

He Puka Kaupapa | Issues Paper 53

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**



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

Te Aka Matua in the Law Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

Kia whanake ngā ture o Aotearoa mā te arotake motuhake

Better law for Aotearoa New Zealand through independent review

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This paper covers a wide range of topics and asks many questions. You are welcome to focus only on those topics that concern you or about which you have views. There is no need to answer all the questions.

When answering questions, we ask that you explain your views wherever possible. This is not a survey — it is not our intention to count up submissions to find the option with which most people agree. Rather, we are interested to hear people's views so that we can understand better the reasons for and against particular reform options, and the practical implications of reform.

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Contents

Have your say	iii
Acknowledgements	v
Chapter 1: Introduction	4
About this Issues Paper	4
New Zealand's anti-discrimination law — the Human Rights Act 1993	4
Evolution of New Zealand's anti-discrimination protections	6
Momentum for change	7
Scope of the review and approach taken in this Issues Paper	8
Limitations on the scope of this review	9
Our process so far	11
What happens now	12
Structure of this Issues Paper	12
Chapter 2: Sex, gender and sex characteristics	15
Introduction	15
The concept of sex	15
The concept of gender	16
Relationship between sex and gender	17
Introduction to the concepts of transgender and non-binary	18
Introduction to innate variations of sex characteristics	20
Other cultural perspectives	23
Gender-critical perspectives	24
Terminology in this Issues Paper	25
Chapter 3: Experiences of discrimination	27
Introduction	27
People who are transgender or non-binary	27
People with innate variations of sex characteristics	38
Chapter 4: Key reform considerations	44
Introduction	44
Coherence of the Human Rights Act	44
Core values underlying the Human Rights Act	45
Constitutional fundamentals	49
Needs, perspectives and concerns of New Zealanders	52
Evidence-led law reform	52
Other principles of good law making	52

Chapter 5: The perspectives and concerns of Māori.....	54
Introduction.....	54
Identity and belonging	55
Experiences of discrimination.....	58
Tikanga and sex-differentiated activities.....	59
Chapter 6: Should section 21 be amended?.....	62
Introduction.....	62
Should New Zealand law protect people from discrimination linked to being transgender or non-binary or having an innate variation of sex characteristics?	63
Should section 21 be amended?	70
Chapter 7: Options for new grounds	75
Introduction.....	75
Stand-alone grounds that take an asymmetrical approach.....	76
Stand-alone grounds that take a symmetrical approach.....	79
Clarifying the scope of the ground of sex.....	83
Chapter 8: Introduction to Part 2 of the Human Rights Act.....	88
Introduction.....	88
How Part 2 works	88
Our approach to Part 2.....	92
Recurrent issues and challenges	96
Chapter 9: Employment.....	99
Introduction.....	99
Scope of protection.....	99
Exceptions.....	102
Implications of this review for the Employment Relations Act 2000.....	113
Chapter 10: Goods, services, facilities and places	115
Introduction.....	115
Scope of protection.....	115
Exceptions.....	117
Chapter 11: Land, housing and accommodation.....	126
Introduction.....	126
Scope of protection.....	126
Exceptions.....	128
Implications of this review for the Residential Tenancies Act 1986	130
Chapter 12: Education	132
Introduction.....	132
Scope of protection.....	132
Exceptions.....	135
Implications of this review for the Education and Training Act 2020.....	140

Chapter 13: Exceptions for single-sex facilities	141
Introduction.....	141
Scope of the exceptions	141
Rationale for the exceptions.....	142
Differing perspectives.....	143
The potential of unisex facilities	144
Should the exceptions be amended?	147
Single-sex facilities in schools and workplaces	151
Chapter 14: Competitive sports.....	154
Introduction.....	154
Scope of the exception	154
Rationales for the exception.....	155
Current practice	156
Differing perspectives.....	159
Evidence backdrop	161
Should the exception be amended?	164
Chapter 15: Other issues in Part 2	170
Introduction.....	170
Other forms of discrimination.....	170
Special provisions relating to superannuation schemes	177
Other matters.....	178
Chapter 16: Part 1A and the New Zealand Bill of Rights Act.....	180
Introduction.....	180
The right to freedom from discrimination in the NZ Bill of Rights.....	180
Part 1A of the Human Rights Act.....	182
Implications of this review for Part 1A and the NZ Bill of Rights	183
Chapter 17: Cross-cutting issues.....	188
Introduction.....	188
Potential for interference with tikanga	188
Misgendering and deadnaming.....	194
Binary language in the Human Rights Act.....	199
Chapter 18: Other matters	201
Introduction.....	201
Part 1 of the Human Rights Act	201
Parts 3 and 4: access to justice and dispute resolution	202
Implications of this review for other laws.....	203



CHAPTER 1

Introduction

ABOUT THIS ISSUES PAPER

- 1.1 Te Aka Matua o te Ture | Law Commission has been asked to review the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people who have an innate variation of sex characteristics. While we explain these terms more fully in Chapter 2, briefly:
- (a) a person who is transgender is someone whose gender identity is different to the sex they were assigned at birth;
 - (b) a person who is non-binary is someone whose gender identity does not fit exclusively into the binary of male or female; and
 - (c) a person with an innate variation of sex characteristics is someone who was born with genetic, hormonal or physical sex characteristics that differ from medical and social norms for male or female bodies (although, in some cases, the variation may not be evident until later in life).
- 1.2 We are seeking feedback from the public about law reform in this area. This Issues Paper is designed to support that consultation process. It provides some background to the review, identifies and explores potential options for reform and poses some questions on which we are seeking feedback.

NEW ZEALAND'S ANTI-DISCRIMINATION LAW — THE HUMAN RIGHTS ACT 1993

- 1.3 The Human Rights Act states when it is unlawful in Aotearoa New Zealand to discriminate. Discrimination is treating a person differently from and worse than others based on a prohibited ground. Examples include refusing someone a job, a tenancy or access to a public facility because of their sex, race or religion.
- 1.4 In Aotearoa New Zealand, it is not always unlawful to treat people differently. Sometimes, it can be fair to treat people differently from others. The Human Rights Act has several ways to distinguish between fair and unfair differences in treatment. This allows for competing rights and interests to be weighed.
- 1.5 We explain in this chapter some key features of the Human Rights Act that we think are helpful for readers of this Issues Paper to understand at the outset. The explanations given in this chapter are not comprehensive. We provide more detailed explanations of some provisions in later chapters where that is needed for readers to understand issues being discussed.

The prohibited grounds of discrimination

- 1.6 The Human Rights Act singles out 13 personal traits or characteristics as “prohibited grounds of discrimination”. These are listed in section 21 and include sex, religious belief, race, colour, disability and sexual orientation.
- 1.7 To make a complaint about discrimination under the Human Rights Act, the difference in treatment must be linked to one or more of these prohibited grounds.¹ For example, a difference in treatment might be motivated by the discriminator’s belief that the person has one or more of these traits or characteristics. Or, even if there is no intention to discriminate, a sufficient link might be present if the difference in treatment has a disproportionate effect on people with the particular trait or characteristic and there is no good reason for it.²
- 1.8 Being transgender or non-binary or having an innate variation of sex characteristics are not identified explicitly in section 21 as prohibited grounds of discrimination. That has led to doubt and confusion about whether discrimination that is linked to these characteristics is ever unlawful in Aotearoa New Zealand. A key issue in this review is whether an amendment to section 21 is necessary and desirable to address that doubt and confusion.

Rules to determine when discrimination is unlawful

- 1.9 Even if a person is treated differently from others based on a prohibited ground, it does not follow automatically that the treatment is unlawful. The Human Rights Act contains two sets of rules to determine when such treatment is unlawful — one applying to government and one to private individuals and organisations.

Rules that apply to government (Part 1A)

- 1.10 The first set of rules is found in Part 1A of the Human Rights Act. It applies to government agencies and others carrying out government functions.³
- 1.11 The rules in Part 1A are drawn from and replicate rules in the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). In general, a government act, omission, policy or practice is unlawful discrimination under Part 1A if:⁴
- (a) it treats someone differently from others (and leaves them materially worse off) based on a prohibited ground; and
 - (b) the government has not demonstrated the difference in treatment was justified.⁵
- 1.12 The second requirement recognises there can be good reasons for the government to treat people differently. A pension that is only for people of retirement age is an example.

¹ There is a small handful of exceptions. The only one relevant to this review is sexual harassment, which we discuss in Chapter 15.

² This is called indirect discrimination. We explain indirect discrimination in Chapter 8.

³ Human Rights Act 1993, s 20J(1) read together with New Zealand Bill of Rights Act 1990, s 3. We explain more precisely which acts are covered by Part 1A and which by Part 2 in Chapters 8 and 16.

⁴ Human Rights Act 1993, s 20L read together with New Zealand Bill of Rights Act 1990, ss 5 and 19; and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [135]–[136] and [143].

⁵ We discuss the idea of demonstrable justification or ‘proportionality’ in Chapters 4 and 16.

Rules that apply to private individuals and organisations (Part 2)

- 1.13 A second set of rules applies to people and organisations that are not exercising government functions.⁶ These are in Part 2 of the Human Rights Act.
- 1.14 The obligations placed on private individuals and organisations are far more confined than those placed on government. Unless they are exercising government functions, private individuals and organisations generally only have obligations under the Human Rights Act when they take part in certain public-facing activities that are listed in Part 2. Some examples are employing staff, selling or renting out a house or supplying goods, services or facilities to the public.
- 1.15 When carrying out one of these activities, it may well be unlawful to treat someone differently from and worse than others based on a prohibited ground of discrimination. For example, it is usually unlawful to refuse to hire someone because of their race, sex or political opinion. The Human Rights Act sets out in some detail what treatment is unlawful and when.
- 1.16 The Act also outlines exceptions — situations in which different treatment based on a prohibited ground is lawful even though it is a regulated activity. We discuss these exceptions in detail later in this Issues Paper. They are key mechanisms by which the Human Rights Act distinguishes between fair and unfair differences in treatment, and weighs competing rights and interests.
- 1.17 Outside of the listed activities, the Human Rights Act does not regulate private (non-government) conduct. For example, the Act does not stop people from discriminating in who they choose to spend time with or live with.⁷

Complaints of discrimination

- 1.18 The Human Rights Act also establishes mechanisms for people to complain about discrimination. People can complain at first instance to Te Kāhui Tika Tangata | Human Rights Commission, which will assist the parties to resolve the dispute.⁸ If the complainant is not satisfied with the outcome, they can take a case to Te Taraipūnara Mana Tangata | Human Rights Review Tribunal. The Tribunal can determine whether discrimination has occurred and has the power to award remedies such as declarations, restraining orders and damages (that is, a payment of money).

EVOLUTION OF NEW ZEALAND'S ANTI-DISCRIMINATION PROTECTIONS

- 1.19 The grounds of discrimination that are prohibited by New Zealand law have evolved gradually. New Zealand's first anti-discrimination law, the Race Relations Act 1971, contained only three prohibited grounds: race; colour; and national or ethnic origin.
- 1.20 Six years later, the Human Rights Commission Act 1977 was enacted to sit alongside the Race Relations Act. It added four new grounds: sex; marital status; religious belief; and ethical belief.

⁶ There are some limited circumstances in which Part 2 applies to government, which we identify in later chapters.

⁷ See, for example, Human Rights Act 1993, s 54.

⁸ Te Kāhui Tika Tangata | Human Rights Commission has other oversight functions, which we do not discuss here.

- 1.21 In 1993, the Human Rights Act repealed and replaced the two earlier laws. It replicated the existing grounds of discrimination and added six new ones: disability; political opinion; employment status; family status; sexual orientation; and age.⁹
- 1.22 New Zealand's tradition of anti-discrimination protection is therefore "gradualist".¹⁰ As one member of Parliament put it during the parliamentary debates leading to the enactment of the Human Rights Act, anti-discrimination laws evolve "as societal attitudes become receptive to new ideas, to changing values, and to changing perceptions of what is just".¹¹
- 1.23 The prohibited grounds of discrimination have not, however, been systematically reviewed in the three decades since the Human Rights Act was enacted.¹²

MOMENTUM FOR CHANGE

- 1.24 There have been several attempts since 1993 to amend section 21 to provide explicit protection from discrimination that is linked to a person's gender identity or their sex characteristics but none so far has been successful.¹³ In 2004, a member's Bill sponsored by Georgina Beyer MP was drawn from the ballot.¹⁴ It sought to add "gender identity" as a prohibited ground. Beyer agreed to withdraw the Bill after Te Tari Ture o te Karauna | Crown Law issued an opinion saying that discrimination based on a person's gender identity already falls within the scope of the Human Rights Act because it amounts to discrimination based on a person's sex.¹⁵
- 1.25 In 2014, the issue was again discussed in Parliament. Louisa Wall MP sought to insert a provision amending section 21 (by adding "gender identity") into a Statutes Amendment Bill. These Bills are for "technical, short, and non-controversial amendments".¹⁶ They can only proceed with the unanimous support of the House.¹⁷ Wall's proposal did not proceed because she was unable to attract sufficient support.¹⁸
- 1.26 In 2021, the government published a consultation document that, among other things, proposed to amend section 21 to "clarify that trans, gender diverse, and intersex people are protected from discrimination". Specifically, the government proposed to define the prohibited ground of sex to include "sex characteristics or intersex status" and to add a new prohibited ground of "gender including gender expression and gender identity".¹⁹

⁹ Age had been made a prohibited ground a year earlier, in 1992, but solely in relation to employment discrimination.

¹⁰ *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 565 per Keith J.

¹¹ (27 July 1993) 537 NZPD 16912 (Graeme Reeves MP).

¹² There has been a handful of amendments to the wording of existing grounds but no new grounds have been added.

¹³ There was also an earlier attempt to amend the Human Rights Commission Act 1977 to that effect: see Human Rights Commission Amendment Bill 1990 (58-1), cl 14F(1)(j).

¹⁴ Human Rights (Gender Identity) Amendment Bill 2004 (225-1).

¹⁵ Letter from Cheryl Gwyn (Acting Solicitor-General) to the Attorney-General "Human Rights (Gender Identity) Amendment Bill" (2 August 2006).

¹⁶ Currently Cabinet Office *Cabinet Manual 2023* at [7.72].

¹⁷ Currently Standing Orders of the House of Representatives 2023, SO 313(2).

¹⁸ See (11 March 2015) 703 NZPD 2185 (Simon O'Connor MP).

¹⁹ Te Tāhū o te Ture | Ministry of Justice *Proposals against incitement of hatred and discrimination* (2021) <www.justice.govt.nz> at 5 and 23.

Following public consultation, this proposal did not proceed. Instead, in November 2022, the then Minister responsible for the Law Commission Hon Kiritapu Allan referred the Law Commission this review.

- 1.27 In August 2023, another member’s Bill (sponsored by Dr Elizabeth Kerekere MP) was drawn from the ballot.²⁰ This Bill would amend section 21 to add two new prohibited grounds: “gender identity or expression” and “variations of sex characteristics”. Dr Kerekere left Parliament at the October 2023 general election. The Bill is now sponsored by Debbie Ngarewa-Packer MP. On 6 December 2023, the Business Committee agreed to postpone the first reading of the Bill until further notice.²¹

SCOPE OF THE REVIEW AND APPROACH TAKEN IN THIS ISSUES PAPER

- 1.28 Our task in this review is to advise the government whether the current wording of the Human Rights Act adequately protects people who are transgender or non-binary or who have an innate variation of sex characteristics and, if not, what amendments should be made.

Should section 21 be amended?

- 1.29 A key issue we are examining is whether to extend, modify or further define the prohibited grounds of discrimination in section 21 of the Human Rights Act to clarify that being transgender or non-binary or having an innate variation of sex characteristics are protected characteristics.
- 1.30 Based on our research and analysis to date, we have reached a preliminary view that an amendment of this kind is necessary and desirable. People who are transgender or non-binary or who have an innate variation of sex characteristics have historically experienced, and continue to experience, significant disadvantage, prejudice, marginalisation and discrimination.²² An amendment to clarify that discrimination on these grounds is prohibited would bring New Zealand law better into line with the laws in other states with similar legal and political systems. The absence of similar protection in New Zealand law is attracting negative attention from several United Nations bodies.²³
- 1.31 In Chapter 6 of this Issues Paper, we discuss the reasons for this preliminary conclusion more fully and seek feedback on it.

Matters to consider if section 21 is amended

- 1.32 If section 21 is to be amended, there are some complex issues to address along the way. First, it is necessary to settle some precise wording for new prohibited grounds of discrimination. There are several potential options, which we present for feedback in Chapter 7.

²⁰ Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill 2023 (275-1).

²¹ Business Committee “Determinations of the Business Committee for Wednesday, 6 December 2023” Pāremata Aotearoa | New Zealand Parliament (6 December 2023) <www.selectcommittees.parliament.nz>.

²² We explore the current data that is available about discrimination in Chapter 3.

²³ For discussion, see Chapter 6.

- 1.33 Second, we need to consider whether any other sections in the Human Rights Act should be amended to address the wider implications of amending section 21. As we explained earlier, the Human Rights Act contains detailed rules that dictate when discrimination is unlawful. These rules are designed to ensure the right to freedom from discrimination is balanced against other rights, interests and concerns that Parliament deemed to be important when it passed the Human Rights Act in 1993. We need to consider the Act as a whole to ensure it strikes an appropriate balance between the right to freedom from discrimination (as it relates to any new prohibited grounds) and other rights, interests and concerns.
- 1.34 For example, we examine closely in this Issues Paper the various exceptions in Part 2 of the Human Rights Act (the circumstances in which it is lawful for a private individual or body to treat someone differently based on a prohibited ground even when engaging in one of the public-facing activities regulated by Part 2).²⁴ We seek feedback on whether it is desirable to amend any of these exceptions to reflect any new prohibited grounds of discrimination that are added to section 21.
- 1.35 We understand from preliminary research and engagement that there are divergent views in the community about some of the issues on which we seek feedback. These include access to single-sex services and facilities (such as bathrooms and changing rooms) and participation in competitive sports. Through the public consultation process, we hope to gain a better understanding of the perspectives people in Aotearoa New Zealand hold on these issues, the reasons and concerns that underlie them and, where relevant, the evidence that exists to support them.
- 1.36 Finally, in this review, we need to understand the consequential implications of amending the Human Rights Act for other New Zealand laws. Some other statutes contain references to the Human Rights Act. For example, the NZ Bill of Rights has a right to be free from discrimination “on the grounds of discrimination in the Human Rights Act”.²⁵ We need to understand the consequential implications of any reform we propose so that we can satisfy ourselves that reform is appropriate.
- 1.37 We may recommend consequential amendments to other laws if that seems necessary to ensure the consistency and coherence of New Zealand’s laws.

LIMITATIONS ON THE SCOPE OF THIS REVIEW

- 1.38 It is helpful to state at the outset several limitations on the scope of our review.

