cultural as well as biological and that courts have recognised that sex is not limited to biological sex. Some submitters pointed to practical issues with defining the ground of sex in biological terms as well as potential privacy implications.

Recurring issues relating to the part 2 exceptions

273. In Chapter 8 of the Issues Paper, we gave a general introduction to Part 2 of the Human Rights Act, including the exceptions in Part 2. We consulted on three issues that we had identified as recurring across a range of exceptions.

274. This section summarises what submitters said in response to these three questions as well as some general feedback about exceptions. Some of the points overlap with the discussion of grounds above.

Potential for uncertainty as to the scope of any sex exception that is not amended to reflect new grounds

275. In the Issues Paper, we asked:

> Question 12: Do you have any feedback on the potential for uncertainty as to the scope of any sex exception that is not amended to reflect new grounds?

276. Several submitters expressed concern that unamended sex exceptions could be used to defeat discrimination claims based on grounds such as gender identity.

277. For other submitters, their main concern was protecting the rights of cisgender women and girls and maintaining

sex exceptions (such as those enabling single-sex bathrooms and sports) along lines associated with sex assigned at birth.

278. There was no explicit support for exceptions being applied on the basis of a person's birth certificate. Some of the submitters who were generally opposed to reform of the Human Rights Act were concerned that this would enable people to be treated consistently with their self-identified sex, while some submitters who were generally supportive of reform of the Human Rights Act said not everyone is able to obtain a birth certificate that aligns with their gender.

279. Some submitters supported an approach that would limit the circumstances in which sex exceptions would apply. For example, submitters suggested:

(a) where relevant, sex exceptions could be amended to be on the basis of gender identity and not sex; or

(b) where current exceptions use sex as a proxy for sex characteristics (rather than gender), their scope should be narrowed to refer to those sex characteristics.

280. Some submitters suggested approaches that they considered would make exceptions clear and specific, including:

(a) precisely defining sex and gender;

(b) rewording exceptions to say sex or gender;

(c) specifying the circumstances in which exceptions might apply, and to which parts of a new sex or gender ground;

(d) amending the sex exceptions to explicitly address how they interact with the new grounds; or

(e) clearly defining each exception to specify its scope and application.

281. Some of the submitters who preferred a combined sex or gender ground being added to section 21 of the Human Rights Act were motivated by a concern that exceptions applying to a stand-alone ground of sex could be interpreted to exclude people who are transgender or non-binary or who have an innate variation of sex characteristics.

282. Other submitters thought the ground of sex should be left undefined to allow courts to interpret the sex exceptions as needed for the case in front of them.

283. Submitters views on this issue were also sometimes evident from the feedback that they gave on specific Part 2 exceptions (which we discuss further below). The option to leave particular exceptions unamended ("no reform") was often popular with submitters. However, submitters made different assumptions or expressed different preferences about what that would mean for the scope of protection.

284. Some submitters thought no reform of a sex exception would mean, or should mean, that people who are transgender cannot be treated differently based on their sex assigned at birth. Others said the opposite: that no reform would mean that differences of treatment based on a person's 'biological sex' would be lawful.

285. Some submitters clarified that they favoured a no reform option *alongside* adding a definition of 'sex' to the Human Rights Act to state that it always means biological sex. Many submitters who favoured no reform of exceptions did not explain why, making it difficult to know what policy outcome they preferred.

Issues of proof if exceptions are tied to sex assigned at birth

286. In the Issues Paper, we asked:

> **Question 13**: Do you have any feedback on how people would prove their sex assigned at birth if any sex exceptions are amended to clarify that they allow different treatment on that basis?

287. Some submitters were supportive of exceptions that were tied to a person's sex assigned at birth. However, many did not like the language of "sex assigned at birth", preferring, for example, "biological sex", "sex observed at birth", "sex recorded at birth" or "sex determined at conception".

288. The main ways that people thought sex assigned at birth (or 'biological sex') could be established were medical testing or birth certificates. For example, some submitters thought medical tests or procedures could establish a person's sex assigned at birth (or 'biological sex'), such as a blood test, DNA cheek swab, or lower body x-ray.

289. Some submitters thought the law allowing self-identification of sex on birth certificates should be reversed so that birth certificates would provide information about sex assigned at birth. Other submitters suggested other ways of establishing sex, such as testimony from others, determination of a court or hospital records.

290. Several submitters thought proof would rarely be required because someone's sex would be obvious.

291. Many submitters expressed concerns about exceptions being tied to sex assigned at birth. Some submitters thought it was problematic to rely on sex assigned at birth because it is typically based solely on genital examination and may not be accurate, particularly for those who are intersex. Some submitters pointed to the practical issue of how someone's sex assigned at birth could be established.

292. Many submitters pointed to privacy, safety and confidentiality issues that would arise if exceptions were tied to sex assigned at birth (a point discussed in more detail in responses to question 14 below).

293. Many submitters commented that having exceptions based on sex assigned at birth could lead to discrimination against transgender people. Some submitters did not see a person's sex assigned at birth as relevant for exceptions.

Privacy issues with tying exceptions to sex assigned at birth

294. In the Issues Paper, we asked:

> **Question 14**: Do you have any feedback about the privacy issues that may arise if exceptions are tied to a person's sex assigned at birth, the fact they are transgender or non-binary, or their sex characteristics?

295. Much of the feedback submitters provided on this question indicated a concern with privacy issues that could arise if exceptions are tied to sex assigned at birth. There were also some submitters who were not concerned about privacy issues or thought this was outweighed by other considerations.

296. Many submitters said requiring a person to disclose their sex assigned at birth, the fact of being transgender or non-binary, or information about sex characteristics could be invasive and humiliating. Some submitters said it would harm people's dignity and could have negative impacts on mental health. Many commented that this information is health information and that no one should be expected to provide it.

297. Many submitters said having exceptions tied to a person's sex assigned at birth would forcibly 'out' people as transgender, which could be very harmful and increase discrimination. Some submitters had concerns about how sensitive information regarding an employee's gender identity or sex characteristics may be handled by employers, including that it may be

disclosed to others. Some submitters commented that people who are transgender or non-binary or who have an innate variation of sex characteristics should be able to decide when they share information about their gender identity or sex characteristics.

298. Other submitters thought any implications for information privacy are reasonable or are justified by other considerations. Some submitters also suggested that individuals could maintain their privacy by avoiding situations that would require them to disclose their sex assigned at birth.

299. Some submitters said intrusions on privacy are sometimes a necessary part of daily life, drawing a parallel with invasions of privacy that other groups have to endure, such as women or disabled people.

300. A number of submitters thought any privacy concerns are outweighed by the need to protect women and girls.

General feedback in exceptions

301. Some submitters provided feedback on general considerations relating to exceptions. This feedback included the following points:

(a) Exceptions should only be used for good reason and based on good evidence.

(b) There should be no new exceptions for any new grounds (or no sex exceptions at all).

(c) Many of the existing exceptions are outdated and need to be repealed or should be reviewed as part of a review of the Human Rights Act.

(d) The existing sex exceptions need to be applied on the basis of 'biological sex' and should protect the rights of cisgender women and girls to have single sex spaces.

(e) The sex exceptions in the Act should not be able to be used to exclude transgender women from women's spaces.

(f) Clear guidance is needed on how the exceptions should be applied.

Employment

302. Part 2 of the Human Rights Act prohibits various forms of discrimination in employment. The main employment protections in the Act are sections 22 and 23.[10]

303. This section summarises what submitters said in relation to:

(a) the scope of sections 22 and 23; and

(b) the exceptions in Part 2 that allow for differences of treatment on the prohibited ground of sex in the following circumstances:

i. work outside New Zealand;

ii. genuine occupational qualification by reason on authenticity;

iii. domestic employment in a private household;

iv. preserving reasonable standards of privacy; and

v. organised religion.

10 No submitter identified specific issues about the protections in the Human Rights Act that relate to business partnerships, industrial and professional associations, and qualifying bodies, so these are not discussed in this summary.

Scope of sections 22 and 23

304. In the Issues Paper, we asked:

> **Question 15**: Are the existing protections in the Human Rights Act 1993 relating to employment (and closely related contexts) sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?
>
> **Question 16**: Do you have any practical concerns about what the employment protections in the Human Rights At 1993 would cover if the new prohibited grounds of discrimination are added to the Act?
>
> **Question 17**: Are new employment exceptions desirable to accommodate any new grounds we propose?

305. Some submitters said they wanted more explicit protection from employment discrimination for people who are transgender or non-binary or who have an innate variation of sex characteristics although not everyone gave details.

306. Many submitters said it should be made clear that the treatment made unlawful by section 22 would also be unlawful if done on the basis of gender, gender identity, gender expression, sex characteristics or intersex status.

307. Some submitters considered that the employment protections in the Human Rights Act already prohibit

discrimination on the basis of gender, gender identity, gender expression or sex characteristics.

308. A number of submitters said people who are transgender or non-binary or who have an innate variation of sex characteristics face discrimination in employment. They explained that this can take the form of losing their job when they transition, struggling to find work, unequal pay, and hostile work environments.

309. Other specific employment issues of concern to submitters included:

(a) missing out on jobs, having employment terminated or receiving worse pay or conditions than others;

(b) being removed from customer-facing roles;

(c) being bullied or harassed;

(d) being made to wear a male or female uniform (such as personal protective equipment or flight attendant uniforms) that does not correspond with their gender identity;

(e) being told by an employer they cannot affirm their gender at work such as by changing names or pronouns;

(f) having to share personal information about gender identity or sex characteristics with employers, with prospective employers (particularly when having to share documents) or with co-workers; and

(g) application forms not having gender-neutral options for gender or titles (such as being restricted to Mr/Mrs/Ms/Miss).

310. Other submitters were concerned about effective enforcement, such as that it can be difficult for an employee to prove that adverse treatment in an employment context was motivated by discrimination.

311. Submitters did not suggest any new employment exceptions. Some submitters raised concerns about how sections 22 and 23 would apply if new grounds are added to section 21. For example, some submitters were concerned that, if an employee alleges discrimination, it may be difficult for the employer to rebut it. One submitter said an employer may feel they have to hire a transgender person who does not have the most suitable experience for the role due to fear of court proceedings.

312. Some submitters were concerned about expenses falling on employers. For example, that it would be expensive and onerous for an employer to support an employee who is transitioning as they would have to allow the employee leave and find other staff to cover duties.

313. Other submitters thought employers should have full discretion over who they employ and should be able to discriminate for any reason. Some submitters expressed concern that employers would be forced to employ people who may make their customers feel uncomfortable through their gender presentation.

314. One of the form text paragraphs provided by the Free Speech Union was concerned about amendment to the Human Rights Act resulting in "severe and unjust penalties on employees who do not affirm the identities of others".

315. The form text provided by Voices for Freedom said the "proposal exacerbates discrimination because employers will not even consider people who will put them and staff at risk and create problems for their business/es".

Work performed outside New Zealand exception — section 26

316. Section 26 of the Human Rights Act allows different treatment in employment based on sex if 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.

317. In the Issues Paper, we asked:

> **Question 18**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 26 for work performed outside New Zealand be amended to reflect those new grounds?
>
> **Question 19**: Do you have any additional feedback on the practical implications of amending section 26?

318. Few submitters gave feedback on this exception, and many of those who did were unsure about whether the exception should be extended to permit differences of

treatment based on any new grounds we proposed. Of those who did express a view, most supported extending the exception to new grounds.

319. No submitter gave examples of overseas laws, customs or practices that require distinctions to be drawn based on a person's gender identity or because they have an innate variation of sex characteristics. No submitter identified themselves as having experience with employing people overseas.

320. Some submitters suggested that section 26 should be repealed entirely or should be narrowed.

Support for extending the exception to permit differences of treatment based on new grounds

321. Of those submitters who supported extending the exception to one or more new grounds:

(a) Some said work performed outside of Aotearoa New Zealand needs to conform with the laws, cultures and social norms of that place.

(b) Some thought extending the exception is needed to allow New Zealand businesses to operate overseas without being caught by contradictory legal requirements.

(c) Some suggested that different treatment based on gender identity could be justified by potential risks to an employee's safety if they were deployed to a country where local laws or customs would put them in danger. Some also raised safety concerns in relation to people with innate variations of sex characteristics.

Opposition to extending the exception to permit differences of treatment based on new grounds

322. Of those submitters who did not support extending the exception to new grounds:

(a) Some expressed concern about how the broad wording of the exception might apply to people who are transgender or non-binary or who have an innate variation of sex characteristics. For example, some submitters pointed out that, in practice, most jobs are likely to be "ordinarily carried out" by people outside of these groups, simply because these are small minorities.

(b) Others were concerned that the exception could be used to refuse to hire a person who is transgender or non-binary in circumstances that are not justified.

(c) Some said New Zealand should not make allowances for other countries' prejudices, and the law should not condone or facilitate New Zealand businesses operating in countries that do not respect the human rights of transgender people.