We have only been asked to review the Human Rights Act

- 1.39 The Law Commission has only been asked to examine the adequacy of protections in the Human Rights Act, not in any other Act. Although we need to understand the implications of any proposed reform of the Human Rights Act for other laws, we are not undertaking an overall review of any other laws. For example, we are not reviewing references to sex or gender in other New Zealand legislation.

²⁴ Especially Chapters 9–14.

²⁵ New Zealand Bill of Rights Act 1990, s 19.

- 1.40 This focus on the Human Rights Act means that we do not address in this review all legal issues of concern to people in Aotearoa New Zealand that relate to gender, gender identity or innate variations of sex characteristics. To give just one example, in our preliminary research and engagement, we heard a range of perspectives and concerns about access to gender-affirming health care (such as hormone treatment and surgeries). We heard, for example, that there are significant barriers to accessing gender-affirming treatment and that this is an issue of concern to many people who are transgender or non-binary. We also heard that some other people worry to the contrary that gender-affirming treatments (including puberty blockers) are too easily available – especially for children and young people.
- 1.41 These issues do not fall directly within the scope of this review. If the Human Rights Act were amended to provide explicit protection from discrimination to people who are transgender or non-binary or who have an innate variation of sex characteristics, that would certainly clarify that government officials and health professionals must make decisions about gender-affirming health care in a non-discriminatory way. If they failed to do so, it might be possible for someone to take a claim under the Human Rights Act. This would not, however, displace other relevant considerations such as those relating to the safety and efficacy of treatments or the equitable distribution of state resources.

We are not reviewing other human rights protections (just discrimination)

- 1.42 The Human Rights Act does not protect all types of human rights. In Aotearoa New Zealand, human rights are protected in many different laws. For example, the NZ Bill of Rights protects a range of rights from interference by the government. These include the right to life, fair trial rights and the freedoms of opinion and belief, expression, religion and association. Aotearoa New Zealand is also a party to some international treaties that protect human rights.
- 1.43 By contrast, the Human Rights Act is mainly about the right to be free from discrimination. That is the focus of this review.

This is not a general review of the Human Rights Act

- 1.44 Another important limitation on the scope of our review is that we have not been asked to conduct a general review of the Human Rights Act. Rather, we have been asked to review the adequacy of protection for people who are transgender or non-binary or who have an innate variation of sex characteristics.
- 1.45 Based on our preliminary research and engagement, we think a broader review of the Human Rights Act may well be desirable. The Act is over 30 years old. Some parts of it (including those most significant to this review) have not been systematically reviewed since enactment.²⁶ Even when it was enacted, the Act drew heavily on earlier anti-discrimination laws from the 1970s. It continues to reflect attitudes and compromises

²⁶ See Te Tāhū o te Ture | Ministry of Justice *Discussion Paper: Re-evaluation of the Human Rights – Protections in New Zealand* (October 2000) at [85] and recommendation iv, advising such a review should occur. A significant package of amendments in 2001 addressed the role of the Human Rights Act 1993 in regulating government agencies and functions and the role of monitoring and enforcement bodies but left large parts of the Act untouched: Human Rights Amendment Act 2001.

made in the context of 1970s Aotearoa New Zealand. We also consider that some sections in the Act are poorly drafted and their meaning is obscure.

- 1.46 In this Issues Paper, we sometimes identify broader issues with the Human Rights Act that could be considered as part of a wider review of the Act. We cannot, however, recommend wider reform of the Act as part of this review even when there is general agreement that such reform is desirable.

We are not examining three provisions in the Human Rights Act

- 1.47 Finally, there are three provisions in the Human Rights Act we do not intend to review even though they do have potential implications for people who are transgender or non-binary or who have an innate variation of sex characteristics:
- (a) We are not reviewing sections 61 and 131 of the Human Rights Act, which concern the incitement of racial disharmony (sometimes referred to as hate speech). The Minister responsible for the Law Commission Hon Paul Goldsmith has requested the Law Commission withdraw issues relating to hate speech from its work programme.
 - (b) We are not reviewing section 63A of the Human Rights Act, which relates to conversion practices. This provision was enacted in 2022 after extensive consultation. We think it is too soon to reconsider the policy on which the section was based or to evaluate how it is working in practice.

OUR PROCESS SO FAR

- 1.48 In the initial phase of this review, we undertook preliminary research to determine the scope of the reference. We examined every provision in the Human Rights Act to establish which of them had implications for the review. We also conducted preliminary engagement with various experts, government agencies and community stakeholders. At the end of this scoping phase of the review, we published terms of reference in August 2023.²⁷
- 1.49 In the second phase (leading up to publication of this Issues Paper), we have been conducting in-depth research on the law and issues. For example, we have reviewed New Zealand case law and commentary, legislative history, international human rights law and the laws in several comparable jurisdictions. We have also sought to understand relevant tikanga Māori.²⁸
- 1.50 Not all our research has been focused on legal regulation. For example, we have tried to inform ourselves about the concepts of sex and gender and the range of perspectives in the community about what they mean and how they interrelate. We have sought to understand the experiences of people who are transgender or non-binary or who have an innate variation of sex characteristics (especially their experiences of discrimination). We have learned about some Māori perspectives on the issues in this review. We have also tried to inform ourselves about the perspectives of others in the community who

²⁷ We have since reissued amended terms of reference to reflect the request from the Minister responsible for the Law Commission that we withdraw issues relating to hate speech from our work programme.

²⁸ We discuss the steps we have taken to do this in Chapter 5.

have views about the legal regulation of gender — including those who worry that it might, in certain circumstances, affect their own rights and interests.

- 1.51 These perspectives provide useful context for the review. Ultimately, however, the Law Commission's role is to make recommendations for the reform and development of New Zealand law.²⁹ We do not seek to resolve non-legal questions (for example, the meaning of terms such as sex and gender) except to the extent strictly necessary to carry out the review.

WHAT HAPPENS NOW

- 1.52 Following publication of this Issues Paper, there will be a 10-week consultation period during which anyone can make a submission on this review.
- 1.53 The feedback we receive on this Issues Paper will help us to understand better the needs, perspectives and concerns of New Zealanders on the issues we discuss and the practical implications of reform. Along with other relevant evidence and analysis, it will help us to develop our recommendations for law reform. It is important to stress that our process is not a matter of counting submissions to find the option with which most people agree. The only way to measure accurately levels of community support on a particular issue is through a well-designed and properly administered survey. For reasons of timing, resourcing and expertise, the Law Commission does not generally conduct surveys of that kind. In any event, the extent of community support (where that can be accurately assessed) is only one of the factors relevant to whether law reform is necessary and desirable. We discuss what we see as the key reform considerations for this project in Chapter 4. We discuss, more specifically, the reasons that might justify adding a new prohibited ground of discrimination to the Human Rights Act in Chapter 6.
- 1.54 We will deliver a Final Report with our recommendations to the Minister responsible for the Law Commission by the end of June 2025. The Minister will then table the report in Parliament (usually around one month later). Once that has happened, we will publish the report on our website.
- 1.55 The government can decide whether to accept any recommendations the Law Commission makes for reform of the law. The government usually presents to Parliament a formal response to a Law Commission report within 120 working days of the report having been tabled in Parliament (and is required to do so if Cabinet has rejected the Law Commission's recommendations).

STRUCTURE OF THIS ISSUES PAPER

- 1.56 There are 18 chapters in this Issues Paper, including this one.
- 1.57 In Chapter 2, we introduce the topics of sex, gender and sex characteristics. The purpose of this chapter is to provide context and background and to explain our approach to terminology.

²⁹ Law Commission Act 1985, s 5(1)(b).

- 1.58 In Chapter 3, we discuss research on the discrimination and mistreatment experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics. We provide some brief history, summarise contemporary data on discrimination and explore some distinctive issues and concerns held by people in these groups.
- 1.59 In Chapter 4, we identify and seek feedback on some key reform considerations that we think the Law Commission should bear in mind when proposing law reform in this review.
- 1.60 In Chapter 5, we explain the steps we have taken to understand Māori perspectives on the issues in this review (including to understand relevant tikanga). We set out our current understanding and seek feedback.
- 1.61 In Chapter 6, we examine the case for amending section 21 of the Human Rights Act to clarify that people in Aotearoa New Zealand are protected from discrimination that is linked to the fact (or the discriminator's belief) they are transgender or non-binary or they have an innate variation of sex characteristics. We reach the preliminary conclusion that amendment is necessary and desirable and seek feedback on that preliminary conclusion.
- 1.62 In Chapter 7, we identify and seek feedback on some options for how section 21 might be amended.
- 1.63 Chapters 8 to 15 all discuss Part 2 of the Human Rights Act. This is the part in the Human Rights Act that imposes obligations on private individuals and organisations (that is, people or organisations that are not performing government functions).
- 1.64 In Chapter 8, we explain how Part 2 works, the approach we are taking to reviewing Part 2 and some recurrent challenges we have encountered when analysing options for reform. We advise reading Chapter 8 before trying to engage with the other chapters on Part 2.
- 1.65 Chapters 9 to 12 group together thematically certain areas of life that are regulated by Part 2: employment and some closely related contexts (Chapter 9); public access to goods, services, places and facilities (Chapter 10); provision of land, housing and other accommodation (Chapter 11); and education (Chapter 12). In each of these chapters, we outline the relevant protections from discrimination and seek feedback on the implications of amending section 21. We also discuss relevant exceptions to these Part 2 protections – circumstances identified in the Act as lawful for a private individual or body to treat someone differently based on a prohibited ground. We seek feedback on whether it is desirable to amend any of these exceptions to reflect any new prohibited grounds that are added to section 21. Finally, we also address in these Part 2 chapters the consequential implications of reform for related statutes that regulate the same areas of life as Part 2 of the Human Rights Act.
- 1.66 In Chapters 13 and 14, we single out some Part 2 exceptions for closer examination:
- (a) Chapter 13 discusses two exceptions in Part 2 that permit the provision of single-sex facilities (such as bathrooms and changing rooms) in certain circumstances and also discusses the implications of this review for single-sex facilities more generally.
 - (b) Chapter 14 discusses an exception that permits certain competitive sporting activities to be limited to one sex in certain circumstances.
- We seek feedback on whether it would be desirable to amend these exceptions to reflect any new prohibited grounds that are added to section 21.

- 1.67 In Chapter 15, we discuss the three remaining subparts in Part 2. The first one is called “Other forms of discrimination”. We seek feedback on the existing provisions in this subpart, and we also ask whether any additional provisions should be added to this subpart. Specifically, we discuss whether there should be new protections in the Act relating to harassment or to medical interventions on children and young people with an innate variation of sex characteristics. In Chapter 15, we also seek feedback on the subparts entitled “Special provisions relating to superannuation schemes” and “Other matters”.
- 1.68 In Chapter 16, we identify and seek feedback on key implications of the review for Part 1A of the Human Rights Act and section 19 of the NZ Bill of Rights. Together, Part 1A and section 19 set out the anti-discrimination obligations of government departments and other people or bodies exercising government functions.
- 1.69 In Chapter 17, we discuss and seek feedback on three cross-cutting issues that are relevant to numerous chapters in this Issues Paper. These are: the potential impacts of reform on the ability of Māori to live in accordance with tikanga; misgendering and deadnaming; and whether some of the binary language in the Human Rights Act ought to be removed.
- 1.70 In Chapter 18, we identify and seek feedback on several additional issues. These include the Human Rights Act’s oversight and enforcement mechanisms and the consequential implications of the review for other laws.
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CHAPTER 2

Sex, gender and sex characteristics

INTRODUCTION

- 2.1 In this chapter, we introduce the topics of sex, gender and sex characteristics. The purpose of this chapter is to provide context and background for later chapters, to explain some relevant concepts and to explain our approach to terminology.
- 2.2 There are different views in the community about many of the concepts we introduce in this chapter — sometimes quite strongly held. Some background understanding of these issues is necessary to give context to our review. We do not, however, canvas all relevant perspectives let alone seek to resolve them. As we explained in Chapter 1, we think it is unhelpful for us to intervene in non-legal arguments except to the extent necessary to move forward with the review. We do, for example, need to settle working language that we can use to communicate clearly in our publications.
- 2.3 In Chapter 5, we discuss Māori perspectives on issues relevant to this review. For that reason, we do not discuss these in this chapter.

THE CONCEPT OF SEX

- 2.4 Sex is often understood with reference to a person's anatomy and physiology. Through this understanding, a person's sex is based on their sex characteristics, which are their physical features that relate to sex. These include genitalia, other sexual and reproductive anatomy, chromosomes, hormones and secondary physical features that emerge at puberty such as body hair.
- 2.5 A baby's sex is usually determined at birth based on their genitalia. A person's birth sex is often referred to as 'sex assigned at birth', although some people prefer other terms such as birth sex, natal sex or sex observed at birth.
- 2.6 In Western societies (or societies with a history of Western colonisation), sex is generally seen as a binary. For example, in Aotearoa New Zealand, a baby's sex can be registered at birth as male or female (or as indeterminate where the doctor or midwife cannot determine the baby's sex).¹ Tatauranga Aotearoa | Stats NZ classifies sex as having two

¹ Te Tari Taiwhenua | Department of Internal Affairs *Notification of birth for registration of child born in New Zealand* (BDM27, 2 April 2024).

categories: male/tāne and female/wahine.² This binary concept of male and female has been deeply embedded in New Zealand law and practice, for example, in relation to bathrooms, uniforms, schools, sports teams, clothing stores, honorifics, and official forms and documents. It is also reflected in statutory language and in the common law.³ As we discuss later in this chapter, not all cultures take this binary approach. Further, not all people are born with sex characteristics that clearly align to the binary of male or female.

- 2.7 There are different opinions about what happens to a person's sex if they choose to make changes to their sex characteristics such as through hormone therapy or gender-affirming surgery. One view is that this means a person is changing their sex. Our bodies are complex, and the biological indicators for sex can be viewed as continuous rather than as discrete variables.⁴ For example, within each sex, there are variations in sex hormones, internal and external reproductive organs and sex chromosomes.
- 2.8 Another view is that sex is fixed and binary and that changing one's sex organs or secondary sex characteristics does not change that.⁵

THE CONCEPT OF GENDER

- 2.9 Gender is another term that is understood in different ways. Gender is often used to describe a person's social and personal identity as male, female or sometimes as another gender or genders.⁶ For example, some people describe their gender as non-binary, and some use other terms such as gender fluid or bigender.⁷
- 2.10 Gender can also be understood as a social and cultural construct. In this sense, gender refers to norms, behaviours and roles that a society associates with men, women and other genders.⁸ There may be hierarchical elements associated with a society's understanding of gender. For example, a central idea in many feminist theories is that the social construct of gender in patriarchal societies assumes that men are dominant and women are subordinate.⁹
- 2.11 Gender is sometimes used as an umbrella term that includes a person's gender identity and gender expression. A person's gender identity may be thought of as their internal and individual experience of gender.¹⁰ Gender expression refers to a person's

² Tauranga Aotearoa | Stats NZ *Data standard for gender, sex, and variations of sex characteristics* (April 2021) at 17.

³ See Theodore Bennett "No Man's Land: Non-Binary Sex Identification in Australian Law and Policy" (2014) 37 UNSWLJ 847 at 850.

⁴ See Anne Fausto-Sterling *Sexing the Body: Gender Politics and the Construction of Sexuality* (1st ed, Basic Books, New York, 2000) at 31–34; and Mara Viveros Vigoya "Sex/Gender" in Lisa Disch and Mary Hawkesworth (eds) *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2015) 852 at 859–860.

⁵ See, for example, Speak Up for Women "Terminology" <www.speakupforwomen.nz>.

⁶ See, for example, Tauranga Aotearoa | Stats NZ *Data standard for gender, sex, and variations of sex characteristics* (April 2021) at 12.

⁷ We discuss these genders further below.

⁸ See, for example, the definition used by the World Health Organization "Gender and health" <www.who.int>.

⁹ See, for example, Simone de Beauvoir *The Second Sex* (Jonathan Cape, London, 1993). This book was first published in 1949.

¹⁰ See *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) at 8.

presentation of gender through physical appearance, mannerisms, speech, behavioural patterns and names.¹¹

- 2.12 Gender identity is sometimes defined as including gender expression.¹² However, it is also the case that a person's gender identity and gender expression may not be the same.¹³ An example might be a man whose gender identity is male but who enjoys wearing and performing in stereotypically female attire such as dresses, high heels and jewellery.
- 2.13 We appreciate some people do not like the term gender identity because they consider they *are* a particular gender rather than *identifying as* a particular gender.¹⁴ We nevertheless use the term in this Issues Paper when describing a person's internal experience of gender. Gender identity is a more precise term than gender. It is also helpful for the purposes of this Issues Paper for us to distinguish between gender identity and expression, each of which may raise different regulatory issues.
- 2.14 We are aware that, for some people with an innate variation of sex characteristics, gender has negative connotations.¹⁵ In the second half of the twentieth century, theories on gender were a key reason why the dominant approach to infants born with an innate variation of sex characteristics was surgical correction.¹⁶ We discuss this issue further in Chapter 3.

RELATIONSHIP BETWEEN SEX AND GENDER

- 2.15 There are different views about whether sex and gender are separate or interconnected. This is influenced by how an individual views each of the two concepts in isolation. For example, some consider that sex is socially constructed and that there may not be an intelligible distinction between sex and gender.¹⁷
- 2.16 In common usage, and sometimes in law, the terms sex and gender are often used interchangeably. For example, under New Zealand law, a person may obtain a birth certificate that lists their nominated "sex" as male, female or "any other sex or gender

¹¹ See *The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (Geneva, 10 November 2017) at 6.

¹² For example, *The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (Geneva, 10 November 2017) at 6.

¹³ See Elisabeth McDonald "Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993" (2005) 5 NZJPL 301 at 304.

¹⁴ Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 4. We discuss some other objections to the concept of gender identity (coming from a gender-critical perspective) later in this chapter and in Chapter 7.

¹⁵ For example, Dr Rogena Sterling argues that "[u]sing gender as a primary centre of analysis continues to erase being and personhood of intersex. Focusing on and centring gender disembodies intersex": Rogena Sterling "Impact of 'Gender Analysis' as a Framework for Intersex" (2022) 19 Psychol Behav Sci Int J 556021 at 2.

¹⁶ See Denise Steers "Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics" (PhD thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 16–18.

¹⁷ See, for example, Anne Fausto-Sterling *Sexing the Body: Gender Politics and the Construction of Sexuality* (1st ed, Basic Books, New York, 2000) at 101.

specified in regulations”.¹⁸ There are other references to gender in New Zealand legislation that, in context, seem to mean ‘male or female’.¹⁹

- 2.17 Some people have concerns that equating sex and gender or relying on gender identity rather than sex in various contexts may dilute the rights of some groups.²⁰ We discuss ‘gender-critical’ views of this kind further below.