Authenticity/genuine occupational qualification — section 27(1)

323. Section 27(1) of the Human Rights Act allows different treatment based on sex where, for reasons of authenticity, being a particular sex is a genuine occupational qualification for the role.

324. In the Issues Paper, we asked:

> **Question 20**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(1) that applies where sex is a genuine occupational qualification for reasons of authenticity be amended to reflect those new grounds?
>
> **Question 21**: Do you have any additional feedback on the practical implications of amending section 27(1)?

325. Rather than expressing general support for or opposition to extending the exception to permit differences of treatment based on any new grounds we proposed, most submitters discussed particular characteristics they thought were relevant or irrelevant to the exception. Submitters told us variously that the following characteristics might be relevant: gender, gender expression, sex characteristics or sex.

Support for extending the exception to permit differences of treatment based on new grounds

326. Some submitters supported extending the exception to permit differences of treatment based on particular characteristics but not necessarily all aspects of gender identity or sex characteristics. For example, some submitters did not think a person's gender identity should be relevant to this exception (see below) but did

support extending the exception to gender expression. They said gender expression was more relevant than gender identity to an exception that was based on how a person looked or sounded.

327. Some submitters thought transgender actors should be prioritised for roles portraying transgender characters, because they can portray these characters authentically. Some thought extending the exception to permit differences of treatment based on new grounds would allow this.

Opposition to extending the exception to permit differences of treatment based on new grounds

328. Some submitters were concerned that, if this exception is extended to permit differences of treatment based on a person's gender identity, transgender actors might be pigeonholed into playing transgender characters or people could claim that being cisgender is a requirement for a role without a good reason.

329. Some submitters also said the concept of authenticity is problematic in its application to people who are transgender or non-binary. For example, one submitter questioned why a transgender woman or non-binary person is not "authentic" for a female modelling role provided they have the relevant physical characteristics. Another said the concept of authenticity suggests that people who are transgender are not authentic men or women.

330. Many submitters raised concerns about section 27(1) more generally, including about lack of clarity as to its scope. Some specific concerns submitters had were:

(a) The concept of authenticity should not be relevant to acting roles given acting involves pretending to be someone you are not.

(b) The terms 'authenticity' and 'genuine occupational qualification' should be defined or more guidance provided.

(c) The exception should only allow distinctions to be drawn on the basis of specific physical traits such as "tall build" or "masculine facial structure".

331. A few submitters thought the exception should be removed entirely.

Domestic employment in a private household — section 27(2)

332. Section 27(2) of the Human Rights Act allows different treatment in employment based on sex where the position is for domestic employment in a private household.

333. In the Issues Paper, we asked:

> Question 22: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(2) for domestic employment in a private household be amended to reflect those new grounds?

Question 23: Do you have any additional feedback on the practical implications of amending section 27(2)?

Support for extending the exception to permit differences of treatment based on new grounds

334. Many submitters supported extending this exception to permit differences of treatment based on one or more of the new grounds we proposed.

335. Some submitters thought extending this exception to new grounds would uphold the freedom of choice, privacy and comfort of householders. Many submitters referred to autonomy and privacy. Some submitters thought the exception might be particularly important for householders who are vulnerable, including those who are elderly or disabled.

336. A small number of submitters who favoured extending the exception mentioned safety concerns. Some were concerned about the safety of residents, and others were concerned about the safety of prospective transgender employees who might end up in hostile work situations. Some submitters thought a reason to extend this exception was that it would allow people who are transgender or non-binary or who have an innate variation of sex characteristics to employ others with shared lived experience in their home.

337. A small number of submitters thought extending this exception would support freedom of religion and belief.

338. A few submitters discussed the consistency of the exception as a reason to extend it to new grounds, for example, pointing out that the existing exception applies broadly and reflects a decision that the Human Rights Act should not generally apply in the private sphere.

Opposition to extending the exception to permit differences of treatment based on new grounds

339. Some submitters did not support extending the exception to allow for differences of treatment based on any new grounds we proposed. Of those who gave reasons, submitters said characteristics such as sex, sex assigned at birth, gender identity and variations of sex characteristics are not generally relevant to a person's ability to perform domestic work in a private household.

340. Some submitters were concerned that extending section 27(2) to new grounds would result in people having to disclose highly personal information during job interviews. Relatedly, one submitter thought section 27(2) should be extended to gender expression but not to any other new grounds, which would mean that an employer would not be able to ask intrusive questions.

341. Some submitters thought section 27(2) should be reconsidered entirely, for example, because they thought it is too broad, because they thought the meaning of "domestic employment" is unclear or because they thought the exception should apply to all prohibited grounds of discrimination.

Reasonable standards of privacy — section 27(3)(a)

342. Section 27(3)(a) of the Human Rights Act allows different treatment in employment based on sex where the position needs to be held by one sex to preserve reasonable standards of privacy.

343. In the Issues Paper, we asked:

> **Question 24**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(3)(a) be amended to reflect those new grounds?
>
> **Question 25**: Do you have any additional feedback on the practical implications of amending section 27(3)(a)?

344. Very few submitters indicated whether they considered the exception should be amended or not. Of submitters who did indicate this, feedback was fairly evenly divided between those who supported extending the exception to permit differences of treatment based on one or more of the new grounds we proposed, and those who opposed this.

Support for extending exception to permit differences of treatment based on new grounds

345. Many submitters who supported extending the exception referred to the privacy and autonomy of customers or service users as important considerations

for this exception, and as the reason to extend the exception to one or more new grounds. Some submitters said privacy and autonomy may be especially important for people who are vulnerable, have a history of trauma or have safety concerns.

346. Some submitters considered that consumers may be more comfortable interacting with a person of the same 'biological sex' as them when they are unclothed or otherwise vulnerable. Some submitters were particularly concerned that female patients should be able to require a provider of the same biological sex as them where intimate procedures are being performed. Examples given were strip searches, doctors performing intimate procedures, waxing services, and helping elderly people with showering and dressing.

347. Some submitters said having a service provider who is transgender may be important to some clients or service users. One submitter who described themselves as a "non-binary trans person" said they would be more comfortable with a non-binary person (first choice) or a transgender person of any gender in a sensitive medical or personal situation.

Opposition to extending exception to permit differences of treatment based on new grounds

348. Some submitters who opposed extending the exception said the rationale for this exception is not relevant to people who are transgender or non-binary or who have an innate variation of sex characteristics because funding constraints and unavailability of services mean it

is unrealistic for transgender people to have dedicated services provided for them.

349. Some submitters considered that, while clients and service users should be able to choose who they want to provide them with intimate services, this should not justify discrimination by an employer.

350. A small number of submitters said social norms about covering your body around people of another sex no longer exist in contemporary Aotearoa New Zealand.

351. Some submitters were concerned that extending this exception to permit differences of treatment based on new grounds would perpetuate discriminatory attitudes towards people who are transgender or non-binary, and may mean that employers make assumptions about customer comfort levels that are not necessarily correct.

352. Some submitters raised concerns about people having to disclose their sex or gender to employers or clients.

353. No submitter suggested that refusing to employ a person because they have an innate variation of sex characteristics would be necessary to preserve reasonable standards of privacy.

Organised religion — sections 28(1) and 39(1)

354. Section 28(1) of the Human Rights Act allows different treatment in employment based on sex where the position 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.

355. Section 39(1) of the Human Rights Act allows different treatment for qualifying bodies where a qualification is needed for an organised religion and is limited to one sex or to persons of that religious belief so as to comply with doctrines or rules or established customs of that religion.

356. In the Issues Paper, we asked:

> **Question 30**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exceptions in sections 28(1) and 39(1) for organised religion be amended to reflect those new grounds?
>
> **Question 31**: Do you have any additional feedback on the practical implications of amending sections 28(1) and 39(1)?

357. Most of those who submitted on these two exceptions supported extending them to permit differences of treatment based on any new grounds we proposed.

Support for extending these exceptions to permit differences of treatment based on new grounds

358. Where submitters supported extending these exceptions, the main reason they gave was consistency with the underlying purpose of the exceptions, which they identified as upholding religious freedom. Many submitters referred to the importance of religious freedom and the importance of religious beliefs to many people.

359. Few submitters made comments about the doctrines or rules of particular religions and how they apply to people who are transgender or non-binary or who have an innate variation of sex characteristics. Some submitters commented generally that many religions do not distinguish between gender and sex or have strict rules about gender.

360. Bruce Gray KC, Provincial Chancellor of the Anglican Church in Aotearoa New Zealand and Polynesia, said in his submission that the Canons of the Church and scripture are couched in terms of binary relationships. He said the Anglican Church has not considered whether any Canons need to be changed or whether a person who is transgender or non-binary or who has an innate variation of sex characteristics can be ordained as a priest. He supported the exceptions being extended to new grounds on the basis that: "Suitability for ordination as a priest … is a matter that goes to the heart of any religion."

Opposition to extending these exceptions to permit differences of treatment based on new grounds

361. Some submitters did not support extending these exceptions because they said religious organisations should be required to follow the Human Rights Act. They said discrimination is not justified, and religious organisations are responsible for causing harm to members of the rainbow community. One submitter said allowing religious groups to discriminate against the rainbow community "continues the rhetoric about these

people living in sin and not being deserving of human rights".

362. Some submitters supported abolishing the exception entirely, saying there should not be an exception for religious organisations. One said the balance between freedom of religion and freedom from discrimination requires further attention in a future wider review of the Human Rights Act. A few submitters thought religions should not be able to restrict positions to people of one sex.

Goods, services, facilities, places and vehicles

363. Sections 42 and 44 of the Human Rights Act contain the protections from discrimination that relate to access to places, vehicles and associated facilities, and to the provision of goods, facilities or services.

364. This section summarises what submitters said in relation to:

(a) the scope of sections 42 and 44; and

(b) the exceptions in Part 2 that allow for differences of treatment on the prohibited ground of sex when providing goods, facilities or services:

i. where the nature of a skill differs depending on the client's sex;

ii. in relation to insurance; and

iii. in relation to superannuation.

Scope of sections 42 and 44

365. In the Issues Paper, we asked:

> **Question 33**: Are the existing protections in the Human Rights Act 1993 relating to goods, services, facilities and places sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?
>
> **Question 34**: Do you have any practical concerns about what the protections for goods, services, facilities and places in the Human Rights Act 1993 would cover if new prohibited grounds of discrimination are added to the Act?
>
> **Question 35**: Are new exceptions relating to access to goods, services, facilities or places desirable to accommodate any new grounds we propose?

366. These questions related to both section 42 (which covers access to places, vehicles and associated facilities) and section 44 (which covers the provision of goods, facilities and services).

367. Some submitters said, if the Act is amended to include new prohibited grounds of discrimination relating to people who are transgender or non-binary or who have an innate variation of sex characteristics, the protections relating to goods, services and facilities will be sufficient. Some submitters said the protections are not sufficient or that further protections are needed, but did not provide further detail.

368. Some submitters discussed specific issues of concern to them linked to discrimination in the provision of goods and services. These included concerns in relation to:

(a) banks and financial services discriminating against people whose income comes from sex work;

(b) transgender people being unable to participate in single-sex sports aligned with their gender identity;

(c) being challenged when accessing facilities such as bathrooms aligned with gender identity, and a lack of gender-neutral or inclusive facilities; and

(d) application forms such as for loans or other financial services not having gender-neutral options for a person's gender or title.

369. Access to health care was a particular concern for some submitters. Some submitters said accessing gender-affirming health care, particularly hormone therapy and gender-affirming surgery, was difficult. Some submitters said they were mistreated by medical professionals and gave examples like being questioned about irrelevant and personal parts of their history, being refused care, being misgendered and deadnamed or having their health concerns ignored. Some submitters were concerned that health insurance did not providing cover for gender-affirming health care.

370. A few submitters explicitly said no further exceptions are needed. No submitter identified new exceptions they said were needed. However, some submitters raised concerns about how sections 42 and 44 would apply if

new grounds are added to section 21. These included concerns that:

(a) this could impose significant costs on parties providing goods, services and facilities;

(b) reforms would have a chilling effect and would make it difficult to run a business;

(c) shopkeepers and people offering services would not be free to decide who they want to serve, including whether they want to serve transgender or non-binary people;

(d) medical practitioners might be caught by provisions (such as when refusing to prescribe puberty blockers to young people);

(e) reforms would negatively affect cisgender women's sex-based rights in the provision of services and facilities.

Skills exception — section 47

371. Section 47 of the Human Rights Act allows service providers to offer a specialist service to one sex only where the nature of a skill differs depending on whether the customer or client is a man or a woman.

372. In the Issues Paper, we asked:

> **Question 38**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the skill exception in section 47 be replaced with a narrower exception?

Question 39: Do you have any additional feedback on the practical implications of amending section 47?