INTRODUCTION TO THE CONCEPTS OF TRANSGENDER AND NON-BINARY

- 2.18 While many people have a gender identity that is the same as their sex assigned at birth, some people do not. Some people identify with the opposite gender to their sex assigned at birth and some identify with a gender other than male or female (as we explain further below). A person might identify with two different genders. Other people do not identify with any gender or feel neutral about their gender. A person’s gender identity can change over time.
- 2.19 We have been asked to review the protections in the Human Rights Act 1993 for people who are transgender and people who are non-binary. In this section, we provide a brief introduction to these overlapping groups and to some related concepts.
- 2.20 In general, a transgender person is someone whose gender identity is different to the sex they were assigned at birth.²¹
- 2.21 A non-binary person is someone whose gender identity does not fit exclusively into the binary of male or female.²² For example, a non-binary person might see themselves as neither male nor female or might identify with multiple genders.
- 2.22 Some people describe non-binary as their gender. Others see non-binary as an umbrella concept that is made up of discrete genders such as gender fluid or bigender.²³ Still others identify with one or more of these discrete genders and do not relate to the term non-binary at all.²⁴
- 2.23 We understand that some non-binary people consider themselves transgender or trans but that not all do.
- 2.24 The 2023 Census asked a question about gender for the first time and also asked about sex at birth, but those data are not yet available. In the household survey for the year

¹⁸ Births, Deaths, Marriages, and Relationships Registration Act 2021, s 24(1)(a). At present, the only additional option specified in regulations is “non-binary”: Births, Deaths, Marriages, and Relationships Registration (Registering Nominated Sex) Regulations 2023, reg 5.

¹⁹ For example, Human Rights Act 1993, s 67; and Maritime Security Act 2004, s 51(6)(b).

²⁰ See, for example, Jan Rivers and Jill Abigail “Sex, Gender and Women’s Rights” (2021) 17(4) Policy Quarterly 38 at 40.

²¹ See Tatauranga Aotearoa | Stats NZ *Data standard for gender, sex, and variations of sex characteristics* (April 2021) at 22; and Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 8.

²² See Tatauranga Aotearoa | Stats NZ *Data standard for gender, sex, and variations of sex characteristics* (April 2021) at 29.

²³ A gender fluid identity can refer to a person whose gender changes over time. A bigender identity can refer to a person who has two different genders simultaneously: Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 13.

²⁴ See Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 8.

ending June 2021, 0.5 per cent of people surveyed said they were transgender or non-binary.²⁵

Terms people use to describe themselves

- 2.25 People use many different terms to define their gender. The *Counting Ourselves* survey of transgender and non-binary people asked respondents to select the gender or genders with which they identified. The more common terms selected included non-binary, transgender, woman/girl/wahine, trans man, man/boy/tāne, trans woman, genderqueer, gender fluid, gender diverse and agender.²⁶ Some people identify with the term transsexual, although we understand that many people consider this term to be outdated.²⁷
- 2.26 There are also Māori kupu (words) for people who are transgender or non-binary. One kupu that is sometimes used is takatāpui. Although some understand this kupu to mean close or intimate friend of the same sex,²⁸ others use it more expansively as “an umbrella term that embraces all Māori with diverse gender identities, sexualities and sex characteristics”.²⁹ Other terms include:³⁰
- (a) irawhiti, tāne irawhiti and wahine irawhiti, tangata ira tāne and tangata ira wahine, whakawahine, whakatāne and tāhine (for people who are transgender);
 - (b) ira tāhūrua-kore, ira weherua-kore and ira-here-kore (for non-binary);³¹
 - (c) irarere and irahuri (for gender fluid) and irahuhua (for gender diverse); and
 - (d) taitamatāne, taitamawahine hoki (for the full spectrum of gender identities between maleness and femaleness).³²
- 2.27 Many of these kupu are very new and there is no one set of terms in preferred usage.³³ Although we acknowledge these kupu may be important to some people, we understand from preliminary engagement that some Māori people are not particularly interested in

²⁵ Tatauranga Aotearoa | Stats NZ “LGBT+ population of Aotearoa: Year ended June 2021” (9 November 2022) <www.stats.govt.nz>.

²⁶ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 7.

²⁷ See Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 4.

²⁸ Ngahuia Te Awēkotuku “He Reka Anō – same-sex lust and loving in the ancient Māori world” in Alison J Laurie and Linda Evans (eds) *Outlines: Lesbian & Gay Histories of Aotearoa* (Lesbian & Gay Archives of New Zealand, Wellington, 2005) 6 at 8; and Te Aka Māori Dictionary (online ed) <maoridictionary.co.nz>.

²⁹ Elizabeth Kerekere “Part of The Whānau: The Emergence of Takatāpui Identity – He Whāriki Takatāpui” (PhD thesis, Te Herenga Waka | Victoria University of Wellington, 2017) at 25.

³⁰ Except where specifically noted, the sources we rely on for this list are: Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023); and Te Aka Māori Dictionary (online ed) <maoridictionary.co.nz>. Where these terms incorporate the kupu ira, some people use ia instead. Ia is used in Te Aka Māori Dictionary.

³¹ The latter comes from Paraone Gloyne and others “Te Kōkōmuka: Sexuality and gender expressions in Te Ao Māori” (25 November 2020) YouTube <[youtube.com](https://www.youtube.com)> at 48 min 20 sec.

³² Former Human Rights Commissioner Merimeri Penfold used this as a Māori translation of “Transgender Inquiry” in Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuutanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008) at [1.26].

³³ See Gloria Fraser *Te Tautoko I Te Hunga Āniwaniwa o Aotearoa: He Puka Whitake mā Ngā Mātanga Hauora Hinengaro* (Youth Wellbeing Study and RainbowYOUTH, Wellington, 2019) at 3.

defining themselves through identity terms associated with gender. We explore the reasons for this in Chapter 5.

- 2.28 As we discuss later in this chapter, other cultures have culturally specific terms to refer to people with diverse genders.

Gender dysphoria or gender incongruence

- 2.29 Gender dysphoria and gender incongruence are terms used by medical professionals where a person has a marked and persistent incongruence between their experienced gender and their sex assigned at birth.³⁴ The term gender dysphoria replaces the earlier terminology of gender identity disorder.³⁵ We understand some people prefer the term gender incongruence on the basis that it does not imply being transgender is a mental health condition.³⁶
- 2.30 Both gender dysphoria and gender incongruence are diagnostic terms. A person does not need to be diagnosed with either to be transgender.

Gender affirmation

- 2.31 Gender affirmation refers to respecting and affirming a person's gender. Individual experiences and preferences vary when it comes to exploring or questioning gender, to 'coming out' as transgender or non-binary and to the process of transitioning or affirming one's gender identity. Forms of transition or gender affirmation can include:³⁷
- (a) expressive gender affirmation such as changes to hair, clothing or makeup;
 - (b) social gender affirmation such as 'coming out', using a different name or pronouns or using bathrooms that align with one's gender identity;
 - (c) legal gender affirmation, which involves changing official documents; and
 - (d) medical gender affirmation, including non-surgical options such as hormone treatment or hair removal or surgical procedures such as breast or genital surgery.
- 2.32 Gender Minorities Aotearoa explains that, while many transgender people are prescribed hormones to change their bodies and some undergo surgery, a transgender identity is not dependent on medical procedures.³⁸ Not everyone wants to undergo medical forms of gender affirmation. Further, as we discuss in Chapter 3, it can be challenging to access some medical procedures due to lack of public funding and long waiting lists.

INTRODUCTION TO INNATE VARIATIONS OF SEX CHARACTERISTICS

- 2.33 In this review, we have also been asked to consider protections in the Human Rights Act for people with an innate variation of sex characteristics.

³⁴ National Library of Medicine "DSM-5 Criteria for Gender Dysphoria" <www.ncbi.nlm.nih.gov>; and World Health Organization "ICD-11 for Mortality and Morbidity Statistics" (2019) <icd.who.int> at 17 (gender incongruence).

³⁵ American Psychiatric Association "Gender Dysphoria Diagnosis" (November 2017) <www.psychiatry.org>.

³⁶ We note the term gender incongruence is used by the World Health Organization.

³⁷ Cross Agency Rainbow Network *Transitioning and Gender Affirmation in the New Zealand Public Service | Te Tauwhiro Ira Tangata i roto i te Ratonga Tūmatanui o Aotearoa* (June 2023) <www.publicservice.govt.nz> at 8–9.

³⁸ Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 4.

- 2.34 The term innate variation of sex characteristics is a broad umbrella term that covers as many as 40 different variations.³⁹ One way of describing an innate variation of sex characteristics is that it is a variation that:⁴⁰
- Shows up in a person's chromosomes, genitals, gonads or other internal reproductive organs, or how their body produces or responds to hormones;
 - Differs from what society or medicine considers to be “typical” or “standard” for the development, appearance, or function of female bodies or male bodies; and
 - Is present from birth or develops spontaneously later in life.
- 2.35 An innate variation of sex characteristics begins during the development of a foetus. It can be caused by chromosomal variances (such as an extra X or Y chromosome), by atypical levels of hormones, by reactions to hormones or by other aspects of foetal development.⁴¹ These influences can result in physical sex characteristics that do not correspond with medical norms for male and female bodies.⁴² What this means will depend on the type of variation. It might, for example, affect primary sex characteristics such as the vulva, clitoris, vagina, fallopian tubes, testes, uterus, ovaries or penis or secondary sex characteristics such as facial hair, breast growth, depth of voice and fat distribution.⁴³ In some cases, a person with an innate variation of sex characteristics will have external genitalia that are ambiguous or appear more typical of a person of the other sex.
- 2.36 Some variations are detected at birth while others may be discovered later in life such as at puberty or when a person seeks to become pregnant. In some cases, a person might never know they have a variation of sex characteristics. Many variations are not noticeable to other people.
- 2.37 Innate variations of sex characteristics are sometimes known as intersex variations. In medical contexts, the term differences of sex development is often used.⁴⁴ We understand the term innate variations of sex characteristics encompasses a slightly broader range of variations than what would be medically termed a difference of sex development.⁴⁵ We also understand there is a lack of consensus about exactly which innate variations of sex characteristics are intersex variations.⁴⁶

³⁹ See Intersex Aotearoa “All About Intersex” <www.intersexaotearoa.org>.

⁴⁰ InterACT *Intersex Variations Glossary: People-centered definitions of intersex traits & variations in sex characteristics* <interactadvocates.org> at 3.

⁴¹ See Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 13–14; and InterACT *Intersex Variations Glossary: People-centered definitions of intersex traits & variations in sex characteristics* <interactadvocates.org>.

⁴² See Starship “Differences of sex development – Atawhai Taihemahema” (9 October 2020) <starship.org.nz>.

⁴³ See Rodolfo A Rey and Nathalie Josso “Diagnoses and Treatment of Disorders of Sexual Development” in J Larry Jameson and others (eds) *Endocrinology: Adult and Pediatric* (7th ed, Elsevier Saunders, Philadelphia, 2016) vol 2 at 2088–2118.

⁴⁴ Starship “Differences of sex development – Atawhai Taihemahema” (9 October 2020) <www.starship.org.nz>.

⁴⁵ For a classification of differences of sex development, see Martine Cools and others “Caring for individuals with a difference of sex development (DSD): a Consensus Statement” (2018) 14 *Nature Reviews Endocrinology* 415 at 417.

⁴⁶ Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 69.

- 2.38 Some innate variations also affect other aspects of foetal development such as a person's height, sense of smell, kidneys, spine or heart. Starship Child Health reports that, in approximately 25 per cent of cases where a newborn has a difference of sex development, this is part of a complex medical condition involving congenital, metabolic or endocrine issues.⁴⁷
- 2.39 Data should soon be available on how many New Zealanders reported having an innate variation of sex characteristics in the 2023 Census. Globally, estimates range as high as 1.7 per cent of the population,⁴⁸ although the figure is a matter of dispute.⁴⁹ There are challenges with gathering accurate data, including stigma, secrecy, lack of understanding of what an innate variation is and misunderstandings with survey questions.⁵⁰
- 2.40 Like other members of society, people with innate variations of sex characteristics have diverse identities. While some consider their innate variation to be an essential part of their identity, others see it as a medical issue. People with innate variations have diverse genders and sexualities, including many who identify as cisgender and heterosexual.⁵¹
- 2.41 People with innate variations of sex characteristics also think about their sex in different ways. Some people who have an innate variation of sex characteristics use the term intersex to describe their sex, but we understand this is presently uncommon. Many people with innate variations of sex characteristics see their variation as quite separate from their sex and describe their sex as male or female.⁵²

Terms people use to describe themselves

- 2.42 People with innate variations of sex characteristics use a variety of terms to describe themselves and their variations. Some of the more common terms are intersex and variation of sex characteristics.⁵³ Many people prefer to use the name of their specific variation rather than an umbrella term.⁵⁴ Terms may also be context dependent. For example, Australian research shows that some people with an innate variation of sex characteristics have a term they prefer to use for themselves but use another term with family and friends and a third when accessing medical services.⁵⁵

⁴⁷ Starship "Differences of sex development – Atawhai Taihemahema" (9 October 2020) <www.starship.org.nz>.

⁴⁸ See Intersex Human Rights Australia "Intersex population figures" (16 September 2019) <ihra.org.au>.

⁴⁹ See Melanie Blackless and others "How sexually dimorphic are we? Review and synthesis" (2000) 12 Am J Hum Biol 151 at 151 and 161.

⁵⁰ See Intersex Human Rights Australia "Intersex population figures" (16 September 2019) <ihra.org.au>.

⁵¹ See Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 76 and 172.

⁵² See Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 74.

⁵³ See, for example, this list of intersex support and advocacy groups worldwide: InterAct "Intersex Support and Advocacy Groups" (7 November 2022) <www.interactadvocates.org>.

⁵⁴ Elena Bennecke and others "Disorders or Differences of Sex Development? Views of Affected Individuals on DSD Terminology" (2020) 58 The Journal of Sex Research 522 at 528.

⁵⁵ Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 96–97.

- 2.43 Different terms are also used in te reo Māori, including: taihemarua or ira tangata (for intersex);⁵⁶ and rerekētanga āhuiatanga ā-ira or ruaruanga taha wahine, taha tāne (for variations of sex characteristics).⁵⁷
- 2.44 As we noted above, in medical settings, innate variations are usually referred to as differences of sex development (or, historically, disorders of sex development),⁵⁸ but we understand many people do not use these terms.⁵⁹ Hermaphrodite is an outdated word that some see as demeaning but others have chosen to reclaim.⁶⁰
- 2.45 The term endosex is sometimes used as the opposite of intersex. One definition of endosex is “a person that was born with physical sex characteristics that match what is considered usual for binary female or male bodies by the medical field”.⁶¹

OTHER CULTURAL PERSPECTIVES

- 2.46 Aotearoa New Zealand is a diverse multicultural society and so we are interested to understand a range of cultural perspectives about sex, gender and sex characteristics.
- 2.47 In many places, particularly in Pacific nations and other non-Western countries, sex and gender are viewed holistically as one and the same, and the binary of male and female is not seen as the only way of experiencing sex and gender.⁶²
- 2.48 Across the many island nations in the Pacific, there are examples of cultural recognition that sex and gender are not always fixed and binary. Many Pacific cultures have terms that encompass concepts of being transgender or gender fluid or the idea of a third gender.
- 2.49 The acronym MVPFAFF+ refers to some of the words used in Pacific cultures to describe sexual orientation and gender identity.⁶³ This acronym refers to mähū (Hawai’i and Tahiti), vakasalewalewa (Fiji), palopa (Papua New Guinea), fa’afafine or fa’atama (Samoa),

⁵⁶ The latter comes from Intersex Aotearoa “All About Intersex” <www.intersexaotearoa.org>.

⁵⁷ The latter was developed by former Human Rights Commissioner Merimeri Penfold in 2007 for the Transgender Inquiry: Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuatanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitira* (2008) at 7. See Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) for the other terms in this list.

⁵⁸ See Starship “Differences of sex development – Atawhai Taihemahema” (9 October 2020) <www.starship.org.nz>.

⁵⁹ For example, Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 95.

⁶⁰ See Elizabeth Reis “Divergence or Disorder? The politics of naming intersex” (2007) 50 *Perspectives in Biology and Medicine* 535 at 536–537; and Intersex Human Rights Australia “Intersex for allies” (7 March 2021) <www.ihra.org.au>.

⁶¹ Surya Monro and others “Intersex: cultural and social perspectives” (2021) 23 *Culture, Health & Sexuality* 431 at 437.

⁶² See Ben Vincent and Ana Manzano “History and Cultural Diversity” in Christina Richards, Walter Pierre Bouman and Meg-John Barker (eds) *Genderqueer and Non-Binary Genders* (Palgrave Macmillan, London, 2017) 11; and Geir Henning Presterudstuen “Understanding Sexual and Gender Diversity in the Pacific Islands” in Jioji Ravulo, Tracie Mafile’o and Donald Bruce Yeates (eds) *Pacific Social Work: Navigating Practice, Policy and Research* (1st ed, Routledge, London, 2019) 161 at 162.

⁶³ Phylesha Brown-Acton “Movement building for change” (speech to Asia Pacific Outgames, third plenary session, Wellington, 18 March 2011). The acronym was developed as a Pasifika alternative to LGBTQI+, which stands for lesbian, gay, bisexual, transgender, queer or questioning, intersex and others (denoted by the +).

akava'ine (Cook Islands), fakafifine (Niue) and fakaleitī/leitī (Tonga). The terms used in the Pacific vary across different communities and do not map neatly onto Western ideas.⁶⁴

- 2.50 In some other non-Western cultures, sex and gender are not considered fixed or binary. There are also cultures across Asia that acknowledge a 'third gender' or more than two sexes and genders. For example, the Bugis people, an ethnic group indigenous to the South Sulawesi region of Indonesia, recognise multiple sexes and genders. These include oroané (male-men), makkunrai (female-women), calabai/calalai (people whose gender expression is different to their sex assigned at birth) and bissu (people who embody both female and male ways of being).⁶⁵ Similarly, the hijra of South Asia are a feminine-presenting 'third gender' and the term can include transgender people and people with an innate variation of sex characteristics.⁶⁶
- 2.51 In many non-Western cultures, gender diversity, gender fluidity and not conforming to the male and female binary is celebrated and sometimes revered. Many of those who are gender diverse hold special roles in their respective societies. For example, the hijra of India hold important ceremonial roles in relation to the birth of children. They provide blessings to newborn babies in a practice commonly known as badhai.⁶⁷
- 2.52 On the other hand, even where gender diversity is part of indigenous traditions, people who are gender diverse can still face discrimination and exclusion. It is also important to acknowledge that, in some parts of the world, traditional understandings of sex and gender may have been disrupted by factors such as colonisation or the introduction of new religions.

GENDER-CRITICAL PERSPECTIVES

- 2.53 As we discussed above, there is a variety of different perspectives on the concepts of sex and gender. Some people are sceptical or cautious about ideas of gender identity and gender fluidity and worry these ideas detract from the priority they think should be given to biological sex in social discourse and public policy. The term 'gender critical' is commonly used to refer to this collection of views. We use that term in this Issues Paper, although we understand it is not a perfect term.
- 2.54 For some people, gender-critical beliefs are linked to feminism. The term 'trans-exclusionary radical feminist' was initially coined to distinguish the subset of radical feminism that sought to exclude transgender women but is now regarded by some as derogatory.⁶⁸

⁶⁴ See Patrick Thomsen and others *The Manalagi Survey Community Report: Examining the Health and Wellbeing of Pacific Rainbow+ Peoples in Aotearoa-New Zealand* (2023) at 13, 15 and 25. We understand that some of these terms may carry derogatory connotations, although in some cases, they may have been reclaimed by communities.

⁶⁵ See Sharyn Graham Davies *Gender Diversity in Indonesia: Sexuality, Islam and Queer Selves* (Routledge, Milton Park (UK), 2010).

⁶⁶ See Lopamundra Sengupta *Human Rights of the Third Gender in India: Beyond the Binary* (Routledge, Milton Park (UK), 2023) at 2–4.

⁶⁷ See Lopamundra Sengupta *Human Rights of the Third Gender in India: Beyond the Binary* (Routledge, Milton Park (UK), 2023) at 14.

⁶⁸ See Madeleine Pape "Feminism, Trans Justice, and Speech Rights: A Comparative Perspective" (2022) 85(1) *Law and Contemporary Problems* 215 at 220–221; and Shonagh Dillon "#TERF/Bigot/Transphobe – We found the witch, burn

- 2.55 Not all feminists are gender critical and not all people who hold gender-critical views see those beliefs as linked to feminism. For example, some people might have gender-critical views based on their religious beliefs.
- 2.56 There is no one homogeneous set of gender-critical views. However, some core beliefs that we understand are held by many people who are gender critical are that sex is binary, innate and immutable and that the rights of cisgender women are being diluted by a focus in public policy and social discourse on gender identity. Some people also believe that the very idea of having a gender identity separate from one's 'biological' sex is an expression of ideology.
- 2.57 We are aware of a range of practical concerns that have been expressed about how gender identity is reflected in public policy, many of which come from a gender-critical perspective. Where those concerns relate to issues in this review, we address them in relevant chapters.
- 2.58 For completeness, we think it is important to note that, while some gender-critical groups in Aotearoa New Zealand oppose the general idea of amending the Human Rights Act to provide securer protection from discrimination to people who are transgender,⁶⁹ some do not. For example, the group Speak Up For Women has said gender non-conforming people should not face discrimination and has supported amending the Act.⁷⁰ However, the group also has specific policy concerns stemming from their gender-critical beliefs that would be relevant to how, precisely, the Act is reformed.⁷¹

TERMINOLOGY IN THIS ISSUES PAPER

- 2.59 As we have discussed in this chapter, there are many different terms that can refer to people who are transgender or non-binary or who have an innate variation of sex characteristics. We acknowledge the importance of people being able to refer to themselves using the language that is right for them.
- 2.60 At the same time, we have needed to settle on some consistent language for our Issues Paper for the purposes of readability and clarity. In a review of law, it helps to be as precise as possible with language. We acknowledge that the terms we use in this Issues Paper will not resonate for everyone.
- 2.61 In this review, we generally use the phrase 'people who are transgender or non-binary or who have an innate variation of sex characteristics'. We use the composite phrase 'transgender or non-binary' to refer to people whose gender identity is different to their sex assigned at birth, including those whose gender identity is neither male nor female. This reflects the fact that some people who are non-binary consider themselves to be

her!': a contextual constructionist account of the silencing of feminist discourse on the proposed changes to the Gender Recognition Act 2004, and the policy capture of transgender ideology, focusing on the potential impacts and consequences for female-only spaces for victims of male violence" (PhD thesis, University of Portsmouth, 2021) at 92.

⁶⁹ See, for example, Jill Ovens "Changes to Human Rights Act will harm women and girls" (11 August 2023) Women's Rights Party <[womensrightsparty.nz](https://www.womensrightsparty.nz)>.

⁷⁰ Speak Up For Women "MEDIA RELEASE: SUFW welcome the introduction of Dr Elizabeth Kerekere's Human Rights Amendment Bill" (5 August 2023) <www.speakupforwomen.nz> and Speak Up For Women "Responses to Media Questions" (7 May 2023) <www.speakupforwomen.nz>.

⁷¹ See Speak Up For Women "Responses to Media Questions" (7 May 2023) <www.speakupforwomen.nz>.

transgender or trans, but others do not. It is also consistent with the letter of referral from the Minister of Justice that initiated this review.

- 2.62 We are more specific if the context requires it. For example, in some instances, the legal implications are different for people who identify outside the gender binary compared to those who do not. This is because, as we explained earlier in the chapter, a binary concept of sex and gender is deeply embedded in current law and practice. Where we need to make this distinction, we generally refer to people who ‘identify outside the gender binary’ rather than using specific labels.
- 2.63 Another example of when we use more specific language is when we are discussing wording that might go into the Human Rights Act to frame new prohibited grounds of discrimination (Chapter 7).
- 2.64 We generally refer to ‘people with an innate variation of sex characteristics’ rather than using terms such as intersex or differences of sex development. While the term intersex is widely used, we understand that some people with an innate variation of sex characteristics do not see this term as applying to them. For some people, the term also has unhelpful connotations of being ‘between the sexes’ or being a third sex. As we have explained above, we understand the term differences of sex development is mainly used in medical contexts and may have a slightly narrower meaning.
- 2.65 We refer to *innate* variations of sex characteristics to clarify that we are referring to variations that are congenital. This is to distinguish them from variations in a person’s sex characteristics that have other causes such as a medical procedure or injury. While we know that some people who are transgender consider themselves to have an innate variation of sex characteristics, we do not use the term in this way in this review. This is so that we can separately consider the needs, interests and concerns of people who have a congenital variation of sex characteristics — as we consider we are required to do by the terms of the referral. (Whether the law should prohibit discrimination based on all variations of sex characteristics is a separate question, which we discuss in Chapter 7.)
- 2.66 We use the term ‘cisgender’ to refer to someone whose gender is the same as their sex assigned at birth. We acknowledge that some people do not like this term and may even find it offensive. However, we have been unable to find another term that clearly and concisely conveys the same concept.
- 2.67 We occasionally use the word ‘rainbow’, which is an umbrella term for gender and sexual minorities.
- 2.68 As noted above, the appropriate terminology for legislation is a different issue. The language we use in this Issues Paper will not necessarily be the best language to use in the Human Rights Act. In Chapter 7, we discuss different options for how any new ground or grounds in the Act could be worded.
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CHAPTER 3

Experiences of discrimination

INTRODUCTION

- 3.1 We have been asked to review the adequacy 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. People in these groups can experience discrimination and unfair treatment in many aspects of their lives. This chapter discusses some of the research on this and identifies some issues we have heard are of particular concern to people in these groups. This is important background to the law reform issues we are considering in this review.
- 3.2 This chapter does not discuss whether amendments to the Human Rights Act are necessary and desirable whether to protect people in these groups from discrimination or to ensure the Act appropriately balances their right to freedom from discrimination against other relevant rights and interests. Those are questions for later chapters.

PEOPLE WHO ARE TRANSGENDER OR NON-BINARY

- 3.3 The “extreme” social stigma and prejudice faced by people who are transgender or non-binary in Western societies throughout history has been described as a “notorious fact”.¹ A United Nations Independent Expert has suggested the levels of violence experienced by transgender people “offend the human conscience”.² The Canadian Supreme Court recently observed that transgender people “remain among the most marginalized in Canadian society”.³ The Court described a history marked by suspicion, prejudice and stereotyping concluding that, despite some gains, “transgender people continue to live their lives ‘facing disadvantage, prejudice, stereotyping, and vulnerability’”.⁴

¹ *XY v Ontario (Government and Consumer Services)* 2012 HRTO 726, [2012] OHRTD No 715 at [164].

² United Nations “Levels of violence against trans people ‘offend the human conscience’, says UN rights expert” (25 October 2018) <www.ohchr.org>.

³ *Hansman v Neufeld* 2023 SCC 14, (2023) 481 DLR (4th) 218 at [89], citing *Oger v Whatcott (No 7)* 2019 BCHRT 58, 94 CHRR D/222 at [62].

⁴ At [84] and [89], citing *Oger v Whatcott (No 7)* 2019 BCHRT 58, 94 CHRR D/222 at [62] and *CF v Alberta (Director of Vital Statistics)* 2014 ABQB 237, 587 AR 332 at [58].

- 3.4 The same is true in Aotearoa New Zealand. In its 2008 report *To Be Who I Am*, Te Kāhui Tika Tangata | Human Rights Commission summed up the position as follows:⁵

Trans people in New Zealand face discrimination that undermines the ability to have a secure family life, to find accommodation, to work, to build a career and to participate in community life. At worst, there was constant harassment and vicious assault. Trans people faced daily challenges simply to find acceptance and do the things other New Zealanders take for granted.

- 3.5 In this section, we traverse some history, summarise some contemporary data on discrimination and violence against people who are transgender or non-binary and explore some distinctive issues and concerns of people in these groups.

Brief history

- 3.6 Until recently, living openly as transgender almost inevitably meant living on the margins of New Zealand society and not being able to “fully participate in regular life”.⁶ For example, New Zealand’s first openly transgender Member of Parliament, the late Georgina Beyer MNZM, described how the lack of employment opportunities for transgender people in the 1970s resulted in many being “funnelled” towards sex work.⁷ While, for some, sex work was (and remains) a choice, others felt they had no option.⁸ According to the research of one scholar, this was particularly so for Māori: “[I]t was expected that if you were both Māori and a trans woman, then the only suitable job for you would be in sex work.”⁹
- 3.7 Throughout the twentieth century, the legal status of transgender people in Aotearoa New Zealand was “largely characterised by invisibility”.¹⁰ It was not until 1995 that legislation was passed to enable transgender people to change their legal sex. The absence of legal status had numerous consequences. For example, it left people vulnerable to being ‘outed’ and it meant heterosexual transgender people could not marry. Further, until 2013, a transgender person who was married had to either divorce or change their relationship from a marriage to a civil union before amending their sex on their birth certificate.¹¹
- 3.8 Although being transgender was never illegal in Aotearoa New Zealand, laws and police practices were used to oppress people who were transgender. Transgender people could be targeted by laws and police practices about vagrancy, sex work, disorderly behaviour, indecent publications and, because they could not change their legal sex, same-sex sexual

⁵ Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuitanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008) at 3.

⁶ Pride NZ “Georgina Beyer profile: Transcript” (21 January 2013) <www.pridenz.com>.

⁷ Pride NZ “Georgina Beyer profile: Transcript” (21 January 2013) <www.pridenz.com>.

⁸ See Will Hansen “Every Bloody Right To Be Here – Trans Resistance in Aotearoa New Zealand, 1967-1989” (MA thesis, Te Herenga Waka | Victoria University of Wellington, 2020) at 29–31.

⁹ Will Hansen “Every Bloody Right To Be Here – Trans Resistance in Aotearoa New Zealand, 1967-1989” (MA thesis, Te Herenga Waka | Victoria University of Wellington, 2020) at 31.

¹⁰ Elisabeth McDonald and Jack Byrne “The Legal Status of Transsexual and Transgender Persons in Aotearoa New Zealand” in Jens M Scherpe (ed) *The Legal Status of Transsexual and Transgender Persons* (Intersentia, Cambridge, 2015) 527 at 530.

¹¹ See Marriage (Definition of Marriage) Amendment Bill 2012 (39-2) (select committee report) at 5.

activity.¹² For example, prior to 1966, transgender women were sometimes arrested for “behaving in an offensive manner in a public place” if they wore women’s clothing.¹³ If transgender people were mistreated by police, there was little recourse. As Georgina Beyer MNZM put it: “I’m not saying it was right, but at that time who are you going to go and complain to?”¹⁴

- 3.9 In a 2004 review of human rights in Aotearoa New Zealand, the Human Rights Commission described transgender (along with intersex) people as a “highly marginalised” population.¹⁵

Contemporary data on conventional forms of discrimination and mistreatment

- 3.10 There is recent evidence in Aotearoa New Zealand of changing attitudes to people who are transgender or non-binary.¹⁶ However, people who are transgender or non-binary continue to experience significant challenges across many areas of daily life.
- 3.11 In 2019, the Transgender Health Research Lab published the first comprehensive national survey of the health and wellbeing of transgender and non-binary people in Aotearoa New Zealand — *Counting Ourselves*.¹⁷ Almost half the participants in that survey reported having been discriminated against in the preceding 12 months. This is more than double the rate for the general population.¹⁸ Research in Australia similarly found transgender and gender diverse participants experienced significantly higher levels of harassment and abuse than cisgender participants (45–52 per cent compared to 29–33 per cent).¹⁹
- 3.12 In this section, we summarise the data relating to conventional forms of discrimination and mistreatment. By this, we mean types of discrimination and mistreatment that are also experienced by other marginalised groups in the community (for example, being refused employment, evicted from housing or experiencing violence or abuse).

Violence and online abuse

- 3.13 Reports of hate-motivated offending against people in Aotearoa New Zealand who are transgender or non-binary are relatively common and seem to be increasing. According to a media article, police received 161 reports of hate crimes motivated by gender identity

¹² See Will Hansen “Every Bloody Right To Be Here – Trans Resistance in Aotearoa New Zealand, 1967-1989” (MA thesis, Te Herenga Waka | Victoria University of Wellington, 2020) at 7.

¹³ See Johanna Schmidt “Gender diversity: Difficulties and visibility” (5 May 2021) Te Ara: The Encyclopedia of New Zealand <teara.govt.nz>.

¹⁴ Pride NZ “Georgina Beyer profile: Transcript” (21 January 2013) <www.pridenz.com>.

¹⁵ Te Kāhui Tika Tangata | Human Rights Commission *Human Rights in New Zealand Today* | Ngā Tika Tangata O Te Motu (September 2004) at 252.

¹⁶ For example, Te Kaunihera Wahine o Aotearoa | National Council of Women of New Zealand *Aotearoa New Zealand Gender Attitudes Survey 2023* (June 2023) at 76.

¹⁷ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019). A second report will be published later in 2024.

¹⁸ At iv and 67–68.

¹⁹ Adam O Hill and others *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia* (Australian Research Centre in Sex, Health & Society, La Trobe University, 2020) at 41.

in 2022 and 229 in 2023. Police believe there is significant underreporting and that the real figure is likely much higher.²⁰

- 3.14 An emerging issue is the increasing levels of extreme anti-transgender content online.²¹ Te Mana Whakaatu | Classification Office recently noted the increasing prevalence of anti-trans narratives online.²² It called for more New Zealand-based data but shared international studies showing that it is common for transgender people to experience transphobic abuse online. One European survey found that 93 per cent of transgender respondents had experienced online abuse in the last five years (compared to 70 per cent of cisgender rainbow respondents).²³ Incidents included insults, threats of physical or sexual violence, death threats, outing, having private details published, threats to destroy property and blackmail.²⁴ A British survey found that one in four transgender people had experienced online abuse in the past month.²⁵
- 3.15 Transgender and non-binary people also experience much higher rates of sexual violence than the general population. Almost a third of *Counting Ourselves* participants (32 per cent) reported someone had had sex with them against their will compared to seven per cent of the general population (11 per cent of women and three per cent of men).²⁶ Separate analysis of data for transgender women, transgender men and non-binary participants showed that each group reported rates of such sexual violence that were two to three times higher than for women in the general population and seven to 12 times higher than for men in the general population.²⁷ According to a survey of survivors of family and sexual violence, more than half of transgender and non-binary participants did not report the violence to the police.²⁸ A key reason was a fear that the police would treat them badly, including because of their gender.²⁹ Of those transgender and non-binary participants who had reported family and sexual violence to the police, over a third (37 per cent) rated their first contact as very poor and only three per cent gave it a very good rating.³⁰ By comparison, 15 per cent of all women in an earlier survey conducted by the

²⁰ Murphy “Reports of hate crimes against trans people jump 42%, spike month of Posie Parker visit” RNZ (17 April 2024) <www.rnz.co.nz>.

²¹ See, for example, Sanjana Hattotuwa, Kate Hannah and Kayli Taylor *Transgressive transitions: Transphobia, community building, bridging, and bonding within Aotearoa New Zealand's disinformation ecologies March-April 2023* (The Disinformation Project, April 2023) at 16.

²² Te Mana Whakaatu | Classification Office “Section 4.4 Intersectionality and misogyny: Intersections with sexual orientation and gender identity” in *Online Misogyny and Violent Extremism — Online Resource* (May 2024) <www.classificationoffice.govt.nz>.

²³ Luke Hubbard *Online Hate Crime Report 2020: Challenging online homophobia, biphobia and transphobia* (Galop, United Kingdom, 2020) at 5.

²⁴ At 6.

²⁵ Chaka L Bachmann and Becca Gooch *LGBT in Britain – Hate Crime and Discrimination* (Stonewall and YouGov, 2017) at 18.

²⁶ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 77–78.

²⁷ At 77.

²⁸ The Backbone Collective and Hohou Te Rongo Kahukura *Make it about us: Victim-survivors' recommendations for building a safer police response to intimate partner violence, family violence and sexual violence in Aotearoa New Zealand* (March 2024) at 40.

²⁹ At 11 and 54.

³⁰ At 57.

same organisation rated their first contact with police as very poor and 17 per cent gave it a very good rating.³¹

- 3.16 Transgender and non-binary participants were three times as likely to say police made fun of them than the women who had been surveyed (21 per cent compared to seven per cent).³² They were also much more likely to say that police involvement made them feel less safe and made their situation worse.³³

Mental distress

- 3.17 According to studies from Aotearoa New Zealand and Australia, fear of discrimination or violence can result in transgender and non-binary people hiding or suppressing their identities.³⁴ An Australian study showed that transgender and non-binary people experience high levels of mental distress, particularly depression and anxiety.³⁵ Similarly, 71 per cent of *Counting Ourselves* participants had experienced high or very high psychological distress compared to eight per cent of the general population. Forty-two per cent of participants had deliberately injured themselves in the past 12 months, and 79 per cent had seriously thought about attempting suicide at some point.³⁶
- 3.18 Research indicates a connection between these high rates of mental distress and experiences of discrimination. *Counting Ourselves* participants who had experienced discrimination due to their gender identity were more likely to report very high psychological distress and twice as likely to have attempted suicide in the past year.³⁷

Employment

- 3.19 Available data suggest that people who are transgender or non-binary experience significant challenges in the workforce. They are unemployed at around twice the rate of the general population³⁸ and have an average income that is substantially less than people

³¹ See The Backbone Collective and Hohou Te Rongo Kahukura *Make it about us: Victim-survivors' recommendations for building a safer police response to intimate partner violence, family violence and sexual violence in Aotearoa New Zealand* (March 2024) at 57–58.