373. Submitters could tick one of the following options for question 38:

(a) the exception should be retained in its current form (option 1);

(b) there should be an exception providing that, where a skill differs depending on a person's sex characteristics, a person does not breach the Human Rights Act by only offering a service in relation to persons with particular sex characteristics (option 2); and

(c) there should be an exception that applies to services where the customer would be fully or partially unclothed (option 3).

374. Submitters could also specify another option.

375. There were submitters who supported and opposed each of the three options. No option stood out as having the most support.

376. Some submitters who responded to these questions discussed the interests of service providers, such as stating that any service provider should be able to choose who they wish to serve. A handful of submitters referred specifically to beauticians or sex workers being able to decline to serve a client, sometimes with reference to the Canadian case *Yaniv v Various Waxing*

Salons.[11] A few said providers need to be able to refuse to provide a service they are not trained for, such as waxing particular body parts or genitals.

377. Other submitters discussed the interests of people receiving a service. A few said beauty services might be important for gender-affirming care for transgender people and that this should be carefully considered. An example given was that having hair permanently removed from genitals is a requirement for some kinds of genital surgery. Others said patients or people receiving a service might have particular vulnerabilities, such as people with genitalia outside the norm for male and female bodies, or people outside the binary of male and female.

378. A handful of submitters thought gendered pricing for services such as haircuts was potentially discriminatory where it was for the same service (such as a buzzcut).

Option 1: retain exception in current form

379. Many submitters who supported option 1 appeared to oppose reform of the Human Rights Act in general. Other reasons given by submitters for preferring option 1 related to the following themes:

(a) the religious freedom of service providers;

(b) the needs of cisgender women, such as being able to access single-sex services; and

---

11 *Yaniv v Various Waxing Salons (No. 2)* 2019 BCHRT 222.

(c) the need for service providers to be able to restrict services if they have insufficient skill.

Option 2: exception makes it permissible to offer a service only to people with particular sex characteristics

380. Submitters who supported option 2 considered that a person's sex characteristics are more likely to be the basis on which a skill varies than their sex or gender. Some specific arguments we heard were as follows:

(a) While a person's sex characteristics are a legitimate basis on which a skill might vary, the current wording "men and women" does not reflect this. Examples given were that a woman may want a buzzcut or may have broad shoulders and want tailoring more typical of male clothing.

(b) Gynaecologists should have a right to work within their expertise.

(c) Any differences of treatment should be based on appearance and presentation, not birth.

381. A handful of submitters expressly opposed option 2. For example, some said it would allow businesses to refuse to serve some body types. Some submitters raised concerns about how option 2 would apply to people with innate variations of sex characteristics.

Option 3: exception applies where customers are fully or partially unclothed

382. Where submitters who supported option 3 gave reasons for it, these related to the desirability of service providers

having choice over which customers they see or interact with when a customer is unclothed. For example, submitters said:

(a) Option 3 reflects a reasonable balance between privacy concerns and protecting the rights of transgender and non-binary people.

(b) Accessibility for all groups should be superseded only by the right to privacy in intimate situations.

(c) Everyone should have the right to determine who they see unclothed.

383. Some submitters also raised concerns about option 3 being too broad.

Another option

384. A handful of submitters said removing the exception altogether would be preferable as the exception is no longer needed or relevant.

385. A few submitters said the binary language in the exception is undesirable and the exception should take account of people who do not identify as a man or a woman.

386. A couple of submitters suggested combined options, such as a combination of options 2 and 3.

Insurance exception — section 48

387. Section 48 of the Human Rights Act outlines certain circumstances in which it is permissible for insurers to offer or provide annuities and insurance policies (including accident and life insurance) on different terms

or conditions for each sex or for disabled people or for people of different ages.

388. In the Issues Paper, we asked:

> **Question 40**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the insurance exception in section 48 be amended to clarify that it entitles insurers to differentiate based on a customer's sex assigned at birth or sex characteristics?
>
> **Question 41**: If new grounds of discrimination are added to the Human Rights Act 1993, should there be a new exception to allow insurers to offer different terms and conditions based on whether a person is transgender or non-binary or has an innate variation of sex characteristics?
>
> **Question 42**: Do you have any additional feedback on the practical implications of amending the insurance exception in section 48 or creating a new insurance exception?

389. The feedback given by submitters on these three questions overlapped.

390. Many submitters said a person's sex assigned at birth and sex characteristics (including hormone levels and physical characteristics) are relevant to health insurance

but not to other kinds of insurance. Other submitters said gender is more relevant for car insurance, including because social factors are what affects a person's risk of having a car accident.

391. Some submitters said a person's sex assigned at birth can be irrelevant, inaccurate or provide misleading information about health risks for people who are transgender or non-binary or who have an innate variation of sex characteristics. For example, one submitter said they were aware of an intersex transgender woman being charged male rates for health insurance. They said this did not make sense because the person's intersex condition meant they did not produce testosterone.

392. Some submitters were concerned about insurers offering people higher premiums purely because they are transgender or non-binary. Other submitters said insurers should be allowed to make decisions about insurance premiums based on a person's sex assigned at birth and sex characteristics.

393. Other submitters who commented on this exception thought the exception should permit distinctions based on a person's sex characteristics, including for the following reasons:

(a) Sex in the current exception is a proxy for sex characteristics.

(b) Sex characteristics or body parts are a better indicator of insurance risk than sex assigned at birth.

(c) A person's sex characteristics (and the insurance risks associated with them) can change over time (whether or not they are transgender or non-binary or have an innate variation of sex characteristics). Submitters gave examples of the impact of hormone levels on the risk of developing cancer, or the reduced risk of cancer if a cisgender woman has her ovaries removed.

394. Some submitters supported extending the exception to new grounds. Points made by these submitters included that:

(a) transgender women present different insurance risks from cisgender women;

(b) transitioning affects health risks; and

(c) transgender and non-binary people should pay higher premiums, for example, to cover the cost of medical interventions.

Other matters

395. A handful of submitters were concerned about insufficient data about people who are transgender or non-binary or who have an innate variation of sex characteristics to inform risk profiles. Others were concerned that, if transgender women were included with cisgender women for data collection, this could skew the data that insurers use to calculate risk.

396. A few submitters were concerned about privacy in the context of insurance disclosure requirements, for example:

(a) whether someone who is unsure or questioning their gender could be penalised for failing to disclose this;

(b) whether people would be able to keep information related to their gender private and how they would be protected against data leaks; and

(c) whether reform would mean insurers would require tests to determine sex assigned at birth.

Superannuation exception – section 70(2)

397. Section 70(2) of the Human Rights Act outlines certain circumstances in which it is permissible for superannuation providers to treat people differently by reason of their sex.

398. In the Issues Paper, we asked:

> Question 70: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the superannuation exception in section 70(2) be amended to reflect those new grounds?

399. It was often difficult to discern submitters' position on whether this exception should be extended to permit differences of treatment based on any new grounds we proposed. Some submitters said the exception should not be amended but did not give any reasons.

400. Of the submitters who commented on this exception, their feedback included the following themes:

(a) The exception should not be extended to new grounds because of its limited application.

(b) The exception should be extended to new grounds for consistency with the sex ground.

(c) There is a lack of data to support amending the exception, or a lack of data that would enable superannuation providers to rely on the exception.

(d) Superannuation schemes should not be permitted to discriminate against people who are transgender or non-binary.

(e) The existing exception might enable women to be disadvantaged in private superannuation schemes, for example, after taking time off work for childcare or maternity leave.

(f) The exception should be repealed entirely, for example, because very few superannuation schemes of the kind envisaged in the exception still exist.

401. A few submitters said superannuation benefits afforded to cisgender women should be provided to transgender women. However, one submitter was concerned that this would enable cisgender men to improperly access benefits afforded to cisgender women.

Accommodation

402. Section 53 of the Human Rights Act contains the protections from discrimination that relate to the provision of land, housing and accommodation.

403. This section summarises what submitters said in relation to:

(a) the scope of section 53;

(b) an exception from the discrimination protections in section 53 for single-sex accommodation in hostels and other establishments; and

(c) two exceptions from the employment discrimination protections discussed earlier for employer-provided accommodation.

Scope of section 53

404. In the Issues Paper we asked:

> **Question 43**: Are the existing protections in the Human Rights Act 1993 relating to land, housing and accommodation sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?
>
> **Question 44**: Do you have any practical concerns about what the land, housing and accommodation protections in the Human Rights Act 1993 would cover

if new prohibited grounds of discrimination are added to the Act?

Question 45: Are new exceptions relating to land, housing or accommodation desirable to accommodate any new grounds we propose?

405. Some submitters said the discrimination protections in section 53 are sufficient to cover the types of discrimination in accommodation faced by people who are transgender or non-binary or who have an innate variation of sex characteristics.

406. Some submitters said the discrimination protections are not sufficient because people in these groups are not currently covered by section 21. A couple of submitters said the scope of protection that section 53 offers would be sufficient if section 21 was amended to provide protection to transgender and non-binary people and those with an innate variation of sex characteristics.

407. Some submitters pointed to accommodation discrimination experienced by people who are transgender or non-binary or who have innate variations of sex characteristics as evidence that section 53 does not provide sufficient protection. Some specific accommodation concerns that submitters identified included being evicted from accommodation, being refused rental accommodation by landlords or property managers and being harassed by landlords and property managers.

408. Many submitters said discrimination in accommodation shared with flatmates was an issue and that the shared accommodation exception in section 54 of the Human Rights Act was a problem.

409. A few submitters were concerned that it would be difficult for tenants who are transgender or non-binary to prove claims of accommodation discrimination. For example, one submitter pointed out that landlords "can just quietly put your application on the bottom of their list of 30, without being open about their motivation". Some submitters thought it would be particularly difficult to prove discrimination if an amendment to the Residential Tenancies Act 1986 permitting 90-day 'no cause' terminations were to be enacted.[12] They said this would mean landlords would not need to give a reason for terminating a lease.

410. A few submitters observed that, while adding new grounds to section 21 will help to mitigate discrimination against people who are transgender or non-binary or who have an innate variation of sex characteristics, this will be undermined if "landlords and property managers are [not] fully aware of their obligations". Submitters also said there is a need for "robust" enforcement measures and accountability mechanisms to ensure that the protections are effective.

411. Some submitters raised concerns about whether the interests of landlords would be adequately protected if

---

12 This amendment was before the House at the time our Issues Paper was published, and has since been enacted.

new grounds were added to section 21. For example, several submitters said landlords should have the right to choose the tenants they see fit to occupy their properties. Some submitters said any decision made by landlords to select a tenant amounts to discrimination. Others said it is acceptable for landlords to discriminate because they needed to select tenants that are most suitable and stable and who will pay rent.

412. No submitter suggested specific new accommodation exceptions. Some submitters said there should be no new accommodation exceptions. Most of these submitters held this view because they thought new exceptions would undermine anti-discrimination protections.

Hostels exception — section 55

413. Section 55 of the Human Rights Act allows hostels and other establishments to provide accommodation only for persons of the same sex (or marital status, or religious or ethical belief, or for persons with a particular disability, or for persons in a particular age group).

414. In the Issues Paper, we asked:

> Question 46: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 55 for shared accommodation such as hostels be amended to reflect those new grounds?

Question 47: Do you have any additional feedback on the practical implications of amending section 55?

415. Submissions were evenly divided as to whether section 55 should allow providers of single-sex accommodation to exclude people who are transgender from single-sex accommodation that aligns with their gender identity.

Support for extending the exception to permit providers to exclude people from single-sex accommodation that aligns with their gender identity

416. Many submitters thought section 55 should be extended to enable providers of single-sex accommodation to restrict access to it based on a person's sex assigned at birth. Submitters who expressed this view generally highlighted the needs of cisgender women for privacy, dignity and safety and the "right to choice". A few submitters highlighted rights to freedom of belief, religion and association but did not explain how these rights were implicated.

417. Submitters who thought section 55 should be extended rarely mentioned people who have an innate variation of sex characteristics.

418. Many submitters who supported extending the exception wanted transgender women excluded from women's refuges. Key views expressed were that transgender women pose a risk to the safety and privacy of cisgender women, and that cisgender women who are victims of family violence could be traumatised by the presence of transgender women in refuges. For

example, one submitter commented that "the vast majority of people who use such refuges are biological females escaping from biological male violence, and therefore want to be in an environment free from biological males".

419. A small number of submitters said transgender and non-binary people could set up their own women's refuges and need not access shelters for cisgender women.

420. A small number of submitters who supported extending the exception raised concerns about hospital rooms.

421. One submitter said not amending section 55 to allow differences of treatment on the basis of gender identity would breach New Zealand's obligations under the Convention on the Elimination of All Forms of Discrimination against Women.

Opposition to extending the exception to permit providers to exclude people from single-sex accommodation that aligns with their gender identity

422. Many submitters said section 55 should not allow providers to exclude people from single-sex accommodation that aligns with their gender identity. These submitters were primarily concerned about people who are transgender or non-binary facing exclusion, violence or discrimination.

423. Many submitters were concerned about people who are transgender or non-binary being excluded from women's refuges. Submitters said people in these groups face high rates of intimate partner violence, and

transgender women do not pose a risk to cisgender women.

424. A number of submitters said hostel providers should not be able to exclude transgender and non-binary people, and those with innate variations of sex characteristics.

425. A few submitters commented on the limited extent to which extending section 55 to new grounds would function as a positive discrimination measure for people who are transgender or non-binary or who have innate variations of sex characteristics. Specific comments included:

(a) while extending section 55 could be used to create safe spaces, it is more likely to be used to exclude; and

(b) the small numbers of people who are transgender, non-binary or who have an innate variation of sex characteristics means it is unlikely that specific accommodation options for these groups would be set up.

426. A couple of submitters said not extending section 55 would reflect the status quo.

Employer-provided accommodation exceptions

427. There are two exceptions in the Human Rights Act for employer-provided accommodation. Section 27(3)(b) of the Human Rights Act allows an employer to treat an employee or prospective employee differently on the grounds of sex if employees need to live on site, the only premises available are not equipped with separate sleeping accommodation for each sex, and it is not

reasonable to expect the employer to equip the premises with separate accommodation or to provide separate premises for each sex.

428. Section 27(5) of the Human Rights Act allows an employer to omit to apply an accommodation-related term or condition entitling or requiring employees to live on site to an employee of a particular sex (or marital status) if, in all the circumstances, it is not reasonably practicable for the employee to do so.

429. In the Issues Paper, we considered these exceptions in the chapter relating to employment. We asked:

> **Question 26**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exceptions in sections 27(3)(b) and 27(5) for employer-provided accommodation be amended to reflect those new grounds?
>
> **Question 27**: Do you have any additional feedback on the practical implications of amending sections 27(3)(b) and 27(5)?

Support for extending these exceptions to permit differences of treatment based on new grounds

430. Some submitters supported extending the exception to permit differences of treatment based on one or more new grounds. Some of these submitters said the employer-provided accommodation should be based on

a person's biological sex. They held these views for similar reasons that we heard in relation to section 55, such as concerns about privacy and safety.

431. A few submitters thought employers would face practical constraints if they had to house transgender people in the type of employer-provided accommodation that the exceptions envisage (only one facility shared by those of the same sex).

432. A couple of submitters said not limiting single-sex accommodation of this kind based on biological sex would violate the rights of employees and employers.

Opposition to extending these exceptions to permit differences of treatment based on new grounds

433. Some submitters opposed extending the exception to permit differences of treatment based on new grounds. Some of these submitters said employer-provided accommodation should be inclusive of transgender and non-binary people, and those with innate variations of sex characteristics. A few said this would ensure these groups are fully included and fairly treated in employment.

434. Some submitters said an employer should not be able to force an employee who is transgender or who has an innate variation of sex characteristics to use alternative accommodation if there is on-site accommodation that aligns with the employee's gender. A few submitters said employers need to be able to provide unisex or non-gendered accommodation options.

435. One submitter commented that privacy is not a valid justification to exclude transgender and non-binary people, and those with innate variations of sex characteristics.

Education

436. Section 57 of the Human Rights Act contains the protections from discrimination that relate to educational establishments.[13]

437. This section summarises what submitters said in relation to:

(a) the scope of section 57; and

(b) an exception for single-sex schools.

Scope of section 57

438. In the Issues Paper, we asked:

> **Question 49**: Are the existing protections in the Human Rights Act 1993 relating to education sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?
>
> **Question 50**: Do you have any practical concerns about what the education protections in the Human Rights At 1993 would cover if new prohibited grounds of discrimination are added to the Act?

13 No submitter identified specific issues about the protections in the Human Rights Act that relation to vocational training bodies, so these are not discussed in this summary.

Question 51: Are new education exceptions desirable to accommodate any new grounds we propose?

439. Few submitters commented directly on whether existing protections are sufficient. Some submitters said the status quo is inadequate but did not provide further detail.

440. A few submitters said people who are transgender or non-binary or who have an innate variation of sex characteristics experience discrimination in education but did not give specific details. Other submitters were more specific. Some said students who are transgender or non-binary face a lack of support from school staff and that schools do not have adequate policies to protect and support such students. Others raised specific concerns such as:

(a) being denied admission to academic programmes due to gender identity;

(b) being denied admission to single-sex schools;

(c) students being made to wear a uniform that does not correspond with their gender identity;

(d) not being able to apply for gendered leadership positions (such as Head Boy or Head Girl) that correspond with the student's gender identity;

(e) bullying and harassment at school;

(f) issues with how personal information about gender identity is treated by schools;

(g) relationships and sexuality education that is not inclusive of students who are transgender or non-

binary or who have an innate variation of sex characteristics; and

(h) schools reinforcing the binary of male and female in the way they operate.

441. The feedback received via the Free Speech Union included an education-specific form text, which said amending section 21 would raise freedom of expression issues in education.

442. Submitters did not suggest any new education exceptions. A few said expressly that they did not think any new exceptions were needed.

443. A few submitters discussed concerns they had about how the new grounds would operate in an education context. For example:

(a) Some submitters thought school clubs may need to be able to discriminate in choosing their members, such as rainbow clubs that exclude cisgender and heterosexual students.

(b) Some were concerned that schools would be prevented from collecting or sharing information about staff or students' sex assigned at birth if the Human Rights Act was amended (which they thought was necessary in certain circumstances).

(c) Some submitters suggested the Human Rights Act should impose obligations on students to refrain from discrimination, while others were concerned that this was already the case, for example, that students would be required to use their classmates' preferred names or pronouns.

444. Many submitters commented on the issue of single-sex facilities in schools. Some were worried about transgender and non-binary students being able to safely access these facilities, while others were concerned about safe access for cisgender students, especially cisgender girls.

Single-sex schools exception — section 58(1)

445. Section 58(1) of the Human Rights Act allows educational establishments that are wholly or principally for students of one sex to refuse to admit students of a different sex. As well as sex, it applies to race, religious belief, disability and age.

446. In the Issues Paper, we asked:

> **Question 52**: If new prohibited grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 58(1) for single-sex schools be amended to reflect any new grounds we propose?
>
> **Question 53**: Are additional amendments to section 58(1) required to accommodate students who have a gender identity that is not exclusively male or female?
>
> **Question 54**: Do you have any additional feedback on the practical implications of amending section 58(1)?

447. Submitters could tick one of the following options for question 52:

(a) the exception should be retained in its current form (option 1);

(b) the exception should clarify that it does not entitle single-sex schools to refuse to admit transgender students whose gender identity aligns with the school's designated sex (option 2);

(c) the exception should clarify that it entitles schools to refuse to admit students whose sex assigned at birth does not align with the school's designated sex (option 3); and

(d) the exception should clarify that it entitles schools to refuse to admit students whose sex recorded on their birth certificate does not align with the school's designated sex (option 4).

448. Submitters could also specify another option.

449. Feedback on this exception was strongly divided. Option 2 was the most popular. Options 1 and 3 were next, with each receiving a roughly equivalent level of support. Few submitters supported option 4.

Option 1: the exception should be retained in its current form

450. Many of the submitters who supported this option did not give reasons for their view. Of those who did, some said it was because they supported parents being able to send their children to single-sex schools. Some said single-sex schools should be based on biological sex. A

few submitters said they were concerned about the rights of others if the exception was to be amended. Some simply preferred no reform of the Human Rights Act at all.

451. Some submitters said they supported the option of single-sex schools continuing to be available, for example, because there were plenty of co-educational schools.

Option 2: the exception should clarify that it does not entitle single-sex schools to refuse to admit transgender students whose gender identity aligns with the school's designated sex

452. Many submitters supported option 2. Submitters who supported this option said transgender students should have options available to them, and highlighted the importance of access to education. Some mentioned international obligations on the right to education, including in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child.

453. Several submitters who supported option 2 discussed practical implications. For example, some were concerned that an option linked to birth certificates would be impracticable, especially for minors. Some said the choice of school could be difficult for transgender students and their parents, and so having options was important. For example, if a co-ed school is not in zone, then a transgender student might be forced to attend a

single-sex school that does not align with their gender identity, causing distress to the student.

454. Other submitters supported option 2 for more general reasons, for example, saying option 2 affirms the dignity and rights of transgender students.

Option 3: the exception should clarify that it entitles schools to refuse to admit students whose sex assigned at birth does not align with the school's designated sex

455. Many of the submitters who supported this option did not give reasons for their view. Of those submitters who did, they gave similar reasons to those under option 1. Submitters said single-sex schools should be based on biological sex and single-sex schools should be able to decide for themselves who they enrol.

456. Some submitters who supported option 3 said parents should have the option of sending their children to a single-sex school and that girls' schools can adapt to girls' different needs and experiences. For example, some said girls have different life experiences, including socialisation, and needs such as menstrual products.

457. A few submitters commented on practical issues, for example, saying that a student's original birth certificate should be used.

Option 4: the exception should clarify that it entitles schools to refuse to admit students whose sex recorded

on their birth certificate does not align with the school's designated sex

458. Few submitters supported option 4. Where those that did gave reasons, many seemed to consider this option would have the same effect as option 3.

Another option

459. Some submitters were opposed to single-sex schools entirely, including because they thought providing education through single-sex schools is out of date and detrimental to students who are transgender or non-binary or who have an innate variation of sex characteristics.

460. Other suggestions made by submitters were:

(a) section 58(1) should be tied to whether a transgender student has "fully transitioned";

(b) options 3 and 4 should be combined; and

(c) there should be specific schools for gender non-conforming identities, or specific schools for transgender students.

461. A couple of submitters discussed religious schools under this option although did not go into detail about their preferred reform option. We heard from some submitters that some versions of Christian theology reflect the belief that humans were created by God to be male and female and that affirming the identity of someone who is transgender may be inconsistent with that belief.

Additional amendments to accommodate students who identify outside the binary

462. In response to consultation question 53 (about whether there should be additional amendments to accommodate students who identify outside the binary), the main suggestion for reform made by submitters was that the Human Rights Act should permit students in this position to attend a school for which they are not zoned. Other suggestions were:

(a) mixed gender schools should be provided by the government in every area;

(b) all single-sex schools should be obliged to accept non-binary students;

(c) all single-sex schools should be abolished; and

(d) schools should have gender-neutral facilities.

463. Some submitters observed that single-sex schools could be difficult for or have a negative impact on students who identify outside the binary of male and female. Some said there should be an amendment to the Act but did not make a specific suggestion.

Courses and counselling

464. Three exceptions in the Human Rights Act permit differences of treatment based on sex in relation to courses and counselling on highly personal matters such as sexual matters or the prevention of violence. In the Issues Paper, we asked questions about these exceptions in the chapters that related to the area of life in which they occurred: employment, provision of goods and services, and education, respectively. In the Final Report, we considered them together in one chapter.

465. This section summarises what submitters said in relation to these three exceptions.

466. No submission indicated that people receiving counselling on highly personal matters might have a preference for a counsellor without an innate variation of sex characteristics. Nor did submitters suggest people might not want to attend a group counselling session with a person who has an innate variation of sex characteristics.

Employment exception for courses and counselling — section 27(4)

467. Section 27(4) of the Human Rights Act allows employers to treat employees or prospective employees differently based on their sex if the position is that of a counsellor on highly personal matters.

468. In the Issues Paper, we asked:

> **Question 28**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(4) for counsellors on highly personal matters be amended to reflect those new grounds?
>
> **Question 29**: Do you have any additional feedback on the practical implications of amending section 27(4)?

469. Most of those who submitted on this issue supported extending this exception to permit differences of treatment based on any new gender-related ground. However, some submitters had concerns about extending this exception.

Support for extending the exception to permit differences of treatment based on new grounds

470. Submitters who supported extending the exception to a gender-related ground discussed the reasons some people would have preferences for counsellors of a particular gender identity. This included feedback that some women, including some female sexual assault survivors, would prefer a cisgender woman counsellor. Other submitters said people who are transgender would prefer a counsellor who is transgender. One submitter who identified as non-binary said they would

prefer a counsellor who "has had similar experiences" to them.

471. Other submitters discussed personal privacy, comfort and intimacy, for example, saying that counselling is an intimate situation and clients should be able to feel comfortable and safe with their counsellor for highly personal matters.

472. Some other submitters said gender identity may be relevant to the counsellor having a shared lived experience or having particular expertise. For example, some said a person's gender identity might provide essential understanding and that people who are transgender or non-binary or who have an innate variation of sex characteristics should be able to seek counselling from those with shared lived experience.

Opposition to extending the exception to permit differences of treatment based on new grounds

473. Some submitters who opposed extending the exception to any new grounds considered sex or gender identity is not relevant to a person's skill as a counsellor. For example, some thought whether a client feels comfortable talking to someone depends on more than gender identity and that a counsellor's sex does not affect their ability to offer counselling.