³² At 4 and 94.

³³ At 105 and 122.

³⁴ For example, Leonie Pihama and others *Honour Project Aotearoa* (Te Kotahi Research Institute, Te Whare Wānanga o Waikato | University of Waikato, 2020) at 79; and Zoe Hyde and others *The First Australian National Trans Mental Health Study: Summary of Results* (Western Australian Centre for Health Promotion Research, 2013) at 48.

³⁵ Zoe Hyde and others *The First Australian National Trans Mental Health Study: Summary of Results* (Western Australian Centre for Health Promotion Research, 2013) at iv.

³⁶ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 45–46.

³⁷ At 67.

³⁸ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 87. See, also, Tatauranga Aotearoa | Stats NZ “LGBT+ population of Aotearoa: Year ended June 2021” (9 November 2022) <stats.govt.nz>.

who are cisgender.³⁹ The *Counting Ourselves* survey found that its participants were two or three times more likely to experience material hardship than the general population.⁴⁰

- 3.20 People who are transgender or non-binary report significant obstacles to gaining employment. Twenty-six per cent of *Counting Ourselves* participants said their gender expression had made it hard for them to get paid work, and 11 per cent said they faced discrimination once the interviewer realised they were transgender or non-binary.⁴¹ The Human Rights Commission’s 2008 report *To Be Who I Am* described one transgender woman receiving 147 rejection letters post-transition before she gained a job.⁴²
- 3.21 People who are transgender or non-binary also report a range of concerns about their treatment once in employment. These include receiving worse pay or conditions than co-workers, being bullied, being denied promotions, being removed from public-facing roles, losing a job and quitting because of how they were treated as a transgender or non-binary person.⁴³

Accessing goods, services and public facilities

- 3.22 It is also common for people who are transgender or non-binary to experience discrimination when seeking to access goods, services or public facilities. A quarter of *Counting Ourselves* participants reported being discriminated against on a street or in a public place in the last 12 months compared to six per cent of the general population. Similarly, 14 per cent reported discrimination in a shop or restaurant compared to three per cent of the general population.⁴⁴
- 3.23 Many *Counting Ourselves* participants said they avoided venues such as gyms, pools, banks, hotels and theatres because they feared being mistreated for being transgender or non-binary. Some reported being treated unfairly or verbally harassed when visiting these types of places.⁴⁵ In a New Zealand survey of takatāpui and rainbow older people (55 years of age or older), three-quarters of transgender and non-binary respondents reported, at some time in their life, avoiding a street or public place due to fear of mistreatment.⁴⁶ Similarly, 46 per cent had avoided public transport and 43 per cent had avoided going to a shop or restaurant.⁴⁷

³⁹ Tatauranga Aotearoa | Stats NZ “One-third of people who identify as LGBT+ hold a bachelor’s degree or higher” (9 November 2022) <stats.govt.nz> (reporting an average income level in the year ending June 2021 of \$32,200 compared to \$42,600 for the cisgender population).

⁴⁰ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 86.

⁴¹ At 88.

⁴² Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People | Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuītanga mō Aukaitanga e Pāngia ana e ngā Tāngata Whakawhitīra* (2008) at 40.

⁴³ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 90.

⁴⁴ At 68.

⁴⁵ At 68–71.

⁴⁶ Sandra Dickson and others *Uplifting Takatāpui and Rainbow Elder Voices: Tukua kia tū takitaki ngā whetū o te rangi* (2023) at 44.

⁴⁷ At 44.

- 3.24 Health care is another context in which people who are transgender or non-binary often report negative experiences. In the *Counting Ourselves* survey, eight per cent of respondents reported being discriminated against when seeking medical care in the last 12 months compared to one per cent of the general population.⁴⁸ Over a third of respondents reported not visiting a doctor because they thought they would be disrespected or mistreated as a transgender or non-binary person, and 20 per cent of respondents said that this had happened in the last 12 months.⁴⁹ In a survey of older people, 24 per cent of transgender and non-binary respondents reported mistreatment when seeking health care, and 21 per cent had avoided seeking health care due to fear of mistreatment.⁵⁰

Housing and accommodation

- 3.25 We understand housing instability is a significant issue for some people who are transgender or non-binary. Almost one in five *Counting Ourselves* participants had been homeless at some point in their lives.⁵¹
- 3.26 The data from *Counting Ourselves* also suggest that people who are transgender or non-binary experience various forms of discrimination in accessing and retaining housing. Eleven per cent of respondents said they had been denied a home or apartment because they are transgender or non-binary, and six per cent said they had been evicted for this reason.⁵²

Education

- 3.27 Children and young people who are transgender or non-binary can face discrimination in educational environments. In the *Counting Ourselves* survey, 35 per cent of transgender and non-binary students aged 15 to 19 reported experiencing discrimination at school compared to 13 per cent of all students.⁵³ In the *Youth19* survey, 23 per cent of transgender and non-binary school students reported regular bullying compared to around five per cent of cisgender students.⁵⁴
- 3.28 The same study reported that secondary students who are transgender or unsure of their gender are less likely to report feeling part of their school (70 and 72 per cent, respectively, compared to 86 per cent of cisgender students) and less likely to think

⁴⁸ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 68.

⁴⁹ At 42.

⁵⁰ Sandra Dickson and others *Uplifting Takatāpui and Rainbow Elder Voices: Tukua kia tū takitaki ngā whetū o te rangi* (2023) at 43–44.

⁵¹ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 87. See, also, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* UN Doc A/74/181 (17 July 2019) at [15], documenting international levels of homelessness among rainbow people at twice the rate of the general population.

⁵² At 69. See, generally, Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (2008) at [4.13].

⁵³ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 62.

⁵⁴ John Fenaughty and others *Te āniwaniwa takatāpui whānui: te irawhiti me te ira huhua mō ngā rangatahi | Gender Identity and young people's wellbeing in Youth19* (Youth19 Research Group, 2023) at 20.

teachers treat students fairly most or all of the time (57 and 47 per cent, respectively, compared to 68 per cent of cisgender students).⁵⁵ They are also less likely to think their teachers care about them (65 and 51 per cent, respectively, compared to 79 per cent of cisgender students).⁵⁶

- 3.29 Transgender and non-binary tertiary students also report experiencing discrimination. For example, in an Ōtākou Whakaihu Waka | University of Otago study on sexually and gender diverse tertiary students, 85 per cent had avoided disclosing their sexual orientation or gender identity to university staff due to fear of negative outcomes, and nearly a quarter reported being denied opportunities because of their sexual orientation or gender identity.⁵⁷

Distinctive issues and concerns

- 3.30 In the previous sections, we discussed types of discrimination that are also experienced by other marginalised groups. People who are transgender or non-binary also have distinctive challenges and concerns that other marginalised groups may not face. In this section, we summarise some of those distinctive concerns as reported in studies and survey data.
- 3.31 We do not seek to resolve in this chapter the question of which of these issues and concerns amount to discrimination of the kind that should be regulated by the Human Rights Act. Those are issues for later chapters and for consultation. In some cases, they are relatively straightforward. In others, there may be other relevant rights, interests and concerns we will need to consider.

Being outed

- 3.32 One distinctive issue reported by people who are transgender or non-binary is being outed — that is, having the fact they are transgender or non-binary disclosed to others without their consent. One way this happens is by having to produce a document that contains a name, pronoun or sex marker that does not align with their gender identity or expression. Another way is through the unauthorised disclosure of personal information. Of those *Counting Ourselves* participants whose work colleagues knew they were transgender or non-binary, around a quarter said an employer or co-worker had improperly shared this information.⁵⁸
- 3.33 Quite apart from the breach of privacy, being outed can have serious consequences. Of those *Counting Ourselves* participants who had used an identification document that did not match their appearance, 18 per cent reported being denied services or benefits, 17 per cent reported being verbally harassed and 10 per cent reported being asked to leave

⁵⁵ At 17–18.

⁵⁶ At 18.

⁵⁷ Gareth Treharne and others *Campus climate for students with diverse sexual orientations and/or gender identities at the University of Otago, Aotearoa New Zealand* (Otago University Students' Association, November 2016) at 19, 22 and 24. We note, however, that the sample size of gender diverse students was small. See, similarly, Juliana Brown *University of Waikato Campus Climate Initial Findings: Experiences of Gender, Sex, and Sexuality Diverse Staff and Students* (Te Whare Wānanga o Waikato | University of Waikato, 2020) at 23.

⁵⁸ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 90.

after showing identification.⁵⁹ For some *Counting Ourselves* participants, having to show documents such as qualifications under another name or gender was a barrier to employment.⁶⁰

Misgendering and deadnaming

- 3.34 A recurrent issue faced by people who are transgender or non-binary is being referred to by a name or gender that does not reflect their gender identity. We understand this can be of particular concern in the workplace. In one survey of rainbow public servants, around one-quarter of all respondents said none of their colleagues used their correct name and pronoun.⁶¹ In another survey, 17 per cent of transgender and non-binary respondents said their boss or co-worker had misgendered them on purpose.⁶²
- 3.35 We have heard misgendering and deadnaming is also an issue of concern in educational settings. In one survey, a quarter of students who had disclosed their name and/or pronouns reported that teachers or students rarely or never used them.⁶³ In that survey, 17 per cent of students said that they could not change their name or gender marker on school records.⁶⁴

Participation in sports

- 3.36 People who are transgender or non-binary report very low levels of participation in sports, including in competitive activities. The *Counting Ourselves* survey found that only 14 per cent of transgender and non-binary respondents had participated in a sports competition, event or other organised physical activity in the past four weeks compared to 26 per cent of the general population.⁶⁵
- 3.37 One reason for low participation levels in sport is lack of access to safe and appropriate bathrooms and changing facilities. In the *Identify* survey (of rainbow young people aged 14–26), slightly over a third of transgender and non-binary participants who did not play sport at secondary school despite wanting to attributed this to not being able to use a changing room that matched their gender.⁶⁶
- 3.38 Another reason for lack of participation in sport is restrictions on transgender people playing in a team that matches their gender. Of *Counting Ourselves* respondents who were interested in competitive sports, 61 per cent were worried about how they would be treated, 20 per cent had been told to play based on their sex assigned at birth and

⁵⁹ At 85.

⁶⁰ At 88.

⁶¹ Te Kawa Mataaho | Public Service Commission “Identity of the rainbow population” Findings from the WeCount 2019 survey <www.publicservice.govt.nz>.

⁶² John Fenaughty and others *Identify Survey: Community and advocacy report* (2022) at 64.

⁶³ At 45.

⁶⁴ At 44. See, also, Te Tari Taiwhenua | Department of Internal Affairs *Final Report of the Working Group for reducing barriers to changing registered sex: Recommendations to the Minister of Internal Affairs* (2020) at 64.

⁶⁵ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 66.

⁶⁶ John Fenaughty and others *Identify Survey: Community and Advocacy Report* (2022) at 41.

five per cent were told to have hormone therapy before they could play.⁶⁷ In the *Identify Survey*, 40 per cent of transgender and non-binary participants said they were not allowed to play competitive school sport unless they were on hormones or puberty blockers.⁶⁸

Access to bathrooms and changing rooms

- 3.39 Difficulty accessing safe and appropriate bathrooms and changing rooms in public settings is a recurrent problem for people who are transgender or non-binary. Experiences reported by *Counting Ourselves* participants included being asked if they were using the wrong bathroom, being verbally harassed and being prevented from entering or using a bathroom or changing room. Seventy per cent of *Counting Ourselves* participants had avoided using a public bathroom in the past year, and a third of participants often or always did.⁶⁹
- 3.40 We understand this can also be an issue for transgender and non-binary people in the workplace. In the *Counting Ourselves* survey, 10 per cent of participants said they had not been allowed to use a bathroom that matched their gender at work.⁷⁰
- 3.41 We have also heard accessing safe and appropriate bathrooms and changing rooms is a significant problem for school students. In the *Identify* survey, half of the (rainbow) student participants reported that their school did not provide gender-neutral bathrooms, and 78 per cent said their school did not provide gender-neutral changing areas.⁷¹ Ten per cent of rainbow secondary school students in the survey said they had been prevented from using a bathroom or changing room that matched their gender while five per cent said they had been disciplined for doing this.⁷² Of secondary school respondents who were transgender or non-binary, one-third said someone had made them feel they were in the wrong bathroom or changing area because of their gender.⁷³ One student remarked that “[a] lot of my trans friends are scared to use the toilets at school”.⁷⁴

Schools organised along the sex binary

- 3.42 As we explained in Chapter 2, many aspects of daily life in Aotearoa New Zealand operate on the assumption that society is divided neatly into two categories of male and female. We have heard that this creates particular challenges in education settings. For example, attendance at single-sex schools can pose challenges for students who are transgender or non-binary, including in relation to admission and when a student transitions while at

⁶⁷ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 66.

⁶⁸ John Fenaughty and others *Identify Survey: Community and Advocacy Report* (2022) at 42.

⁶⁹ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 73–75.

⁷⁰ At 90.

⁷¹ John Fenaughty and others *Identify Survey: Community and Advocacy Report* (2022) at 44 and 42.

⁷² At 40.

⁷³ At 44.

⁷⁴ At 45.

the school.⁷⁵ Enrolling in a co-educational school may not be possible if a student does not live within the zone of one.⁷⁶

- 3.43 Some other issues that we have heard can cause challenges for young people who are transgender or non-binary include gendered uniforms, gendered language and situations where teachers group or categorise students by gender.⁷⁷ Forty-six per cent of student participants in the *Counting Ourselves* survey reported that their school did not allow them to choose between the girls' or boys' uniform while 52 per cent said that their school did not have a gender-neutral uniform.⁷⁸

Difficulty accessing gender-affirming health care

- 3.44 We understand difficulty accessing medical services, especially in relation to gender-affirming health care, is an issue of significant concern to many people who are transgender or non-binary. The 2008 report *To Be Who I Am* found major gaps in the availability, accessibility, acceptability and quality of medical services required by transgender people.⁷⁹ A decade later, *Counting Ourselves* participants reported significant difficulties accessing gender-affirming health care. Two-thirds of transgender men in the survey reported an unmet need for chest reconstruction surgery, and half of transgender women in the survey reported an unmet need for voice therapy and feminising genital surgery.⁸⁰
- 3.45 The Gender Affirming (Genital) Surgery Service run through Te Whatu Ora | Health New Zealand is the only publicly funded service for gender-affirming genital surgery. It is funded for up to 14 surgeries a year.⁸¹ Based on current information about the number of people on the active waitlist, this means it would take more than two decades to clear the waitlist.⁸²
- 3.46 *He Ara Oranga*, the report of the Government Inquiry into Mental Health and Addiction, found that limited access to gender-affirming health care “has a negative effect on the mental health and wellbeing of people seeking to access them”.⁸³

⁷⁵ See, for example, Katy Jones “Transgender students should automatically get into nearest co-ed school, MP says” (2 January 2023) <www.stuff.co.nz>; and New Zealand Parents of Transgender and Gender Diverse Children “Nadia” (2020) <www.transgenderchildren.nz>.

⁷⁶ In exceptional circumstances, the Ministry of Education may direct a state school to accept an out-of-zone student: Education and Training Act 2020, sch 20, cl 14.

⁷⁷ See John Fenaughty and others *Identify Survey: Community and Advocacy Report* (2022) 44–45.

⁷⁸ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 63.

⁷⁹ Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuitanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008) at 50.

⁸⁰ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 19, 22 and 25.

⁸¹ Te Whatu Ora | Health New Zealand “The Gender Affirming (Genital) Surgery Service (7 March 2024) <www.tewhatuora.govt.nz>.

⁸² Te Whatu Ora | Health New Zealand “Updates from the Gender affirming (genital) surgery service” (30 March 2024) <www.tewhatuora.govt.nz>.

⁸³ Ron Paterson and others *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (Government Inquiry into Mental Health and Addiction, November 2018) at 72.

PEOPLE WITH INNATE VARIATIONS OF SEX CHARACTERISTICS

- 3.47 As we discussed in Chapter 2, historically in some non-Western societies, people with innate variations of sex characteristics were sometimes celebrated and even revered. In Western societies, however, people with innate variations of sex characteristics have been marginalised and vilified throughout modern history.⁸⁴
- 3.48 There are fewer data available regarding people with innate variations of sex characteristics than regarding people who are transgender or non-binary. The data that are available suggest people with innate variations of sex characteristics continue to face many forms of discrimination and other obstacles to full and open participation in New Zealand society.
- 3.49 In this section, we traverse some brief history, summarise some contemporary data on discrimination and violence against people with innate variations of sex characteristics and explore some distinctive issues and concerns.

Brief history

- 3.50 For many centuries, people with innate variations of sex characteristics have been medicalised, dehumanised and subjected to violence and discrimination. In certain periods and places, they were sometimes killed as infants. Historically, people with innate variations of sex characteristics have been subjects of freak shows.⁸⁵
- 3.51 During the nineteenth century, variations of sex characteristics were associated with homosexuality because scientists conceived of homosexuality as ‘sexual inversion’. Deep-seated homophobia therefore drove a desire to ‘correct’ someone with an innate variation to “eradicate ambiguity and prevent homosexuality”.⁸⁶
- 3.52 During the second half of the twentieth century, the dominant approach to infants born with a variation of sex characteristics was surgical correction. This approach was heavily influenced by the work of psychologist John Money, who thought that gender was entirely a social construct. Money thought a child could be nurtured into a gender assigned to them by doctors so long as their genitals were altered to conform to that gender.⁸⁷ This genital ‘correction’ of infants with innate variations sometimes involved multiple surgical interventions as well as other highly invasive treatments such as repeat post-surgical dilation of the genitals by the insertion of an instrument.⁸⁸
- 3.53 Surgical ‘correction’ of infants with an innate variation of sex characteristics was often accompanied by secrecy, including concealment from the individual themselves even into

⁸⁴ See Geraldine Christmas “‘It’s a ... does it matter?’ Theorising ‘boy or girl’ binary classifications, intersexuality and medical practice in New Zealand” (PhD Thesis, Te Herenga Waka | Victoria University of Wellington, 2013) at 41, citing Hugh Young *Genital abnormalities, hermaphroditism & related adrenal diseases* (Williams & Wilkins Company, Baltimore, 1937) at 8.

⁸⁵ See Morgan Carpenter “The human rights of intersex people: addressing harmful practices and rhetoric of change” (2016) 24(47) *Reproductive Health Matters* 74 at 74.

⁸⁶ Council of Europe Commissioner for Human Rights *Human rights and intersex people* (April 2015) at 19.