474. Some submitters had concerns about the privacy implications of extending the exception to new grounds because it might require counsellors to disclose their gender identity to their employers.

475. A few submitters were concerned that it would limit access to services for people who are transgender or non-binary or who have an innate variation of sex characteristics. For example, submitters said, particularly in rural areas, it is not practical for people who are transgender or non-binary or who have an innate variation of sex characteristics to request a counsellor with the same experiences.

Goods and services exception for courses and counselling — section 45

476. Section 45 of the Human Rights Act allows courses or counselling involving highly personal matters to be limited to persons of a particular sex.

477. In the Issues Paper, we asked:

> Question 36: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the courses and counselling exception in section 45 be amended to reflect those new grounds?
>
> Question 37: Do you have any additional feedback on the practical implications of amending section 45?

478. Opinion was strongly divided on whether section 45 should be extended to a new gender-related ground.

Support for extending the exception to permit differences of treatment based on new grounds

479. Many submitters who supported extending the exception to new gender-related grounds acknowledged the importance of the rationale underlying section 45, which we had identified as to enable participants to feel comfortable with each other, participate freely and secure full therapeutic benefits.

480. Submitters said participants who need support or counselling on highly personal matters should have the right to choose who they share personal matters with, even if this is exclusionary of others.

481. Some submitters referred to the need for shared lived experience in courses and group counselling sessions on highly personal matters. In some cases, submitters felt women's courses and counselling groups should be limited to cisgender women.

482. Many submitters said women need women-only courses and counselling groups for safety and therapeutic support. Again, some said such spaces should be for cisgender women only. Some submitters expressed a desire for certain courses and group counselling sessions on highly personal matters to be restricted to men.

483. Some submitters said it is important for people who are transgender or non-binary to be able to get support from people with shared experiences and who understand their challenges.

Opposition to extending the exception to permit differences of treatment based on new grounds

484. Submitters who opposed extending section 45 to any new grounds were concerned that, if group counselling could be restricted to cisgender women or cisgender men, people who are transgender or non-binary would be prevented from accessing necessary support. Some submitters were particularly concerned about the effect of such an exception on transgender women and non-binary people due to the high rates of sexual violence experienced by these groups and the barriers these groups experience in accessing counselling.

485. Other submitters said it was not justifiable to exclude transgender and non-binary people from courses and counselling, and some specifically said transgender women should be able to access women-only services.

486. As with the employment counselling exception, some submitters also had concerns about the privacy implications of extending the exception to new grounds. Some submitters questioned how a service provider would know whether a person was cisgender or transgender.

Education exception for courses and counselling — section 59

487. Section 59 of the Human Rights Act allows courses and counselling involving highly personal matters that are held or provided at educational establishments such as

schools or tertiary institutions to be limited to persons of a particular sex.

488. In the Issues Paper, we asked:

> **Question 55**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 59 for courses and counselling be amended to reflect those new grounds?
>
> **Question 56**: Do you have any additional feedback on the practical implications of amending section 59?

489. Relatively few submitters gave feedback specifically in relation to section 59. Where submitters did comment, it was often unclear whether they supported or opposed extending the exception to new grounds.

Support for extending the exception to permit differences of treatment based on new grounds

490. As with the goods and services exception, some people thought the law should enable courses and counselling in educational establishments to be restricted in certain circumstances to people who are transgender or non-binary or who are cisgender. The reasons given were similar to those given in relation to the other courses and counselling exceptions.

Opposition to extending the exception to permit differences of treatment based on new grounds

491. A key concern from submitters who opposed extending this exception was that, in practice, it would result in students who are transgender or non-binary being excluded.

492. Some submitters said it can be particularly detrimental for children and young people to be excluded from groups aligned with their gender identity. Some said participating in courses and counselling aligned with one's gender identity promotes mental wellbeing, academic success and a positive school environment.

Relationship and sexuality education in schools

493. Some submitters responding to this question discussed relationship and sexuality education in schools. Some supported students being able to attend relationship and sexuality education relevant to their gender while others supported students attending education related to their sex.

494. Some submitters thought relationship and sexuality classes should not be divided based on sex as all students should receive a holistic education.

Single-sex facilities

495. Sections 43(1) and 46 of the Human Rights Act contain exceptions that allow for the maintenance and provision of separate facilities for each sex for reasons of public decency or public safety.

496. This section summarises what submitters said in relation to:

(a) the existing exceptions in sections 43(1) and 46;

(b) whether there should be new exceptions for single-sex facilities in educational establishments or workplaces; and

(c) whether the Human Rights Act should have a requirement relating to provision of unisex facilities.

Sections 43(1) and 46

497. In the Issues Paper, we asked:

> **Question 59**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the single-sex facilities exceptions in sections 43(1) and 46 be amended to reflect those new grounds?

Question 61: Do you have any additional feedback on the practical implications of amending the exceptions in sections 43(1) and 46?

498. Submitters could tick one of the following options for question 59:

(a) the exceptions should be retained in their current form (option 1);

(b) the Act should clarify that it is lawful to use a single-sex facility aligned with your gender identity (option 2);

(c) the Act should clarify that service providers can exclude people from single-sex facilities that do not align with their sex assigned at birth (option 3);

(d) the Act should clarify that service providers can exclude people from single-sex facilities that do not align with their sex recorded on their birth certificate (option 4).

499. Submitters could also specify another option.

500. A large number of submitters commented on the questions about single-sex facilities. Support was fairly evenly divided across the first three options. There was little support for option 4.

Option 1: the exceptions should be retained in their current form

501. Submitters who supported option 1 appeared to understand its legal effect in different ways, and it was not always clear what they thought its effect would be.

502. Many submitters who supported option 1 seemed to support restricting single-sex toilets based on a person's sex assigned at birth. Some submitters referred to the safety, privacy or comfort of cisgender women and girls as their reason for preferring option 1.

503. A couple of submitters thought option 1 and option 2 had the same effect. One submitter queried whether the existing exceptions (and therefor option 1) had any effect in bathrooms.

504. Some other reasons submitters gave in favour of option 1 included the following:

(a) It would give flexibility and give society time to reach consensus.

(b) It would maintain the status quo and may avoid potential confusion arising from changes.

(c) Alternative options would require organisations to have unisex facilities.

Option 2: clarify that it is lawful to use a single-sex facility aligned with your gender identity

505. Submitters who supported option 2 often did so by reference to the safety, privacy, comfort, dignity and participation of people who are transgender or non-binary, as well as to issues of practicality.

506. Some submitters shared their experiences of using public bathrooms and changing rooms, including the particular risks encountered by transgender women when using male bathrooms. For example, some gave examples of transgender women being sexually harassed, verbally abused and physically assaulted in male bathrooms.

507. One submitter said, during their transition from male to female, they began to encounter abuse and violence in male single-sex facilities. This included hateful and degrading speech, being splashed with water on their crotch and "hands-on assaults". Some submitters said evidence has shown that transgender women are in danger when using public bathrooms (or that they are at risk of violence and harm more generally).

508. Some submitters who supported option 2 commented that it was the most sensible, straightforward, practical, reasonable or realistic option. Several submitters felt that option 2 matched the status quo.

509. Several submitters said concerns about the risk of cisgender men masquerading as transgender women to gain access to women's facilities lacks evidence. Some submitters referred to there already being criminal legislation to deal with the few perpetrators who seek access to single-sex facilities for the purpose of harassment or assault.

510. Other arguments made by supporters of option 2 were that:

(a) Limiting transgender people's ability to use a single-sex facility limits their ability to participate fully in public life.

(b) Option 2 would provide certainty for people in these communities and addresses the current lack of clarity in the law.

(c) Option 2 would uphold the privacy and dignity of people who are transgender, non-binary or who have an innate variation of sex characteristics.

511. Submitters also sometimes raised issues with the other options in their reasoning in favour of option 2. For example, many submitters who supported option 2 were concerned that any other option would be unworkable and impractical because it would be policed based on how people present or their gender expression.

512. Several submitters used terms to describe the other options such as "cruel", "unfair", "demeaning" and "invasive and dehumanising". For example, one person commented:

> Public bathrooms and changing rooms became dangerous places for debate where people seem to imagine all sorts of horrors occurring, when really all everyone is wanting is a little privacy to use the loo.

513. Several submitters thought unisex facilities should continue to be encouraged alongside option 2.

Option 3: clarify that service providers can exclude people from single-sex facilities that do not align with their sex assigned at birth

514. The safety of cisgender women and girls was the most common concern mentioned by supporters of option 3. Some submitters also discussed the privacy, comfort and dignity of cisgender women as reasons for supporting option 3.

515. Many submitters who supported option 3 were concerned that cisgender women and girls will be at risk of harm if the law enables people who are transgender to use single-sex facilities that align with their gender identity. Some submitters referred to high rates of male violence against women, including sexual violence. Some said there is a lack of evidence that transgender women are less likely than cisgender men to commit such violence.

516. Some submitters had concerns about voyeurism and exhibitionism, and some were worried that cisgender men would misuse an inclusive exception to gain access to women's spaces.

517. Several submitters raised concerns about cisgender women and girls seeing, or being seen in a state of undress by, people they perceive as male. Some submitters referred to the need for cisgender women and girls to have privacy to manage menstruation. Two submitters gave examples of experiences of cisgender women being uncomfortable with a transgender woman using a female changing room and a women-only sauna.

518. Several submissions discussed cisgender Muslim women's comfort sharing single-sex facilities and services with transgender women, although none of the submitters identified themselves as Muslim. Some said they understood it was a concern for Muslim women to share certain spaces with transgender women in some circumstances.

519. Some submitters said the ability of cisgender women to participate in society could be eroded if people they regarded as men are allowed into women-only facilities. Several said they would not use toilets outside of the home or would stop activities such as swimming if transgender women are allowed in women's changing rooms.

520. Some submitters also said amendments to the Human Rights Act to clarify that people who are transgender can use facilities if their gender identity aligns with the designated sex of the facility would contravene the Convention on the Elimination of All Forms of Discrimination against Women.

Option 4: clarify that service providers can exclude people from single-sex facilities that do not align with their sex recorded on their birth certificate

521. Very few submitters preferred option 4. Of those that did, their reasons were sometimes unclear. For example, several submitters selected option 4 but made arguments that suggested they supported option 3.

522. A handful of submitters expressly criticised option 4. Some submitters said it would be impractical for people to carry around their birth certificate or were concerned about the privacy impact. Other submitters said birth certificates are unreliable as the sex marker on them can be changed.

Other options suggested and other comments made

523. Submitters could specify other options. Two submitters suggested other forms of documentation that might be able to be used by people who are transgender or non-binary or who have an innate variation of sex characteristics to access their preferred single-sex facility. One submitter suggested a document that was approved by "a medical gender care specialist" and another suggested cards akin to the 'I can't wait' toilet cards used by some people with health conditions. Several submitters said there should be separate "LGBQT" toilets.

524. Some submitters suggested the exception should depend on a person's genitalia or sex organs.

525. A few submitters suggested other ways to encourage inclusion that should sit alongside option 2. For example, one submitter suggested that providers should display gender-affirming signs such as: "You are welcome to use whatever toilet you are identified with".

Additional mitigation if options 3 or 4 are adopted

526. In the Issues Paper, we asked:

> **Question 60**: If options 3 or 4 are adopted, are other reforms desirable to mitigate the potential risks for people who are transgender or non-binary?

527. In the Issues Paper we suggested two possibilities:

(a) requiring providers who wish to exclude people who are transgender from single-sex facilities to provide a unisex facility; or

(b) adding a reasonableness threshold before the single-sex facilities exceptions could be relied on.

528. Many submitters did not respond to this question. Most submitters who responded to this question told us no mitigation would be sufficient to allay their concerns about the negative impacts of options 3 and 4 for people who are transgender or non-binary or who have an innate variation of sex characteristics.

529. Some of these submitters explained their concerns about people who are transgender or non-binary being restricted to unisex facilities. These concerns related to:

530. accessibility – for example, that unisex facilities are sometimes located much further away, may require a key to access and are sometimes intended for disabled people;

531. other impacts on dignity – for example, that requiring people to use unisex facilities risks othering, outing and harming them.

532. Most submitters who responded to this question thought a reasonableness threshold would not be sufficient to manage the negative implications of option 3 or 4 or were unsure whether it would be.

533. Some submitters nevertheless said, if option 3 or 4 were to be preferred, some mitigation of its impact would be desirable.

Unisex facilities

534. In the Issues Paper, we asked

> **Question 58**: Is an amendment to the Human Rights Act 1993 desirable to encourage the provision of unisex facilities and, if so, what should it require?

535. Few submitters commented on this question. Many of those who responded to this question, liked the idea of increased provision of unisex facilities, but there was little support for adding such a requirement to the Human Rights Act and no consensus about what such a provision might look like.

536. Some submitters thought a reform of this kind would have significant cost implications for providers. Many submitters expressed reservations about whether the Human Rights Act is the best regulatory vehicle for a provision of this kind.