⁸⁷ See, for example, Jameson Garland and Milton Diamond “Evidence-Based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development” in Jens M Scherpe, Anatol Dutta and Tobias Helms (eds) *The Legal Status of Intersex Persons* (Intersentia, Cambridge, 2018) 81 at 84–87.

⁸⁸ See Morgan Carpenter “The human rights of intersex people: addressing harmful practices and rhetoric of change” (2016) 24(47) *Reproductive Health Matters* 74 at 75.

adulthood. This was motivated by concern about shame and stigma as well as by Money's theory that a child who was ignorant of their birth circumstances could be socialised into identifying with a particular gender.⁸⁹ The approach has been described in this way:⁹⁰

Genital surgery, gender reassignment, and non-disclosure were common practice, often stemming from the belief it would protect the child and in some instances the parents from being psychologically scarred or overwhelmed. Ironically this was proven to create the opposite effect, with many affected individuals feeling betrayed, lied to and having a sense of shame.

- 3.54 Surgical interventions on infants and children with innate variations were also common in this period in Aotearoa New Zealand.⁹¹ In 2008, *To Be Who I Am* documented some of the concerns expressed by intersex people about these practices. These included unhappiness at medical decisions that were made on their behalf, concerns about uninformed consent, inability to access medical records (even into adulthood) and ongoing negative effects from interventions such as loss of genital sensation.⁹²

Contemporary data on conventional forms of discrimination and mistreatment

- 3.55 There are very little data available about the experiences of discrimination of people with an innate variation of sex characteristics and almost none from Aotearoa New Zealand. The data that are available suggest people with an innate variation of sex characteristics continue to experience high levels of discrimination. In a European study, almost two-thirds (62 per cent) of intersex respondents felt they were discriminated against because of being intersex in the 12 months before the survey.⁹³
- 3.56 As we explained in Chapter 2, the fact a person has an innate variation of sex characteristics is often not obvious to strangers. In an Australian study, 41 per cent of intersex respondents said strangers “never noticed” their variation while 20 per cent said “few people noticed”.⁹⁴ The study found that large proportions of people with an innate variation did not disclose their variation in many areas of their lives.
- 3.57 In those circumstances, people with an innate variation of sex characteristics might be less likely to experience traditional forms of discrimination such as being refused employment or evicted from housing. However, the same Australian study found the following:⁹⁵

⁸⁹ See Morgan Carpenter “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in Jens M Scherpe, Anatol Dutta and Tobias Helms (eds) *The Legal Status of Intersex Persons* (Intersentia, Cambridge, 2018) 445 at 447–453; and Alice Dreger *Shifting the Paradigm of Intersex Treatment* (Intersex Initiative, Portland, 2003) at 6–8.

⁹⁰ Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD thesis, Ōtākou Whakaihū Waka | University of Otago, 2019) at 19.

⁹¹ We discuss further below the extent to which these practices continue today.

⁹² Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People | Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuītanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008) at 81–82.

⁹³ FRA – European Union Agency for Fundamental Rights *EU LGBT II: A long way to go for LGBTI equality* (Publications Office of the European Union, 2020) at 51.

⁹⁴ Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 160.

⁹⁵ At 78, 114, 130 and 147–151.

- (a) Around half of participants said being intersex affected their work experiences. Issues included getting a job, support in their job and employer prejudice due to the visible effects of intersex variations (such as facial hair). For some people, medical issues relating to their variation impacted on their ability to work. The study also found people with an intersex variation experienced higher unemployment than the general population and 41 per cent were earning less than \$20,000 per year.
 - (b) Respondents were overrepresented in homeless populations compared to the general population, at a similar rate to gender-questioning youth.
 - (c) More than a third of people with intersex variations rated their healthcare provider's treatment of their variation as "bad" or "very bad". A common theme was being given insufficient information about their variation.
 - (d) Eighteen per cent of respondents had not completed secondary school, compared to two per cent of the general Australian population.
- 3.58 A New Zealand study documented instances of children with innate variations of sex characteristics being teased and tormented at school.⁹⁶ Another publication observed that access to bathrooms was a "huge" issue for students with an innate variation of sex characteristics.⁹⁷
- 3.59 Research also indicates that people with an innate variation of sex characteristics may experience poorer mental health than the general population. One study found they had rates of self-harm and suicidal tendencies comparable to women with a history of physical or sexual abuse (and twice as high as women with no such history).⁹⁸ An Australian study found 60 per cent of respondents with an innate variation had thought about suicide compared to 20 per cent of all Australians.⁹⁹

Distinctive issues and concerns

- 3.60 As will already be clear, people with an innate variation of sex characteristics have distinctive challenges and concerns that other marginalised groups do not face. In this section, we summarise some of those distinctive concerns.

Medical interventions and their legacy

- 3.61 Medical interventions on people with an innate variation of sex characteristics remain an issue of significant concern for many such people in Aotearoa New Zealand.¹⁰⁰ Clinical guidelines for newborns with differences of sex development state that surgical management is not a key focus and will not happen unless there are compelling reasons.¹⁰¹

⁹⁶ Drew MacKenzie, Annette Huntington and Jean Gilmour "The experiences of people with an intersex condition: a journey from silence to voice" (2008) 18 *Journal of Clinical Nursing* 1775 at 1779.

⁹⁷ Te Tāhuhu o te Mātauranga | Ministry of Education *National Education & Learning Priorities: Treat kids like they're gold* (August 2019) at 49 and 70.

⁹⁸ Karsten Schützmann and others "Psychological distress, self-harming behavior, and suicidal tendencies in adults with disorders of sex development" (2007) 38 *Archives of Sexual Behavior* 16.

⁹⁹ Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 121; and Department of Health and Aged Care "Suicide in Australia" (17 March 2021) <www.health.gov.au>.

¹⁰⁰ See, for example, Zoe Madden-Smith "I'm intersex and I wish doctors had left my body alone" (16 April 2021) Re: News <www.renews.co.nz>.

¹⁰¹ Starship "Differences of sex development – Atawhai Taihemahema" (9 October 2020) <starship.org.nz>.

However, some community experts and researchers believe these surgeries still happen far too often and in cases that cannot be described as medically necessary.¹⁰² We have heard of concerns that the focus from healthcare providers and experts is still on making patients functional for penetrative sex as adults and enabling them to go through a form of puberty typical for their assigned sex. Related concerns include a lack of education for general practitioners and specialists about innate variations of sex characteristics, inadequate attention to other health effects associated with specific variations (such as those we discussed in Chapter 2), an absence of data on potential health risks and wellbeing issues associated with particular variations and lack of long term follow-up.

- 3.62 There are also related concerns about the collection and reliability of data.¹⁰³ In 2020, the government said that seven children with an intersex condition had undergone “limited surgery” since 2014 and that all of these were “to resolve a specific functional problem and did not involve sex assignment or re-assignment”.¹⁰⁴ However, researchers point to data showing that, on average, 563 children under 10 years of age had surgery on their genital or reproductive organs between 2015 and 2019.¹⁰⁵ This variance likely reflects an absence of consensus about how to define an intersex condition and contributes to the issues we discuss below about data collection.¹⁰⁶
- 3.63 In 2022, the government announced funding for a rights-based approach to intersex health care, which will include updated clinical guidance and funding for peer support.¹⁰⁷ We understand work is currently underway to implement this.

Poor data collection

- 3.64 As we have already mentioned, there is very little data available about the experiences of people with an innate variation of sex characteristics. Further, the research that exists is often medical, focusing on people “through the lens of aberration or disorder needing intervention”.¹⁰⁸ An absence of accurate baseline data makes it difficult to identify and address human rights issues and concerns.¹⁰⁹

¹⁰² See, for example, Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 *The International Journal of Children’s Rights* 533; Te Kāhui Tika Tangata | Human Rights Commission *PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 41–42; and Intersex Aotearoa *Thematic Report to the United Nations Committee on the Rights of the Child* (August 2022).

¹⁰³ See, for example, Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 *The International Journal of Children’s Rights* 533.

¹⁰⁴ *Seventh periodic report submitted by New Zealand under article 19 of the Convention pursuant to the simplified report procedure, due in 2019* UN Doc CAT/C/NZL/7 (16 March 2020) at [329].

¹⁰⁵ Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 *The International Journal of Children’s Rights* 533 at 537.

¹⁰⁶ See Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 69.

¹⁰⁷ Murphy “Intersex awareness day: Aotearoa’s journey towards change” (26 October 2023) RNZ <www.rnz.co.nz>.

¹⁰⁸ Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 28.

¹⁰⁹ See Te Kāhui Tika Tangata | Human Rights Commission *PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 22.

Shame and secrecy

- 3.65 A related issue is that the treatment of people with an innate variation of sex characteristics has been defined by stigma, silence and invisibility.¹¹⁰ In Aotearoa New Zealand, the 2008 report *To Be Who I Am* referred to the secrecy and shame that was historically associated with innate variations and how this could leave people vulnerable to discrimination and abuse.¹¹¹ A 2019 publication indicates that shame and secrecy remain a significant issue for intersex people and their whānau:¹¹²

...[T]he majority of families I met were told that they would never meet anyone else like them, that there was nobody else like them, or that they shouldn't ever talk about their diagnosis ... Shame and secrecy today is still a very raw and relevant issue facing families. This issue is not merely historical.

- 3.66 A perceived lack of openness from the medical establishment about the existence and prevalence of intersex conditions has also affected the ability of people with innate variations to find community:¹¹³

...[S]ilence gave people with intersex traits no words to describe our sutures, scars and lack of sensation, and no words to understand commonalities shared across the diversity of lives and histories.

- 3.67 People with an innate variation of sex characteristics have also struggled to access their medical records.¹¹⁴

Other challenges of living in the sex binary

- 3.68 Intersex advocates say the marginalisation of people with an innate variation of sex characteristics has been underpinned by the sex binary and views about what a 'normal' body should look like.¹¹⁵ Categorisations of sex and gender are used everywhere, and "society does not usually recognise a person without reference to their sex".¹¹⁶ In practical terms, this has been given effect through measures such as the requirement to register a child's sex shortly after birth. The options for registering a baby's sex in Aotearoa New Zealand are male, female or indeterminate.¹¹⁷ The decision is then reflected in identity

¹¹⁰ Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 15–17.

¹¹¹ Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuītanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008) at 80.

¹¹² Te Tāhuhu o te Mātauranga | Ministry of Education *National Education & Learning Priorities: Treat kids like they're gold* (August 2019) at 70.

¹¹³ Morgan Carpenter "The human rights of intersex people: addressing harmful practices and rhetoric of change" (2016) 24(47) *Reproductive Health Matters* 74 at 79.

¹¹⁴ See Te Kāhui Tika Tangata | Human Rights Commission *PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 41–42.

¹¹⁵ Astraea Lesbian Foundation for Justice *We are Real: The Growing Movement Advancing the Human Rights of Intersex People* (2016) at 18.

¹¹⁶ Council of Europe Commissioner for Human Rights *Human rights and intersex people* (April 2015) at 13.

¹¹⁷ See Te Tari Taiwhenua | Department of Internal Affairs *Births, Deaths, Marriages, and Relationships Registration Bill Supplementary Order Paper – Departmental Report* (11 October 2021) at [73.2] and [113]. This report notes the term 'indeterminate' is most commonly used as a marker for sex at birth for babies who are stillborn or who die soon after birth where their sex cannot be determined. It is not intended to be a non-binary identity option.

documents required to access services and participate in “countless aspects of daily life”.¹¹⁸

QUESTION

Q1

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?

¹¹⁸ Astraea Lesbian Foundation for Justice *We are Real: The Growing Movement Advancing the Human Rights of Intersex People* (2016) at 15.

CHAPTER 4

Key reform considerations

INTRODUCTION

- 4.1 In this chapter, we identify some key reform considerations we think Te Aka Matua o te Ture | Law Commission should bear in mind when proposing law reform in this review. We group these considerations into six categories:
- (a) coherence of the Human Rights Act 1993;
 - (b) core values underlying the Human Rights Act;
 - (c) constitutional fundamentals;
 - (d) needs, perspectives and concerns of New Zealanders;
 - (e) evidence-led law reform; and
 - (f) other principles of good law making.
- 4.2 We are interested in feedback on whether these are useful considerations for the Law Commission to bear in mind and whether there are other key considerations we should consider.
- 4.3 We hope to use these key reform considerations to evaluate options for reform when preparing our Final Report. We expect some of them will point in different directions on some issues and we may need to make trade-offs between them.

COHERENCE OF THE HUMAN RIGHTS ACT

- 4.4 A statute should be internally coherent and make sense as a scheme. That poses some challenges for this reference as we have not been asked to conduct a general review of the Human Rights Act. As we explained in Chapter 1, the Minister responsible for the Law Commission only asked us to review the adequacy of protections in the Act for people who are transgender or non-binary or who have an innate variation of sex characteristics.
- 4.5 We think our core task is to identify the policy intent underlying provisions we are reviewing and to consider how to apply that policy intent to the groups named in the reference. Understanding the policy intent of provisions is not always straightforward. As we explained in Chapter 1, some sections in the Human Rights Act are poorly drafted and the legislative history does not always explain why they were included in the Act. Nevertheless, in preparing this Issues Paper, we have tried to ascertain the underlying policy intent wherever possible.

- 4.6 We see it as outside the scope of this review to renegotiate key policy trade-offs embodied in the Human Rights Act. One example is the line the Act draws between public conduct (which it regulates) and private conduct (which it generally does not). In preliminary engagement, we heard from some people that this line is drawn in the wrong place. For example, we heard that the exception in Part 2 allowing people to discriminate when choosing flatmates is of concern to many transgender people. Although a wider review of the Act might consider this issue, we do not think it is open for us to do so in this review.
- 4.7 Working out which issues it is appropriate for the Law Commission to address in this review, and which should await a wider review, is not straightforward and must be assessed in the light of other key reform considerations identified below. In some cases, whether our review should address an issue is appropriately a matter for consultation.
- 4.8 Although some of our recommendations will inevitably have implications beyond the subject matter of the review, we need to proceed cautiously in recommending any broad-based reform. One reason is that we cannot consult in this review with all the groups that might be affected by a general review of the Human Rights Act.

CORE VALUES UNDERLYING THE HUMAN RIGHTS ACT

- 4.9 As we explained in Chapter 1, the Human Rights Act is a product of gradual evolution in response to changing social norms. It is also a product of pragmatism, compromise, custom and ‘common sense’ (as that idea was understood at the time particular provisions were drafted).
- 4.10 Ultimately, however, an anti-discrimination code is a statement of values and ideals that are held dear in liberal democratic societies. In drawing out the policy intent underlying provisions in the Human Rights Act, we think it is helpful to consider some core values that thread through the Act (and that underlie all domestic and international human rights instruments). We have identified four pairs of ideas: equality/fair play; dignity/self-worth; autonomy/privacy; and limits/proportionality.
- 4.11 When considering the policy intent underlying provisions in the Human Rights Act, we think it may be helpful for us to consider how a provision seeks to advance these ideas and to mediate any tensions between them. Ultimately, it will be helpful for us to consider the ways in which these core ideas are advanced or affected by any proposed reform.

Equality/fair play

- 4.12 Te Kōti Pira | Court of Appeal has described the “core purpose of anti-discrimination law” as “to give substance to the principle of equality under the law”.¹ The idea of equality “rests at the heart of almost all contemporary liberal moral and political theories”² as well as of international human rights law. Its roots in New Zealand social and political thinking go back at least as far as te Tiriti o Waitangi | Treaty of Waitangi, article 3 of which

¹ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [116], citing *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 573 per Tipping J.

² Charlie Cox “The Majestic Equality of Disenfranchisement: Assessing the Right to Freedom from Discrimination in Light of the Ngaronoa Litigation” (2020) 51 VUWLR 27 at 27, citing Louis P Pojman and Robert Westmoreland (eds) *Equality* (Oxford University Press, New York, 1997) at 1.

guarantees to Māori “nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani” (“the same rights and duties of citizenship as the people of England”).³

- 4.13 The notion of equality is closely aligned to ideas of ‘fair go’ or ‘fair play’ that feature in New Zealand’s political culture.⁴ As one political journalist and commentator put it, a fair go means “as good a chance as possible to get on in life without other people, including bureaucrats, getting in the way”.⁵ This underlying idea of fair play was invoked by the sponsoring ministers in the parliamentary debates leading to the enactment of both the Human Rights Act and its predecessor, the Human Rights Commission Act 1977.⁶
- 4.14 Although equality is a cardinal value underlying the Human Rights Act, we acknowledge that equality and freedom from discrimination are not the same thing. Achieving equality requires far more than can be delivered through anti-discrimination laws alone.
- 4.15 We also acknowledge that the meaning of equality is complex and unsettled.⁷ When examining whether and how particular provisions in the Human Rights Act seek to advance equality, we will need to consider the particular vision of equality the drafters had in mind. For example, many provisions in the Act reflect a ‘substantive’ rather than a ‘formal’ view of equality — one that acknowledges that treating people the same as each other does not always lead to equality of outcome.⁸ In short, the Act reflects an understanding that sometimes people need to be treated differently from others to access equal opportunities and to participate in society on an equal basis.⁹

Dignity/self-worth

- 4.16 Another cardinal value underlying the Human Rights Act is respect for human dignity. Like equality, the idea of human dignity has no one settled meaning.¹⁰ In human rights law and anti-discrimination law, it is generally used in two ways.
- 4.17 First, it is used to encapsulate “the notion that every person has equal worth”.¹¹ When used in this way, human dignity describes an inherent quality all humans are born with that cannot be taken from them and that explains why they have rights and deserve equal treatment.¹²

³ See Cabinet Office *Cabinet Manual 2023* at 159 reproducing the authoritative translation by Sir Hugh Kawharu.

⁴ See, for example, David Bromell “‘A Fair Go’ in Public Policy” (2014) 10(2) *Policy Quarterly* 12; and Barbara Brookes “A Fair Go” in Royal Society Te Apārangi (ed) *Te Tapeke Fair Futures in Aotearoa* (2020) 2.

⁵ Colin James “Ombudsmen’s services ensure ‘a fair go’” (1 October 2012) *Stuff* <www.stuff.co.nz>.

⁶ (20 July 1977) 411 NZPD 1477; and (27 July 1993) 537 NZPD 16904.

⁷ See Department of Justice “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at [10.81].

⁸ One example is that the Act exempts certain kinds of ‘positive discrimination’ (distinctions that help a group that has suffered past discrimination): Human Rights Act 1993, s 73.

⁹ See, for example, Sheilah L Martin “Equality Jurisprudence in Canada” (2019) 17 NZJPL 127 at 135.

¹⁰ See, for example, Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1978) at 198, describing dignity as a “vague but powerful idea”.

¹¹ James May and Erin Daly “Why dignity rights matter” (2019) 2 EHRLR 129 at 129.