537. Many submitters said unisex facilities were more inclusive, safe and comfortable than single-sex facilities, and that this was particularly important for many people who identify outside the gender binary but also for some

people who are transgender or who have an innate variation of sex characteristics. Submitters also said properly designed unisex facilities offered better privacy and could be more practical, such as by reducing wait times. Several submitters gave examples of situations where well-designed unisex facilities could be beneficial. This included for transgender men who menstruate and need access to sanitary bins, people with children (particularly those of another sex or gender identity) and caregivers assisting a disabled person.

538. Some submitters were concerned that unisex facilities would replace single-sex facilities or raised issues with unisex facilities linked to the safety, privacy and comfort of cisgender women and girls. These submitters thought a private facility for cisgender women and girls was safest for them and said unisex toilets could be embarrassing for cisgender women and girls to use, particularly when menstruating. Some said toilet facilities used by men were dirtier than facilities used by women and so women should not be required to share with men.

539. Although this was not what we had asked about, several submitters expressed concerns in their answer to this question about people who are transgender or non-binary or who have an innate variation of sex characteristics being required to use unisex facilities. They said this risks othering, outing and harming them.

540. A few submitters observed there are existing locations where unisex facilities are already common, such as in

homes, in aeroplanes, small businesses and service stations.

Single-sex facilities and educational establishments

541. In the Issues Paper, we asked:

> **Question 62**: Do you have any feedback on the implications of this review for single-sex facilities in education?

542. Submitters made similar types of comments about single-sex facilities in educational establishments as they did about single-sex facilities generally.

543. Many of the submitters who supported having single-sex facilities aligned with a person's sex assigned at birth in educational establishments raised concerns about the safety, privacy, comfort, dignity and health of cisgender women and girls. Concerned we heard that were more specific to the education context related to:

(a) cisgender girls needing to feel comfortable using changing rooms or bathrooms (including when managing menstruation);

(b) girls not having to share with boys who dirty the toilets;

(c) cisgender girls contracting urinary infections because they do not want to use a shared bathroom or going a whole day without changing their sanitary pad or tampon because they feel embarrassed doing this in a bathroom shared with males.

544. Submitters who supported an inclusive approach in educational establishments often referred generally to their view that students should be able to access the single-sex facility that aligns with their gender identity. Submitters who included more specific reasons generally referred to the inclusion, safety and wellbeing of people who are transgender, non-binary or who have an innate variation of sex characteristics. Submitters who referred to the safety and wellbeing of transgender and gender diverse students said it is cruel not to allow them to use the facility matching their gender identity, and that access is important for students' psychological wellbeing.

545. Occasionally, submitters referred to the need to create respectful and supportive educational environments for all students.

546. Many submitters thought it was helpful to have unisex facilities in educational establishments, including some who said they should be required. These comments came both from submitters who supported and submitters who opposed students being able to access single-sex facilities that aligned with their gender identity. Several submitters said all schools should be providing private facilities for everyone or improving the privacy of their facilities.

Single-sex facilities and workplaces

547. In the Issues Paper, we asked:

> **Question 63**: Do you have any feedback on the implications of this review for single-sex facilities in employment?

548. Few submitters gave feedback in response to this question. Of those that did, they either did not provide reasons or made similar points to those made in response to other questions (by reference, for example, to ideas about safety, comfort, privacy and dignity).

549. Some submitters thought it was helpful to have unisex facilities in workplaces, typically alongside single-sex facilities.

550. A few submitters thought the issue of transgender people accessing single-sex facilities is less controversial, or less of a concern, in workplaces than in some other contexts (for example, because people come to know and accept their work colleagues).

Competitive sports

551. Section 49(1) of the Human Rights Act contains an exception that enables single-sex competitive sporting activities.

552. This section summarises what submitters said in relation to how section 49(1) should apply to any new grounds of discrimination.

Overview of feedback

553. In the Issues Paper, we asked:

> **Question 64**: Do you think the exception in section 49(1) of the Human Rights Act 1993 that allows competitive sports to be limited to one sex should be amended to reflect any new grounds we propose?

554. Submitters could tick one of the following options for question 64:

(a) the exception should be retained in its current form (option 1);

(b) the exception should be amended 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 (option 2);

(c) the exception should be amended 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 (option 3);

(d) there should be 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 (option 4);

(e) the exception should be amended so it only applies to women's sport (option 5); and

(f) the exception should be extended to the new grounds but it should 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 (option 6).

555. Submitters could also specify another option.

556. A large number of submitters commented on the question about competitive sporting activities. Many submitters focused their feedback on whether they supported transgender athletes being able to compete in line with their gender identity. The feedback was very polarised, with some strongly in favour of this and others strongly opposed.

557. Submitters who favoured inclusion tended to prefer option 2. Submitters who were concerned about the impact of inclusion tended to prefer either option 1 or 4. Submitters did not always explain why a particular option would best meet their concerns. In some cases, submitters were happy with more than one option and some submitters identified an alternative option. Some submitters were expressly opposed to a particular option.

558. Submitters in favour of permitting athletes to compete in line with their gender identity discussed the following points:

(a) the positive benefits of sport, including the role of sport in forming social connections;

(b) the negative effects of exclusion on transgender and non-binary people, such as on their physical and mental health or on their dignity;

(c) critiques of fair competition and safety concerns;

(d) the negative impact that testing for sex or gender has on athletes generally, such as because of intrusive or degrading tests; and

(e) that biological diversity and individual advantage are accepted in sports.

559. Submitters who were concerned about transgender athletes competing in line with their gender identity discussed the following points:

(a) that transgender women have a physical advantage compared to cisgender women;

(b) the negative impact of inclusion of transgender athletes in women's sport on cisgender women's participation rates and safety;

(c) that including transgender women in women's sport can make competition unfair; and

(d) that women's sporting categories are based on biological sex rather than identity.

560. Of those submitters who were concerned that transgender women athletes could have an unfair biological advantage over cisgender women athletes, most did not address the impact of gender-affirming hormone therapy. It was often unclear if their concerns extended to transgender women who had undergone such therapy. A small number did address this point, arguing that transgender women still have an advantage after undergoing gender-affirming hormone therapy.

561. Some of the emails we received in response to the Voices for Freedom campaign also indicated a concern about transgender women competing in women's sport.

Option 1: no reform of section 49

562. Although option 1 was the most popular option among individual submitters who opposed inclusion of transgender athletes in line with gender identity, few submitters provided reasons specific to this option.

563. Of those submitters who supported option 1 and did give reasons, these included the following:

564. The current exception seems to be working well in its current form.

(a) The existing wording would not prevent mixed-sex sports teams.

(b) The current exception would maintain the status quo, provide clarity and consistency for sports organisations and avoid disruption.

565. Some submitters supported option 1, but with some amendments to the requirements of s 49(1), such as defining competitive sport.

Option 2: clarify that the exception does not apply to new grounds

566. As discussed above, option 2 was the most popular option among individual submitters who supported the inclusion of transgender athletes in sporting events that align with their gender identity. Many of these submitters gave as a reason that transgender women who have undergone hormone therapy do not have any advantage when competing against cisgender women.

567. A small number of submitters challenged the premise that cisgender men are innately stronger and better at sports than cisgender women or suggested that other factors are more significant than sex. Some pointed out that biological advantage is an accepted part of sporting competition and that cisgender athletes vary in characteristics such as height, natural testosterone levels and how efficiently their body uses oxygen.

568. Several submitters said forcing transgender people to compete in a category that does not align with their gender identity would be "cruel and degrading",

"humiliating and discriminatory" or "an affront [to] their basic dignity". Some were concerned that transgender (and cisgender) athletes could be subject to intrusive and degrading tests to determine their eligibility to compete in women's sport.

569. Other points made by submitters who supported option 2 were that it:

(a) was the most aligned with the values underlying the Human Rights Act;

(b) prioritised inclusivity and fairness;

(c) would provide clarity; and

(d) was preferrable until the science is clearer.

570. Some submitters thought concerns about safety risks posed by transgender women competing in women's events were not supported by the evidence, or should be addressed in other ways such as through weight categories. One submitter pointed out there are safety risks for transgender women if they have to compete with cisgender men.

571. Some submitters who supported option 2 indicated they were comfortable with some limitations on this option. For example, several submitters differentiated between community sport and elite sport, or between domestic and international competition. Some submitters were comfortable with requiring transgender athletes to take hormone therapy for a certain period of time before being permitted to compete in line with their gender identity.

Option 3: add new grounds of discrimination to current exception

572. Option 3 essentially involved adding new grounds of discrimination to the current exception. This option was only supported by a few individual submitters. Most of the submitters who supported this option indicated they had concerns about inclusion of people who are transgender or non-binary or who have an innate variation of sex characteristics in sports that align with their gender identity, although none indicated why they thought option 3 would be better than other options.

Option 4: separate and unqualified exception for new grounds

573. Option 4 was favoured by many of those who had concerns about transgender athletes competing in line with their gender identity. However, few submitters who supported option 4 explained why they thought it would be the best option for responding to those concerns.

574. Some submitters expressed concern that the safety of cisgender women and girls could be put at risk if they compete with transgender women. Of the few submitters who explained their concern further, they tended to refer to contact sports such as rugby, boxing, roller derby and mixed martial arts.

575. Some submitters suggested that, as a mitigating measure, there could be a special category for athletes who are transgender or non-binary or an open category alongside men's and women's categories.

576. Other points made by submitters in support of option 4 were as follows:

(a) It would allow the sporting body to make the choice about who to accept.

(b) It would provide sports organisations with the flexibility to design competitions according to their specific needs and requirements.

(c) Sex rather than gender identity is what matters in sports.

Option 5: limit the exception to women's sport only

577. Only a small number of submitters supported option 5. Most of these referred to general concerns about permitting athletes to compete in line with their gender identity, and relatively few gave reasons why option 5 would be the best approach for responding to those concerns.

578. Of those that did give reasons, these included the following:

(a) It seems the fairest and most clean-cut option to administer.

(b) Men's sport do not need protecting.

(c) It would focus the exception on women's sport.

Option 6: exception only applies when required to advance underlying policy rationales

579. Option 6 was preferred by some submitters who supported inclusion of people who are transgender or non-binary or who have an innate variation of sex

characteristics in competitive sport. However, it was considerably less popular among individual submitters than option 2.[14]

580. Although some submitters identified disadvantages of option 6, few submitters singled it out in their submission to express direct opposition. Several submitters indicated that, while they thought another option would be more inclusive, option 6 would be the most practicable or a compromise.

581. Some submitters supported this option because it allowed for sport-specific consideration and did not apply a blanket rule.

582. Several submitters who supported option 6 indicated they thought it was important for any exclusion to be based on evidence. Many submitters accepted that it would be appropriate to have an exception that applies at the international level. However, some submitters were concerned that option 6 might allow sports to rely on international rules applicable to the sport even when the particular event was not governed by those rules.

Another option

583. Some submitters identified other policy options they preferred. These include suggestions the following suggestions:

---

14 Option 6 was, however, the most popular option among organisations who submitted on this question. As noted, this summary focusses on individual submissions.

(a) Men's and women's sport categories should be removed altogether.

(b) Section 49(1) should clarify that it only applies when strength and body mass is an advantage.

(c) Section 49(1) should apply more broadly (for example, to people under the age of 12).

(d) "Competitive sporting activity" in section 49(1) should be defined.

584. Some submitters suggested that any restrictions could be based on physical characteristics or requirements such as weight, height or hormone levels rather than gender identity alone.

Other forms of discrimination

585. Chapter 16 of the Final Report considered issues relating to the subpart in Part 2 of the Human Rights Act called "Other forms of discrimination". This subpart labels some specific types of conduct as unlawful discrimination.

586. This section summarises what submitters said in relation to:

(a) any implications of this review for a provision in this subpart that relates to sexual harassment;

(b) whether a new provision should be added to this subpart that prohibits harassment that is based on being transgender or non-binary or having an innate variation of sex characteristics; and

(c) whether any other new provisions should be added to this subpart.

587. Because we discussed it in a separate chapter in the Final Report, we hold back to discuss in the next section one further possible addition to the Other forms of discrimination subpart on which we consulted (relating to medical interventions on intersex children).

Sexual harassment — section 62

588. Section 62 of the Human Rights Act states that it is unlawful for a person "in the course of that person's involvement" in certain areas of life to:

(a) ask a person for sexual contact where there is an (implied or overt) promise of preferential treatment or a threat of detrimental treatment; or

(b) subject 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 the person in the area of life in which it occurs.

589. In the Issues Paper, we asked:

> **Question 65**: Do you have any feedback on the implications of this review for section 62?

590. Some submitters described the types of behaviour that people who are transgender or non-binary or who have an innate variation of sex characteristics experience and that they thought should be treated as sexual harassment. Submitters said people in these groups are commonly asked questions about, or have comments made about, their sex characteristics (including their genitals), their sex, their gender, their fertility and their sex lives (including stereotypical assumptions about transgender people engaging in sex work).

591. Few submitters raised problems with the wording of section 62. However, some submitters did propose reforms, such as:

(a) clarifying that unwelcome or offensive language includes asking questions or making comments about the status or appearance of someone's sex characteristics, sex, gender or fertility;

(b) extending the section to cover harassment grounded in hostility to someone's sex characteristics, gender or gender identity alongside behaviour of a "sexual nature"; and

(c) making the list of areas of life in which section 62 applies open ended so that it covers sexual harassment that arises outside these settings.

592. Some other submitters said section 62 does not need to be amended, primarily because they said section 62 already protects everyone. Others said section 62 probably already covers the main types of sexual harassment experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics.

593. Some submitters raised concerns about sexual harassment of cisgender women by people who are transgender. Others suggested that adding new prohibited grounds to section 21 of the Human Rights Act would increase sexual harassment.

594. Some submitters suggested reforms of the statutory thresholds in section 62. Others suggested broadening section 62 to cover any harassment relating to a person's sex or gender. Some submitters wanted amendments to section 62 to cover the specific experiences of people who are transgender or non-

binary or who have an innate variation of sex characteristics. For example, a few suggested section 62 should refer to people who are transgender or non-binary or who have an innate variation of sex characteristics or that it should be clear that specific conduct, such as asking about a transgender person's genitalia, is harassment.

595. One submitter suggested that sexual orientation and gender identity be listed alongside sexual experience and reputation in section 62(4) of the Human Rights Act (as matters than cannot be taken into account when someone complains of sexual harassment).

Adding new harassment provision

596. In the Issues Paper, we asked:

> Question 66: Are there sufficient legal remedies available to address harassment that is directed at a person because they are transgender or non-binary or they have an innate variation of sex characteristics?
>
> Question 67: Should there be a new provision inserted into Part 2 of the Human Rights Act 1993 to protect people from harassment directed at them because they are transgender or non-binary or they have an innate variation of sex characteristics?

597. Many submitters who responded to these questions said the current legal remedies for addressing harassment of people who are transgender or non-binary or who have an innate variation of sex characteristics are insufficient.

598. Some submitters who supported further legal remedies or a new provision discussed concerns relating to the harassment experienced by people who are transgender or non-binary. These submitters said harassment was a regular occurrence. Submitters most often talked about online harassment, but also discussed harassment in workplaces, public streets, on public transport, when using public toilets, in social housing, in schools and at organised rainbow events.

599. Some submitters who said the existing remedies were insufficient said it was because of the lack of express protection in section 21 of the Human Rights Act.

600. Some submitters acknowledged that section 63 applies to very few current grounds but thought the provision should also be extended to all or some other grounds, including sexual orientation.

601. Some submitters suggested that a harassment provision should go further than section 63, for example, that it should cover specific issues such as misgendering and deadnaming.

602. Of those submitters who said the existing legal remedies were sufficient or opposed a new provision, few gave reasons. Some of those who gave reasons expressed concern that there was not sufficient justification to single out any new grounds we proposed for protection from harassment, when many existing grounds were not covered by the current harassment provisions.

603. Some submitters who opposed reform of the Human Rights Act generally were concerned about the impact

of reform of section 21 on the harassment provisions. This included those who gave feedback via the Free Speech Union. One of the form text topics provided in the feedback related to harassment, including saying that misgendering and deadnaming was not harassment.

Other suggestions for additions to the 'Other forms of discrimination' subpart

604. In the Issues Paper, we asked:

> Question 69: Should there be any additional provisions added to the "Other forms of discrimination" subpart to address issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics (that are not captured by other provisions in the Human Rights Act 1993)?

605. Only a few submitters gave suggestions for new provisions to be added to the 'Other forms of discrimination' subpart in answer to this question. The specific suggestions submitters made were that:

(a) the Human Rights Act should include additional provisions to address inclusive access to public services (but submitters did not specify what these should address);

(b) outing transgender people without their consent should be prohibited;

(c) where a gender non-conforming person is particularly vulnerable, they should have a right to access support

systems (including professional support) that provide them with the care and feedback they require; and

(d) there should be a review or audit of education and information in areas such as health practice and medical schools to ensure guidance follows good practice.

Medical interventions on children with an innate variation of sex characteristics

606. In the Issues Paper, we asked:

> **Question 68**: Should there be a new provision added to the "Other forms of discrimination" subpart to clarify the circumstances in which medical interventions on children and young people with an innate variation of sex characteristics are allowed?

607. This section summarises what submitters said in relation to this question.

608. Among submitters who answered this question, there were mixed views on whether reform was desirable, as discussed further below. Some submitters who answered this question did not express a clear view about whether they supported reform and some said they were unsure or did not feel they had the expertise to respond.

609. Some submitters interpreted the question to be proposing an exception to enable medical interventions

with respect to people with an innate variation of sex characteristics in some circumstances (rather than a limitation on medical interventions as we had intended). Those who thought this were opposed to an exception.

610. Some submitters interpreted the question to be about gender-affirming care and answered on this basis. Among these submitters, the main theme was a general opposition to the provision of gender-affirming care and opposition to minors having surgery.

Unnecessary medical interventions should not occur

611. Most submitters who gave a clear answer to the question we had posed expressed the view that unnecessary medical interventions on infants and children with innate variations of sex characteristics should not occur. While submitters used a variety of different words to discuss what they thought the threshold for medical intervention should be, there were common themes. Submitters used descriptions such as "necessary for safety from a strict medical need", "necessary for the function of the body" or "medically necessary, involving urination or physical pain associated with the variation, but not to conform to social gender norms".

612. Many submitters said it should be necessary to obtain consent of the person. For example, some submitters said non-essential interventions on children with innate variations should be delayed until they could give informed consent.

613. A few submitters made suggestions about the process for making the decision, such as that any intervention should be signed off by two paediatricians.

614. A few submitters discussed the negative impact of medical interventions on children, for example, that operations performed on people at a young age without their consent is traumatising and identity-denying and that interventions to "normalise" intersex people lead to psychological exclusion and stigma.

Mixed views on a provision in the Human Rights Act

615. Among submitters, there was some support for a new provision to be added to Part 2 of the Human Rights Act and some opposition. As noted above, some submitters did not clearly state their position or said they were unsure.

616. Many submitters who commented on this issue thought the Human Rights Act was not the appropriate vehicle to address the issue. Of these submitters, many said they thought the issue is too complex and requires stand-alone legislation. Some thought it is outside the scope of the Human Rights Act.

617. A submission from one individual who said they were intersex said the topic was very complicated and they thought change would come from educating doctors and supporting whānau. Another submitter who said they were intersex said they thought the right to bodily autonomy could be enshrined in law (affecting all medical interventions on children and young people) but they

were unsure whether the Human Rights Act was the right place for this.

618. Some submitters questioned whether this area was an appropriate place for the law to intervene and instead thought the issue should be left to medical professionals. These submitters said, for example, that legal issues should not be imposed on the medical profession, that clinical need should prevail and the government should not interfere with people's medical care, or that section 11 of the NZ Bill of Rights already provides protection.

619. A few submitters said education was required, for example, that medical professionals and parents need education so they understand the difference between interventions that may be necessary for the child's health and interventions that are better delayed.

620. Some of the submitters who supported reform recognised that the Human Rights Act might not be the perfect vehicle but thought any opportunity for reform should be taken. For example, some thought a provision could be an interim or fallback measure or was necessary because the problem requires an urgent response.

621. A few submitters thought a general provision in the Human Rights Act making unnecessary interventions unlawful could support more detailed provisions elsewhere.

Part 1A of the Human Rights Act

622. Part 1A of the Human Rights Act sets out the anti-discrimination rules that apply to government agencies and to other people and bodies exercising public functions.

623. Chapter 16 of the Issues Paper discussed the implications of the review for Part 1A and for the NZ Bill of Rights and asked:

> Question 72: Do you agree with our assessment of the implications of this review for Part 1A of the Human Right Act 1993 and section 19 of the New Zealand Bill of Rights Act 1990?

624. This section summarises what submitters said in relation to this question.

General feedback about implications

625. Some submitters gave general feedback about the implications of the review for Part 1A while others commented on specific government activities.

626. Some submitters gave feedback on the provisional analysis in the Issues Paper. Dr Eddie Clark commented:

The approach set out in the paper regarding the relationship between any changes to s 21 and Part 1A & the NZBORA seems accurate. It is difficult to predict the exact impact given that this is inherently a reactive area of law; the parameters of what is decided depend on the specifics of any claims that may be brought.

627. Several submitters indicated that it would be beneficial to have clarity that the public sector cannot discriminate against people who are transgender or non-binary or who have an innate variation of sex characteristics and that claims can be brought on this basis. Some submitters were concerned that it might be difficult to establish breaches of Part 1A in relation to some issues that were of concern to them.

628. Other submitters expressed the opposite concern: that Part 1A could be used to bring claims they considered unmeritorious. For example, some submitters were concerned about discrimination cases being brought about gender-affirming health care. One submitter expressed concern that reform would lead to people demanding "new unmeetable and medically unjustifiable treatments". While not opposing reform of the Human Rights Act, Professor Paul Rishworth KC referred to the potential for Part 1A claims (as well, depending on the circumstances, as Part 2 claims) to be brought about medical decisions and protocols such as those relating to the prescription of puberty blockers for children and young people. He suggested courts would need to give appropriate deference to responsible medical opinion.

629. Several submitters were worried that the rights of other people would not be appropriately considered in the balancing exercise required by section 5 of the NZ Bill of Rights.

Suggestions for reform

630. Several submitters suggested reform of Part 1A. For example, submitters suggested:

(a) adding the single-sex facilities exceptions in Part 2 of the Act to Part 1A;

(b) introducing a separate exception for hospitals and transgender women; and

(c) requiring government to undertake disparate impact analysis to shift the enforcement burden from individuals to government agencies.

631. One submitter said public officials should be subject to the same obligations under the Human Rights Act as other members of the public. Two submitters said there should be a stronger onus than at present on government to protect the rights of people who are transgender or non-binary.

Concern about specific government activities

632. Some submitters expressed views about specific government activities. Some expressed concern that adding new grounds to section 21 would inevitably lead to undesirable policy outcomes on particular topics. Conversely, some were more concerned about current discrimination against people who are transgender or

non-binary or who have innate variations of sex characteristics.

633. Many submitters raised issues related to prison placement. Some submitters expressed concern about ensuring the safety of transgender prisoners, such as ensuring the safety of transgender women in men's prisons. Other submitters were concerned about the safety of cisgender female prisoners if they are housed with transgender female prisoners. Barrister Susan Shone commented that female prisoners are a particularly vulnerable group and she was not aware of them being consulted about transgender women being housed in women's prisons.

634. Many submitters also expressed views about access to gender-affirming health care such as gender-affirming surgery and hormone therapy. Some referred to difficulties in accessing such care, including:

(a) prerequisites (such as being required to take hormones for a certain length of time before having surgery, or having to undergo a psychological assessment);

(b) difficulty in accessing fertility treatment as a transgender person;

(c) difficulty in accessing hormone therapy; and

(d) transgender health care being treated as elective and not urgent.

635. Other submitters thought gender-affirming health care is too readily available in Aotearoa New Zealand. For example, a number of submitters expressed concern

about the long-term health effects of puberty blockers on children and young people. As mentioned above, some made comments indicating they were concerned that adding new grounds of discrimination to section 21 of the Human Rights Act would create an entitlement to certain forms of gender-affirming care (such as puberty blockers) regardless of the circumstances or the evidence.

Implications for other laws

636. This section summarises what submitters said about the implications of reform of the Human Rights Act for other laws, including both primary and secondary legislation.

637. In the Issues Paper, we asked:

> **Question 79**: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, are there implications for other legislation that we need to consider?

638. There were also questions on some specific statutes, as explained below.

639. Few submitters responded to these questions.

Employment Relations Act 2000

640. The Employment Relations Act 2000 provides that one of the situations in which an employee can bring a personal grievance is where they have experienced discrimination. Section 105 of the Employment Relations Act refers to the Human Rights Act to define discrimination.

641. In the Issues Paper, we asked:

> **Question 32**: Do you have any feedback about the implications of this review for the Employment Relations Act 2000?

642. Few submitters responded to this question. Of those who did respond, most agreed the Employment Relations Act would require amendment to avoid internal inconsistency.

643. The handful of submitters who said the Employment Relations Act should not be amended expressed general opposition to reform of the Human Rights Act rather than specific opposition to consequential amendments to the Employment Relations Act. These submitters did not identify any specific reasons why the implications of reform of section 21 of the Human Rights Act for the Employment Relations Act are undesirable.

Education and Training Act 2020

644. Sections 127 and 218 of the Education and Training Act 2020 refer to the Human Rights Act.

645. In the Issues Paper, we asked:

> **Question 57**: Do you have any feedback about the implications of this review for the Education and Training Act 2020?