¹² See, for example, Mihiata Pirini and Anna High “Dignity and Mana in the ‘Third Law’ of Aotearoa New Zealand” (2021) 29 NZULR 623 at 629.

- 4.18 Second, human dignity is sometimes used to describe feelings of self-worth that can be harmed through ill treatment, including discrimination. According to the Supreme Court of Canada in *Law v Canada*:¹³

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

- 4.19 The connection between human dignity and New Zealand's anti-discrimination laws was acknowledged by the sponsoring minister in parliamentary debates leading to the enactment of the Human Rights Commission Act in 1977.¹⁴ It is reflected in the current Act in the power of Te Taraipiunara Mana Tangata | Human Rights Review Tribunal to award damages for "humiliation, loss of dignity, and injury to the feelings of the complainant".¹⁵ The Tribunal has described human dignity as "an irreducible, core principle of human rights"¹⁶ and as "the source of all human rights".¹⁷

Autonomy/privacy

- 4.20 Autonomy (or freedom) is a third idea that is foundational to human rights law and anti-discrimination law. Like equality and dignity, autonomy has no one settled meaning.¹⁸ In general terms, it refers to a person's right "to make choices and have their choices respected without being dictated to by the state or others".¹⁹
- 4.21 Equality and autonomy are closely connected. According to the scholar John Gardner, anti-discrimination laws support autonomy by "open[ing] up valuable options to people who have previously had few".²⁰ He suggested: "Access to a reasonable range of goods, facilities and services, like access to a reasonable range of employment opportunities, is essential for those who are to lead autonomous lives."²¹ The Canadian Supreme Court has said the equality guarantee in the Canadian Charter "is concerned with the realization of personal autonomy and self-determination".²²

¹³ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53]. Canadian judges have since backed away from using 'harm to dignity' as an operational test to determine whether discrimination has occurred but still identify dignity as a cardinal value underlying anti-discrimination law: for example, *R v Kapp* [2008] 2 SCR 483 at [21].

¹⁴ (20 July 1977) 411 NZPD 1474. See, similarly, (23 August 1977) 413 NZPD 2387 (Dr Shearer MP).

¹⁵ Human Rights Act 1993, s 92M(1)(c).

¹⁶ *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [82].

¹⁷ *Marshall v Idea Services Ltd* [2020] NZHRRT 9 at [79]. See, also, *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556 at [67].

¹⁸ See *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556 at [71].

¹⁹ Jill Marshall *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff, Leiden, 2009) at 21.

²⁰ John Gardner "Private Activities and Personal Autonomy: At the Margins of Anti-discrimination Law" in Bob A Hepple and Erika M Szyszczak (eds) *Discrimination: the limits of law* (Mansell Publishing, 1992) 148 at 155.

²¹ At 155.

²² *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53].

- 4.22 Conversely, ideas about freedom or autonomy also underlie some of the limits the Human Rights Act places around the reach of anti-discrimination laws. Liberal democracies recognise an area of liberty within which people are entitled to act on their individual preferences in relation to matters of concern to them (even including “a moral right to do what is morally wrong”).²³ This explains why Part 2 of the Human Rights Act (regulating private individuals and bodies) only applies if the individual or body has chosen to engage in certain public-facing activities and, even then, carves out many exceptions.
- 4.23 As this suggests, there is a close connection between autonomy and privacy. In international human rights law, rights to privacy or private life are often said to encapsulate ideas of personal autonomy. For example, the European Court of Human Rights has said of the right to private life in the European Convention on Human Rights that it protects “aspects of an individual’s physical and social identity, including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world”.²⁴
- 4.24 The right to privacy has other dimensions, for example, relating to concealment of naked bodies and intimate activities.²⁵ As we will explore in later chapters, this dimension of the right to privacy also underlies some provisions in the Human Rights Act.

Limits/proportionality

- 4.25 The right to freedom from discrimination is not absolute. It must sometimes give way to the rights of others or to other important interests of society or of the government. As we explained in Chapter 1, the Human Rights Act contains rules designed to balance the equality rights of particular groups against other rights, interests and concerns that Parliament deemed to be important. One reason why we need to explore the policy rationale underlying particular provisions is so we can understand the reasons that Parliament thought were sufficient to justify limiting the right to freedom from discrimination in specific contexts.
- 4.26 To be considered legitimate in contemporary human rights law, limits on rights should be ‘proportionate’. This means they should create a benefit to society sufficient to justify the intrusion on people’s rights and freedoms. This idea is reflected in section 5 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). It says the rights and freedoms in the NZ Bill of Rights may be subject to reasonable limits that are authorised by law and that are “demonstrably justified in a free and democratic society”. This second requirement of demonstrable justification is often said to require proportionality. We explain the tests courts use to determine whether a limit is proportionate in Chapter 16.
- 4.27 Section 5 of the NZ Bill of Rights is directly relevant to this review because, as we explained in Chapter 1, Part 1A of the Human Rights Act replicates rules in the NZ Bill of Rights to determine when government (or agencies exercising government functions) have engaged in unlawful discrimination. Those rules include section 5.

²³ Larry Alexander “What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies” (1992) 141 U Pa L Rev 149 at 156; and see, further, at 154–155 and 201–202.

²⁴ *Tysiāc v Poland* ECHR 5410/03, 20 March 2007 at [107].

²⁵ For example, Human Rights Act 1993, s 27(3)(a). For discussion of this dimension of the right to privacy (which the author calls ‘sexual privacy’) see Danielle Keats Citron “Sexual Privacy” (2019) 128 Yale LJ 1870.

- 4.28 By contrast, there is no overarching proportionality requirement in Part 2 of the Human Rights Act (which regulates private individuals and organisations). Instead, Part 2 sets out in detail the circumstances in which Parliament decided it was unacceptable for private individuals or bodies to discriminate. In a loose sense, this regime of prohibitions and exceptions reflects what Parliament determined was reasonable and justified. However, not all the Act's provisions would necessarily be considered proportionate in the sense that term is now understood in human rights law. For example, Part 2 incorporates ideas such as custom, compromise and common sense that would have little place in a proportionality inquiry.²⁶ Further, as we explained in Chapter 1, some of the understandings of custom and common sense reflected in the Human Rights Act date back to the 1970s.
- 4.29 In a general review of the Human Rights Act, it might well be desirable to review all the Part 2 exceptions to ensure they achieve a proportionate balance between relevant rights and interests. Within the limited scope of this review, we are more constrained. As we explained earlier, the desirability of maintaining the coherence of the Human Rights Act means making law reform recommendations that are generally consistent with the existing logic underlying particular provisions.
- 4.30 Where possible within these constraints, we think it is important for us to consider how the Act can achieve a proportionate balance between relevant rights and interests.

CONSTITUTIONAL FUNDAMENTALS

- 4.31 Law reform in Aotearoa New Zealand should be consistent with fundamental constitutional principles and values that underpin New Zealand's legal system.²⁷ Those that are particularly relevant to this review are te Tiriti o Waitangi | Treaty of Waitangi (the Treaty), ngā tikanga, and human rights in domestic and international law.

Te Tiriti o Waitangi | Treaty of Waitangi

- 4.32 The Treaty is an integral part of the constitutional framework of Aotearoa New Zealand.²⁸ The Legislation Design and Advisory Committee's *Legislation Guidelines* (LDAC Guidelines) describe it as of "vital constitutional importance" and "part of the fabric of New Zealand society".²⁹ Analysis of Treaty implications has been an expectation of good policy design in Aotearoa New Zealand for nearly four decades.³⁰ We aim to give practical effect to the Treaty in our work within the limits of our statutory function.

²⁶ See, for example, Alysia Blackham "A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK" (2018) 41 MULR 1085 at 1086, suggesting the exceptions regimes in Australian anti-discrimination law represent a "negotiated compromise" between the progressive potential of equality law and the established status quo.

²⁷ See, for example, Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [4.1].

²⁸ See, for example, Cabinet Office *Cabinet Manual 2023* at 155.

²⁹ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at Ch 5, citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

³⁰ See, also, *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 37, which sets out the obligation on states to honour and respect treaties and agreements entered into with indigenous people.

- 4.33 The Law Commission has set out its approach to the Treaty in several recent reports.³¹ Two brief points are worth restating here.
- 4.34 First, as is well known, there are both Māori and English language versions of the Treaty and significant differences between them. The Law Commission takes the view that, where there are differences, the Māori version is more authoritative.³² This is because it was the version signed by the overwhelming majority of Māori signatories (following debate in te reo Māori) as well as by Lieutenant-Governor Hobson himself. We rely in this review on Sir Hugh Kawharu’s authoritative English translation of the Māori text as reproduced in the Cabinet Manual.³³
- 4.35 Second, the Law Commission treats the text rather than Treaty ‘principles’ as its primary point of reference. Treaty principles have emerged in recent decades from the work of various agencies, especially Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal.³⁴ They can sometimes be helpful in “enabling the Treaty to be applied in situations that were not foreseen or discussed at the time”.³⁵ Ultimately, however, the Crown’s obligations under the Treaty are contained in the text.³⁶
- 4.36 The Treaty records an exchange of undertakings between the Crown and Māori rangatira (chiefs). For the purposes of this review, we think two undertakings may be relevant: the Crown’s article 2 obligation to protect the exercise by Māori of tino rangatiratanga;³⁷ and the Crown’s article 3 obligation to care for Māori and extend the rights and duties of citizenship. We explore the content of these obligations at relevant points in the project – primarily, Chapters 6 and 17.

Ngā tikanga

- 4.37 Tikanga derives from the word tika, which means right or correct.³⁸ Tikanga means the right way of doing things. Tikanga includes a system of values and principles that guide and direct rights and obligations in a Māori way of living. It governs relationships by providing a shared basis for “doing things right, doing things the right way, and doing things for the right reasons”.³⁹ In te ao Māori (the Māori world), tikanga is a source of

³¹ For example, Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* | *Review of succession law: rights to a person’s property on death* (NZLC R145, 2021) at [2.54]–[2.67].

³² For example, Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* | *Review of succession law: rights to a person’s property on death* (NZLC R145, 2021) at [2.61]–[2.62].

³³ Cabinet Office *Cabinet Manual 2023* at 155.

³⁴ See Treaty of Waitangi Act 1975, s 6.

³⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386.

³⁶ See Te Aka Matua o te Ture | Law Commission *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu* | *Public safety and serious offenders: a review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at [2.37].

³⁷ We explain tino rangatiratanga in Chapter 6.

³⁸ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 29.

³⁹ Bishop Manuhua Bennett “Te Pū Wānanga Seminar” (presented with Te Mātāhauariki Research Institute, 23 March 2000) as cited in Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 431.

rights, obligations and authority that governs relationships. It is lived and practised today by whānau, hapū, iwi and other Māori communities and collectives.⁴⁰

4.38 Tikanga may involve both:⁴¹

- (a) tikanga Māori, being values and principles that are broadly shared and accepted generally by Māori; and
- (b) localised tikanga that are shaped by the unique knowledge, experiences and circumstances of individual Māori groups (such as waka, iwi, hapū, marae or whānau).

4.39 Analysis of the impact of policy proposals on tikanga is another established tenet of good law making in Aotearoa New Zealand. For example, the LDAC Guidelines advise those designing legislation to identify the potential effect of the reform on any practices governed by tikanga and to ensure new legislation is, as far as practicable, consistent with tikanga.⁴² Other public service guidance invites policy makers to demonstrate how their proposals have approached an issue from the perspective of tikanga values.⁴³ The Law Commission Act 1985 directs the Law Commission, when making its recommendations, to have regard to te ao Māori (which includes tikanga).⁴⁴

4.40 The kind of recommendations the Law Commission makes in respect of tikanga can differ substantially depending on the scope and nature of a particular review.⁴⁵ Within the limited scope of this review, we are primarily concerned to consider and address the potential impacts of any law reform recommendations we might make on the ability of Māori to live in accordance with tikanga. We address this issue in Chapter 17.

Human rights and international law

4.41 We also need to consider the significance of the government's human rights obligations found in international and domestic law.⁴⁶

4.42 A central issue in this review is whether more explicit protection from discrimination for people who are transgender or non-binary or who have an innate variation of sex characteristics is supported or demanded by human rights obligations found in international law. We address this in Chapter 6.

4.43 We also need to ensure that any amendments we propose do not violate other human rights protected by the NZ Bill of Rights and at common law (for example, the freedoms of conscience, religion, expression and association). These rights can be limited so long

⁴⁰ See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [1.8].

⁴¹ See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [1.22] and Figure 1.

⁴² Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [3.4] and [5.3].

⁴³ Cabinet Office Circular "Te Tiriti o Waitangi/Treaty of Waitangi guidance" (22 October 2019) CO 19/5 at [74]–[76].

⁴⁴ Law Commission Act 1985, s 5(2)(a). See, also, *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), which, in numerous articles, sets out the right of indigenous peoples to maintain, strengthen and practise their own customs, traditions and cultural institutions (for example, arts 5, 8, 9, 11, 12, 15 and 31).

⁴⁵ See, for example, Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* | *Review of Succession Law: rights to a person's property on death* (NZLC R145, 2021) at [2.127] in which the Law Commission recommended weaving together tikanga Māori with other values to make new law for all New Zealanders.

⁴⁶ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at Ch 6 and 9.

as the limits are proportionate in the sense described earlier in this chapter (and explained in more detail in Chapter 16).

NEEDS, PERSPECTIVES AND CONCERNS OF NEW ZEALANDERS

- 4.44 Our aim is good law for all New Zealanders. For that, we need to understand as best we can the needs, perspectives and concerns of all those interested in or affected by the review. This includes people who are transgender or non-binary or who have an innate variation of sex characteristics. It also includes all others in the community whose rights, interests and obligations would be affected by law reform in this area or who have relevant expertise or experience. It includes, for example, Māori, women's groups, rangatahi/young people, businesses and service providers, experts and officials, and people from New Zealand's ethnic minority communities.
- 4.45 This is not about searching for a reform option with which everyone agrees nor even for the reform option supported by the greatest number of people. Rather, our understanding of the perspectives and concerns of New Zealanders will inform our recommendations for law reform along with other relevant evidence and analysis.

EVIDENCE-LED LAW REFORM

- 4.46 Good law reform is evidence based. In this review, the need to act on evidence is also underscored by the proportionality principle discussed earlier. To be proportionate, limits on rights must be *demonstrably* justified.
- 4.47 One type of evidence that is relevant in this review is evidence of people's needs, perspectives and concerns (as discussed above). Other types of evidence are also relevant. For example, the Department of the Prime Minister and Cabinet's *Policy Project* suggests that policy advice needs to be "informed by up-to-date data, contextual and other knowledge, people's experiences and research from New Zealand and overseas".⁴⁷
- 4.48 The Law Commission must, however, act within certain institutional and resource constraints. For example, as we explained in Chapter 1, the Law Commission rarely has the resources to generate new data such as by conducting its own surveys. In this review, we are primarily dependent on data that others have generated.
- 4.49 Further, our preliminary research suggests that, on some relevant issues, definitive data have not yet emerged. For example, the evidence on the extent to which gender-affirming hormone treatment may mitigate the biological advantages of male puberty with respect to sports performance is still emerging. We may therefore need to grapple with how best to regulate some issues against the background of emerging or contested evidence.

OTHER PRINCIPLES OF GOOD LAW MAKING

- 4.50 There are other principles of good law making that we bear in mind in our work. Many of these are highlighted in the LDAC Guidelines. For example:

⁴⁷ Policy Project "Evidence and evaluation" (13 February 2024) Te Tari o Te Pirimia me Te Komiti Matua | Department of the Prime Minister and Cabinet <www.dpmc.govt.nz>.

- (a) Law reform should only be undertaken if it is necessary and if it is the most appropriate way to achieve a policy objective. Before we propose law reform, we should be satisfied the costs of legislating do not outweigh the benefits.⁴⁸
- (b) Laws should be fit for purpose. They should be carefully designed to achieve their goals and to ensure they do not overreach or result in unintended consequences.⁴⁹
- (c) Laws need to achieve a balance between certainty and flexibility (although the correct balance is very context dependent).⁵⁰
- (d) Laws also need to be accessible so that people can find them, navigate them and understand them.⁵¹ One of the Law Commission's statutory functions is to advise on ways in which New Zealand law can be made as understandable and accessible as is practicable.⁵² Accessibility of law is critical to ensuring access to justice.

QUESTION

Q2

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

⁴⁸ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [2.3].

⁴⁹ At Ch 1.

⁵⁰ See Australian Government Productivity Commission *Access to Justice Arrangements* (Inquiry Report 72, 5 September 2014) at 132.

⁵¹ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at Ch 1.

⁵² Law Commission Act 1985, s 5(1)(d). See, also, Law Commission Act 1985, s 5(2)(b), directing the Law Commission, when making its recommendations, to “have regard to the desirability of simplifying the expression and content of the law, as far as that is practicable”.

CHAPTER 5

The perspectives and concerns of Māori

INTRODUCTION

- 5.1 We want to understand Māori perspectives on the issues being considered in this review. These include:
- (a) the experiences and perspectives of Māori who are transgender or non-binary or who have an innate variation of sex characteristics; and
 - (b) other Māori perspectives on the issues being considered in this review, including the implications for this review of any relevant tikanga.
- 5.2 These issues are closely linked so we discuss them together.
- 5.3 To improve our understanding of Māori perspectives on issues relevant to this review, we convened a wānanga (a gathering to discuss an issue or issues) of Māori pūkenga (experts). Many attendees at the wānanga had specific expertise on the experiences of Māori who are transgender or non-binary or who have an innate variation of sex characteristics. Others were pūkenga in tikanga Māori and mātauranga Māori more generally. We summarise below some key themes that emerged from the wānanga as well as from our preliminary research and other engagement. We acknowledge these views represent just some of the wide-ranging perspectives that Māori people will have on the issues in this review. We hope to hear about others in our consultation.
- 5.4 An understanding of Māori perspectives on relevant issues is necessary to advance several of the key reform considerations we identified in Chapter 4. As we explained in that chapter, to make good-quality law reform recommendations, we need to understand as best we can the needs, perspectives and concerns of all those affected by the review. This includes Māori. As we also explained, we need to ensure our reform proposals are consistent with constitutional fundamentals, including te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) and ngā tikanga.
- 5.5 In later chapters (Chapters 6 and 17), we identify and explore the specific implications of ngā tikanga and the Treaty for this review and seek feedback on them.

IDENTITY AND BELONGING

- 5.6 We understand that many Māori who are transgender or non-binary or who have an innate variation of sex characteristics do not see these features as centrally defining of their identity. We heard repeatedly during preliminary engagement, including at the wānanga, that, for many Māori, their identity as Māori is far more important. This idea is captured in Dr Elizabeth Kerekere's explanation for her expansive use of the kupu takatāpui to embrace all Māori with diverse gender identities, sexualities and sex characteristics. According to Kerekere, the term:¹

... emphasises Māori cultural and spiritual identity as equal to — or more important than — gender identity, sexuality or having diverse sex characteristics. Being takatāpui offers membership of a culturally-based national movement that honours our ancestors, respects our elders, works closely with our peers and looks after our young people.