646. Very few submitters responded to this question. Submitters responding to this question mainly gave reasons why they supported reform of section 21. These

reasons were linked to the provisions in the Education and Training Act, such as that reform would clarify the definition of what a "serious dispute" in the Education and Training Act means. Other reasons included support for schools to provide physically and emotionally safe environments for students.

647. Some submitters who responded to this question were opposed to reform of section 21 in general but did not elaborate on any implications for the Education and Training Act.

648. In the feedback in the spreadsheet provided by the Free Speech Union, one of the form text paragraphs gave reasons for opposing reform of section 21 of the Human Rights Act that related to implications for the Education and Training Act. The paragraph stated:

> Refusal to use language which affirmed a person's self-declared gender identity would amount under the Education and Training Act 2020 to discrimination. Teachers refusing to comply on the basis of individual conscience or religious belief could lose their jobs, their professional registration and even face criminal prosecution.

Residential Tenancies Act 1986

649. The Residential Tenancies Act 1986 refers to the Human Rights Act when prohibiting discrimination in relation to a tenancy agreement.

650. In the Issues Paper we asked:

Question 48: Do you have any feedback about the implications of this review for the Residential Tenancies Act 1986?

651. Some submitters said the review would have positive implications for the Residential Tenancies Act. A few submitters said the ability to choose between two complaint mechanisms was positive.

652. A small number of submitters who opposed reform of the Human Rights Act also opposed any reform that would affect the Residential Tenancies Act, such as because they thought the existing protections in the Residential Tenancies Act were sufficient.

653. Some submitters expressed concerned about some proposed amendments to the Residential Tenancies Act that were before Parliament to allow 90-day 'no-cause' terminations of tenancies.[15] Submitters were worried that these powers could be used by landlords to evict people on the basis of a prohibited ground of discrimination. Some submitters thought this would undermine discrimination protections in the Human Rights Act.

Films, Videos, and Publications Classification Act 1993

654. The Films, Videos, and Publications Classification Act 1993 states that one of the factors that must be taken into consideration in classifying and rating publications is whether and how the publication represents certain

15 These amendments have since been enacted.

groups as inherently inferior by reason of a prohibited ground in section 21 of the Human Rights Act.

655. One submitter said this factor could inhibit freedom of expression by enabling films that express gender-critical views or question gender ideology to be censored.

New Zealand Bill of Rights Act 1990

656. A few submitters commented on the impact of reform on the NZ Bill of Rights. A small number of submitters indicated that it would be beneficial to have a choice as to how to pursue complaints of discrimination against government. Conversely, a small number of submitters expressed concern that the reform would amount to a change or amendment to the NZ Bill of Rights.

657. Submitters did not identify any particular reasons why it would be inappropriate for people who experience public sector discrimination based on their gender identity or having an innate variation of sex characteristics to have the same access to NZ Bill of Rights remedies as people who experience discrimination on other grounds.

Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996

658. The Code of Health and Disability Services Consumers' Rights includes the right of health and disability consumers to be free from discrimination that is unlawful under Part 2 of the Human Rights Act.

659. A small number of submitters gave feedback about the implications of reform for the Code of Health and Disability Services Consumers' Rights.

660. One submitter suggested that amending section 21 would mean that people cannot choose a healthcare provider of their own sex for intimate procedures. Another submitter said there would be a conflict between sex-based and gender identity-based rights. They gave the example of a transgender woman wanting to be accommodated on a women's ward in a hospital and another woman not wanting to share a ward with them. They pointed to the rights to privacy and to have services provided in a manner that respects the consumer's dignity and independence, and queried whose rights would take precedence.

Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

661. The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 specify that lawyers must not engage in discrimination that is unlawful under the Human Rights Act.

662. One submitter said lawyers should not be compelled to use preferred pronouns in cases where the sex of an involved party is relevant.

Other comments

663. Some submitters expressed concern about the impact of reform on certain categories of legislation, without naming specific statutes. These categories included:

(a) any legislation that affects sex-based categorisation;

(b) laws relating to incarceration, hate speech policies and harassment policies;

664. conversion practises legislation; and

665. laws relating to health, employment and education.

666. One submitter said the Care of Children Act 2004 may be affected by the review. This submitter said a child may "choose to leave" family members who accidentally deadname them, or a parent may sever a relationship they have with a child or co-parent by forcing an expectation with which the child or co-parent is not comfortable.

667. Some submitters commented that laws built on the gender binary should have their wording replaced to be more gender neutral, and that these laws should be more inclusive.

Other matters addressed in the Issues Paper

668. This section summarises what submitters said in relation to:

(a) whether reforms are needed of the provisions in the Human Rights Act that address the membership, powers and functions of Te Kāhui Tika Tangata | Human Rights Commission and the resolution of disputes under the Act;

(b) the use of gendered pronouns in the Human Rights Act; and

(c) the wording of a provision relating to pregnancy or childbirth.

Membership, powers and functions of the Human Rights Commission

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

670. In the Issues Paper, we asked:

> Question 77: Are the membership, powers and functions of the Human Rights Commission sufficient to promote and protect the rights of people who are transgender or non-binary or who have an innate variation of sex characteristics?

671. Relatively few submitters commented on this question. Many of those who responded gave short responses or gave a response related to whether reform of section 21 was desirable or not.

672. Many submitters said the provisions were sufficient or they were not aware of any issues. A few specifically said they thought the Human Rights Commission's work was positive.

673. Some submitters responding to this question said the membership, powers and functions of the Human Rights Commission were not sufficient, but few identified specific issues.

674. Some submitters raised issues about the appointment of human rights commissioners. Some were concerned that people with anti-transgender views could be appointed as human rights commissioners and said people who are transgender or non-binary or who have an innate variation of sex characteristics needed to have confidence in the Human Rights Commission. One said there should be a requirement for people at the Human Rights Commission to understand the issues facing these communities.

675. Other specific issues about the Human Rights Commission's membership, functions and powers, raised by submitters were as follows:

    (a) The Human Rights Commission should be replaced with a unit of specialist human rights lawyers.

(b) The Human Rights Commission needs prosecution powers in some circumstances (for example if the behaviour involves violence or harassment).

(c) The Human Rights Commission should focus on women's rights or should not overreach.

676. Some submitters said public education would be an important part of any reform of section 21 of the Human Rights Act. Some suggested the Human Rights Commission could have a role in this.

Access to justice and dispute resolution

677. Parts 3 and 4 of the Human Rights Act deal with the resolution of disputes.

678. In the Issues Paper, we asked:

> **Question 78**: Do you have any feedback on the implications of this review for the dispute resolution process in Part 3 of the Human Rights Act 1993?

679. Relatively few submitters provided specific feedback on this question.

680. Several submitters said the lack of express protection for people who are transgender or non-binary or who have an innate variation of sex characteristics may be a barrier to making a complaint of discrimination.

681. Some submitters pointed to other barriers to making a complaint such as:

(a) difficulties in proving discrimination;

(b) concerns about lack of privacy;

(c) inaccessible or expensive legal pathways;

(d) fear of retaliation; and

(e) fear or distrust of formal institutions.

682. One submitter suggested complainants may not trust the Human Rights Commission or may want other avenues for redress. Another submitter thought the existing remedies were insufficient for addressing the harm caused by discrimination.

683. A few submitters said legislative change was needed or discussed the importance of ensuring the dispute resolution process is inclusive, but generally did not provide specific suggestions for amendment.

684. A few submitters indicated that reform of dispute processes was unnecessary or was not within the scope of the review.

Gendered language in the Human Rights Act

685. Some provisions in the Human Rights Act use the male and female gendered pronouns "him or her", "his or her" or "he or she".

686. In the Issues Paper, we asked:

> Question 76: Should the binary language "him or her", "his or her" and "he or she" in the Human Rights Act 1993 be replaced by gender-neutral language?

687. Feedback was divided, with some submitters supporting the use of gender-neutral language in the Human Rights Act and others opposing it.

Support for replacing the binary pronouns in the Act

688. A large number of submitters supported replacing the binary pronouns in the Human Rights Act with gender-neutral language.

689. Submitters who supported the use of gender-neutral language said it would be more inclusive, would enhance accessibility, would make the Act more readable and would be consistent with other recommendations. Some thought the use of binary pronouns in the Act gives the impression that these provisions do not apply to non-binary people.

690. Associate Professor Selene Mize and Dr Eddie Clark said in their submissions that it would be incongruent for an Act that extends anti-discrimination protection to people who identify outside the gender binary to use binary pronouns that do not include them. Some submitters said accessibility and inclusivity is particularly important in the context of human rights law. Others thought gender-neutral language resulted in less clunky and more efficient legislative drafting.

Opposition to replacing the binary language in the Act

691. Submitters who opposed the use of gender-neutral pronouns said the use of "they" and "them" to refer to a single person is confusing. Some said gendered pronouns reflect biological reality and the binary of male and female.

692. Some submitters were concerned that reform on this issue would undermine women's rights. Some thought it

would be ideological or virtue-signalling or would violate the right to freedom of expression.

Measures relating to pregnancy and childbirth — section 74

693. Section 74 of the Human Rights Act clarifies that the Act does not prohibit preferential treatment related to a woman's pregnancy, childbirth and childcare responsibilities.

694. In the Issues Paper, we asked:

> Question 71: Should section 74 be amended to clarify that it applies to anybody who is pregnant or who is giving birth regardless of their gender identity?

695. Feedback on this issue was divided, with some submitters supporting reform of section 74 and others opposing it.

Support for clarifying section 74

696. Many submitters wanted the language of section 74 to be more inclusive. Submitters said some transgender men, people who identify outside the gender binary and men with innate variations of sex characteristics can and do give birth. They said it is the capacity for pregnancy that is relevant, not sex or gender, and that all pregnant people should be entitled to the same treatment regardless of whether they are women.

697. A few submitters specifically said transgender, non-binary and intersex people who give birth need

protection. These submissions highlighted that people from these groups have the same issues with healthcare in pregnancy as cisgender women and have pre- and post-natal needs.

Opposition to clarifying section 74

698. Many submitters felt strongly that section 74(a) should only refer to a woman's pregnancy or childbirth. Submitters were concerned that removing sex-based language erases women, their experiences and their rights.

699. Some submitters thought using gender-neutral language to describe women is demeaning and reduces women to their anatomy or bodily functions. For example, some particularly disliked gender-neutral language that refers to body parts such as "people with uteruses" or "people with a cervix".

700. One submitter said using gender-neutral language in relation to pregnancy could be potentially "dangerous" for women who have English as a second language.

701. Some submitters said amending section 74(a) is unnecessary or said it would be inaccurate to do so because, as a matter of reality, pregnancy is a biological phenomenon that only women can experience.

Other themes

702. This section summarises themes shared by submitters that are not covered in other sections in this summary. Some were shared in response to the final catch-all question in the Issues Paper, which was:

> **Question 80**: Are there any other issues relevant to this review or options for reform that we have not identified or anything else you would like to tell us?

703. Primarily, the themes not summarised elsewhere relate to feedback about the Issues Paper, the project and the consultation process.

704. Some submitters criticised the Issues Paper for employing language which they said derived from a particular ideology. This included language such as 'cisgender' and 'sex assigned at birth'. They said this suggested the Issue Paper accepted a particular viewpoint on issues of gender identity.

705. Some submitters said the Issues Paper should have defined terms such as transgender, gender, gender identity, non-binary or sex.

706. A few submitters said that the Pacific terms provided to describe gender identity were misleading because the concepts do not translate neatly onto Western definitions.

707. A couple of submitters criticised the use of 'Ia Tangata' in the report or the failure to define the phrase.

708. Some submitters said the Issues Paper was biased or indicated that the Law Commission had predetermined its view of the issues. The form text provided by Voices for Freedom included the comment that: "The report's authors are from one side of the fence and are compromised by their conflicts of interest".

709. Some submitters said the evidence and information used in the Issues Paper was selective or one-sided, for example, that the rights of women were ignored or given insufficient weight in the Issues Paper.

710. Some submitters were critical of the review occurring at all, suggesting money could be spent better elsewhere.

711. Other submitters gave positive feedback on the review and the Issues Paper, for example, by saying they appreciated the work in the Issues Paper, usually with reference to the level of detail, or supported the review occurring. Some submitters appreciated the way the Issues Paper was written and said it was comprehensive but reader friendly.

712. Some submitters shared difficulties they had with the process itself. These issues included:

(a) difficulties with the length of the Issues Paper and the number of questions, including for those with disabilities or those who speak English as a second language;

(b) difficulties with the technical and legal nature of the questions; and

(c) insufficient notice or awareness about the review for people to give submissions, or that the review should have been better advertised for the public to be adequately informed.

713. Some submitters discussed policy issues unrelated to the review, such as issues related to the COVID-19 pandemic, veganism and obesity.