- 5.7 We understand that gender is less present in te reo Māori than the English language.² Unlike English, te reo Māori does not use third person pronouns that imply a person's gender, with ia meaning both he and she.

- 5.8 We also heard in preliminary engagement that many Māori who are transgender or non-binary or who have an innate variation of sex characteristics feel more acceptance and belonging within te ao Māori (the Māori world) than in other settings. This is consistent with the results of the *Counting Ourselves* survey (of people who are transgender or non-binary). Half of the Māori participants in that survey said they strongly agreed or somewhat agreed that they had a strong sense of belonging to their ethnic group or groups.³ For example, one participant said:⁴

There is plenty of space in a traditional Māori context for gender diversity, and I have always felt seen, understood and more comfortable in a Māori setting, at least so far as gender is concerned.

- 5.9 At the wānanga and in our preliminary research and engagement, we heard about some tikanga that help explain these experiences and perspectives. Tikanga functions as an integrated system of norms.⁵ The tikanga we discuss in this chapter are interdependent and are also closely entwined with other tikanga that we do not discuss. We have focused in this Issues Paper on those tikanga that participants at the wānanga identified for us as particularly relevant. We are interested to receive feedback about other tikanga that are also relevant.⁶

¹ Elizabeth Kerekere "Part of The Whānau: The Emergence of Takatāpui Identity – *He Whāriki Takatāpui*" (PhD thesis, Te Herenga Waka | Victoria University of Wellington, 2017) at 25.

² See Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [146].

³ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 104.

⁴ At 104.

⁵ See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.1].

⁶ For example, we wonder if concepts related to nurturing relationships such as whanaungatanga, manaakitanga and tiaki are relevant.

- 5.10 The first tikanga that we heard is particularly relevant is whakapapa. This is commonly translated as genealogy, although there are other meanings.⁷ The recent study paper on tikanga by Te Aka Matua o te Ture | Law Commission, *He Poutama*, explained that whakapapa (alongside the closely related concept of whanaungatanga) “frame Māori existence” and reflect “the importance in te ao Māori of all things being connected”.⁸ Through whakapapa, individuals are connected to all things past, present and future, including to whānau, hapū and iwi, and to atua Māori (Māori gods). Whakapapa therefore frames an individual’s identity, confirms their membership in Māori society and governs their relationships and obligations.⁹
- 5.11 The importance of whakapapa for establishing an individual’s identity and their rights and obligations with respect to other individuals and to the collective helps to explain why some Māori who are transgender or non-binary or who have an innate variation of sex characteristics see their identity as Māori as far more important than their gender or sex characteristics.¹⁰ It may also help to explain why some people in these groups feel a strong sense of belonging and acceptance within te ao Māori. Their whakapapa defines their identity and establishes an unbreakable connection with the collective to which they belong.
- 5.12 Participants at the wānanga particularly emphasised three other tikanga that they considered relevant to this review: mauri, tapu and mana. We understand these to be relevant because they help to explain the inherent value of each individual within te ao Māori, the considerations that are most determinative of status in te ao Māori and the responsibilities of individuals to the collective and to each other.
- 5.13 Mauri has been translated as the “spark of life”.¹¹ All things animate and inanimate have a unique mauri,¹² and this includes humans. Kerekere describes mauri as encompassing how you present and express yourself to the world.¹³ It is important in a Māori world view that each person’s mauri is acknowledged and respected. As the late Rangimarie Rose Pere explained:¹⁴

⁷ For a fuller and more nuanced explanation, see Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.23]–[3.35].

⁸ Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.22]. We concentrate in this discussion on whakapapa rather than whanaungatanga because the latter was not a focus of discussion at the wānanga.

⁹ See Te Aka Matua o te Ture | Law Commission *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: a review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at [2.7].

¹⁰ See Elizabeth Kerekere “Part of the Whānau: The Emergence of Takatāpui Identity – *He Whāriki Takatāpui*” (PhD thesis, Te Herenga Waka | Victoria University of Wellington, 2017) at 25; and Te Timatanga | Auckland Pride “Te Whē S1 E6 – Te Ira Tangata with Tu Chapman and Hāmiora Bailey” (podcast, 24 March 2022) <www.podcasters.spotify.com> at 4 min 20 sec.

¹¹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 395.

¹² See Wiremu Doherty, Hirini Moko Mead and Pou Temara “Appendix 1: Tikanga” in Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.23].

¹³ Elizabeth Kerekere “Te Whare Takatāpui – Reclaiming the Spaces of Our Ancestors” in Alison Green and Leonie Pihama (eds) *Honouring Our Ancestors: Takatāpui, Two-Spirit and Indigenous LGBTQI+ Well-being* (Te Herenga Waka University Press, Wellington, 2023) at 82.

¹⁴ Rangimarie Rose Pere *Ako: Concepts and learning in the Maori Tradition* (Te Whare Wānanga o Waikato | University of Waikato, 1982) at 32.

If a person feels that she is respected and accepted for what she herself represents and believes in, particularly by people who relate or interact with her, then her mauri waxes; but should she feel that people are not accepting her in her totality, so that she is unable to make a positive contribution from her own makeup as a person, then her mauri wanes.

- 5.14 According to a Māori world view, every Māori person is also born with an inherent tapu by virtue of their connection to an atua.¹⁵ Tā Hirini Moko Mead describes tapu as “the sacred life force which supports the mauri” and explains:¹⁶

The idea of tapu works best when this personal attribute is recognised, known and accepted by the community at large. To be somebody is to know one’s identity, be aware of one’s personal tapu and be known to many others in the community.

- 5.15 Tapu is inseparable from mana, which is a broad concept representing a person’s authority and associated responsibilities, reputation and influence.¹⁷ We understand that a person’s mana may be derived from, or influenced by, multiple sources.¹⁸ For example, an aspect of a person’s mana is inherited from their tūpuna (ancestors), so mana is closely linked to whakapapa. A person can also acquire or lose mana through their actions and the responsibilities they discharge in relation to the collective. We have read that people of mana are often able to harmonise (bring together) the community and that they have insight to see possibilities and understandings that others might not.¹⁹
- 5.16 At the wānanga, participants suggested that one reason people who are transgender or non-binary can sometimes be more accepted in Māori spaces is because their mana is determined by factors other than their gender identity. As one pūkenga put it: “people with mana have mana.”²⁰ Another pūkenga emphasised the importance of leaders in te ao Māori having the humility to recognise the mauri and mana of all individuals.
- 5.17 We understand that the mauri, tapu and mana of a person can be affected by external forces, including insults, injuries and abuse inflicted by others.²¹
- 5.18 Finally, we heard at the wānanga about another feature of te ao Māori that participants considered relevant to the flexibility of te ao Māori to accommodate gender diversity. It

¹⁵ See Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Melbourne, 1991) at 128; and Te Aka Matua o te Ture | Law Commission *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: a review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at [2.8].

¹⁶ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 50.

¹⁷ See Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 154; and Te Aka Matua o te Ture | Law Commission *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: a review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at [2.8].

¹⁸ See, for example, Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.73]–[3.86].

¹⁹ Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn and others (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195 at 203.

²⁰ We have read this may also be a reason sex is not regarded by some in te ao Māori as a particularly important determinant of social status: see, for example, Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [141]–[144].

²¹ See, for example, Joan Metge *In and Out of Touch: Whakamā in a Cross Cultural Context* (Victoria University Press, Wellington, 1986) at 68–69; Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 51; and Rangimarie Rose Pere *Ako: Concepts and learning in the Maori Tradition* (Te Whare Wānanga o Waikato | University of Waikato, 1982) at 32.

is that te ao Māori recognises that each person has multiple taha (sides) and these include, in each person, a taha wahine (feminine side) and a taha tāne (male side).²²

EXPERIENCES OF DISCRIMINATION

- 5.19 As we explained in Chapter 3, people in Aotearoa New Zealand who are transgender or non-binary or who have an innate variation of sex characteristics experience high levels of discrimination. Māori people in these groups also experience discrimination on these grounds. They may also experience discrimination because they are Māori.
- 5.20 In a 2020 survey of takatāpui and Māori LGBTQI+ generally, more than half of participants said they had experienced discrimination for being Māori.²³ Forty-five per cent of participants reported they were not open or only sometimes open in their day-to-day lives about being takatāpui and Māori LGBTQI+. Fear of discrimination was the main reason given. Further, 78 per cent reported they felt they had to be “on guard” for all, most or some of the time, and 71 per cent reported experiencing fear of being bullied or attacked all, most or some of the time.²⁴
- 5.21 One survey found that Māori rainbow young people are less likely than both Pākehā rainbow young people and Māori non-rainbow young people to feel safe at school. They also have lower rates of wellbeing and higher rates of depressive and suicidal symptoms.²⁵
- 5.22 Participants at the wānanga emphasised that, as well as experiencing discrimination and unfair treatment from non-Māori, Māori who are transgender or non-binary or who have an innate variation of sex characteristics sometimes also experience discrimination within te ao Māori. One example we were given stemmed from ignorance in te ao Māori (as in te ao Pākehā) about innate variations of sex characteristics, and how this resulted (on the occasion we heard about) in a diminishment of mana for the affected individual.
- 5.23 Wānanga participants linked experiences of this kind to the effects of colonisation. This is consistent with the work of several scholars who have suggested that pre-colonial understandings of sexual fluidity and gender fluidity in te ao Māori have likely morphed or been erased as a result of colonisation and the introduction of Christianity.²⁶ It is impossible to fully reconstruct precolonial Māori understandings of gender diversity or of variations of sex characteristics. Some scholars point to fragments from traditional stories

²² See, also, Mahi Tahi “Te Kōkōmuka Episode 13 – Sexuality and gender” (25 November 2020) YouTube <www.youtube.com> at 44 min 14 sec, in which Pānia Papa discusses the male and female side of all things.

²³ Leonie Pihama and others *Honour Project Aotearoa* (Te Kotahi Research Institute, Te Whare Wānanga o Waikato | University of Waikato, 2020) at 85. LGBTQI+ is an acronym that represents diverse sexualities and genders and stands for lesbian, gay, bisexual, transgender, queer or questioning, intersex and others (denoted by the +).

²⁴ At 79.

²⁵ Youth19 Research Group *Negotiating Multiple Identities: Intersecting Identities among Māori, Pacific, Rainbow and Disabled Young People* (2021) at 32–33. See also Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 68.

²⁶ For example, Elizabeth Kerekere “Part of The Whānau: The Emergence of Takatāpui Identity – *He Whāriki Takatāpui*” (PhD thesis, Te Herenga Waka | Victoria University of Wellington, 2017) at 63; and Clive Aspin and Jessica Hutchings “Reclaiming the past to inform the future: Contemporary views of Maori sexuality” (2007) 9 *Culture, Health & Sexuality* 415 at 419.

or carvings that might suggest evidence of gender fluidity or variations of sex characteristics.²⁷ However, these are very few and their meanings are not always clear.

- 5.24 Participants at the wānanga also emphasised that the experiences of people who are transgender or non-binary (especially young people) can sometimes vary depending on whether they have a person of mana to advocate for them in Māori settings.

TIKANGA AND SEX-DIFFERENTIATED ACTIVITIES

- 5.25 There are some situations in te ao Māori where wāhine and tāne have different roles or where sex is significant to differences in particular cultural practices. We understand these are usually tapu (spiritually restricted) practices that may require appropriate kawa (protocols). They include:
- (a) practices associated with pōwhiri (a formal welcoming ceremony) such as karanga (a welcome call) and whaikōrero (a formal speech);
 - (b) the practice of kawanga whare (the ceremony to open a new building);
 - (c) tā moko (traditional Māori tattooing); and
 - (d) kapa haka and poi (types of Māori performing arts).
- 5.26 Practices vary between different hapū, iwi or other Māori groups so a person's sex may not always be an important factor.²⁸
- 5.27 We have heard that it is important to understand the intention behind the different roles played by men and women, which is itself dictated by tikanga. Participants at the wānanga emphasised the importance of tiaki (protection) as a frequent rationale for sex-differentiated activities. For example, the desire to protect women from the possibility of abuse is one reason that women often stand in the middle of the ope (group) during the karanga and sit behind men during whaikōrero. It is also a reason we have seen given for the prohibition of women delivering whaikōrero.²⁹ For some hapū and iwi, it is the tapu of all women that requires such protection as spiritual attacks could affect not only the

²⁷ See, for example, Ella Yvette Henry *Brief of Evidence* (29 June 2021) in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry* (Wai 2700, 2021) at [17] and [20]; Heeni Meretini Collins *Brief of Evidence* (21 July 2022) in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry* (Wai 2700, 2022) at [25]; Pei Te Hurinui Jones *King Pōtatau: An account of the life of Pōtatau Te Wherowhero the first Māori King* (The Polynesian Society, Wellington, 1959) at 247–253; Elizabeth Kerekere “Part of The Whānau: The Emergence of Takatāpui Identity – He Whāriki Takatāpui” (PhD thesis, Te Herenga Waka | Victoria University of Wellington, 2017) at 65; Ngahua Te Awakotuku “He Reka Anō – same-sex lust and loving in the ancient Māori world” in Alison J Laurie and Linda Evans (eds) *Outlines: Lesbian & Gay Histories of Aotearoa* (Lesbian & Gay Archives of New Zealand, Wellington, 2005) 6 at 7; and Leonie Hayden “Pre-colonial attitudes to sex and gender fluidity – On the Rag: Sex positivity” (23 October 2019) YouTube <www.youtube.com> at 4 min 40 sec.

²⁸ For example, while the role of kaikōrero is typically occupied by males, among some iwi, including Ngāti Porou, Ngāpuhi and Ngāti Kahungunu, women are also kaikōrero: Poia Rewi *Whaikōrero: The World of Māori Oratory* (Auckland University Press, Auckland, 2010) at 74.

²⁹ For example, Rawinia Higgins and Paul Meredith “Te Mana o te wāhine – Māori women: Waiata, karanga and whaikōrero” (1 June 2017) Te Ara Encyclopedia of New Zealand <teara.govt.nz>.

woman but also her progeny for all time to come.³⁰ Other hapū and iwi consider that a post-menstrual woman who can no longer bear children is exempt from this vulnerability.³¹

- 5.28 An issue with which Māori groups are grappling is what roles Māori who are transgender or non-binary or who have an innate variation of sex characteristics can fulfil in relation to sex-differentiated activities — for example, whether a person who is transgender can fulfil a role that aligns with their gender identity and whether a person who identifies outside the gender binary can move between male and female roles. We understand that different accommodations are being reached on these issues by hapū, marae and whānau around the motu and that there is no uniform response. We are interested to understand more about existing practice.
- 5.29 We are aware of several examples of transgender Māori women performing karanga both on marae and in community settings.³² We have also been told of examples of transgender women who want to karanga being turned down by their community. However, we were told this may sometimes be due to the person lacking the skills and seniority to perform the role rather than necessarily because they are transgender. We are not aware of any transgender Māori men or non-binary Māori who have taken the role of kaikōrero in their Māori group (although that does not mean it does not happen). We have heard of people who identify outside the gender binary and who were assigned male at birth performing whaikōrero in educational settings. We have not heard about the experiences of people with an innate variation of sex characteristics in relation to karanga and whaikōrero.
- 5.30 We have heard there can be particular challenges for people who do not identify as male or female to find their place in sex-differentiated tikanga activities. One transgender Māori woman, Stacey Kerapa, describes her drag-mother, Witōria Drake, saying to her:³³
- Girl, there are no grey areas and you're either going to be one or the other. You can't have it both ways. So choose a role and stick to it because it'll be on you if you get it wrong.
- 5.31 We understand that, in kapa haka, groups are taking different approaches when deciding where to place members who are transgender or non-binary. For example, we have heard of one group that agreed to maintain traditional sex-differentiated roles in a particular waiata but to permit transgender wāhine to perform the roles assigned to wāhine. By contrast, the kapa haka group Angitū had two members performing both male and female roles at Te Matatini in 2023.³⁴
- 5.32 These practices are emerging and evolving. Pūkenga at the wānanga stressed two things about this process of evolution. The first is that, while expressions of tikanga can and do evolve, a change to tikanga relies on collective consciousness. Tikanga should not be

³⁰ See, for example, Poia Rewi *Whaikōrero: The World of Māori Oratory* (Auckland University Press, Auckland, 2010) at 71. Rewi refers to the practices of Mātaatua and Te Arawa.

³¹ See, for example, Poia Rewi *Whaikōrero: The World of Māori Oratory* (Auckland University Press, Auckland, 2010) at 71–72. Rewi refers to Ngāti Porou, Te Whānau-a-Apanui and Ngāti Kahungunu.

³² See, for example, Ngāhuia Te Awēkotuku and others *Mau Moko: The World of Māori Tattoo* (Penguin Group, North Shore, 2007) at 101; Jordan Harris *Takatāpui – A Place of Standing* (Oratia Books, Auckland, 2016) at 47; and Māori Television “Karanga: The First Voice, Series 2 Episode 11” <www.maoriplus.co.nz>.

³³ See Jordan Harris *Takatāpui – A place of standing* (Oratia Books, Auckland, 2016) at 46.

³⁴ Te Hiku Media “Angitū Challenge Gender Roles In Te Matatini 2023” (3 March 2023) <tehiku.nz>.

changed to fit one person's agenda, kōrero or way of living.³⁵ One pūkenga said “ki te panoni te tikanga, ka ngaro te tapu i te tikanga” (if we keep changing tikanga, it loses its tapu).³⁶

- 5.33 The second is that tikanga is less rules-based and more solutions-focused than Western law. We were told tikanga solutions emerge out of consultation and wānanga. Some participants at our wānanga told us they were engaged in these conversations with their own Māori groups. The solutions that emerge from these conversations do not always favour the position being advocated for by gender diverse Māori. However, wānanga participants explained that the people involved tend to accept the outcome because it is tikanga-based and enables all those involved to deepen their relationship with tikanga. Wānanga participants were clear that they did not see any role for state law to intervene on such questions of tikanga.

QUESTIONS

Q3

Are there Māori perspectives on the issues in this review you would like to share with us?

Q4

Do you have any feedback on the tikanga we have identified and how we have described them?

Q5

Are there other tikanga that are relevant to this review?

³⁵ See, also, Wiremu Doherty, Hirini Moko Mead and Pou Temara “Appendix 1: Tikanga” in Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [2.38]: “[T]ikanga needs to be accepted and acknowledged by the collective”

³⁶ See, also, Wiremu Doherty, Hirini Moko Mead and Pou Temara “Appendix 1: Tikanga” in Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [2.34].

CHAPTER 6

Should section 21 be amended?

INTRODUCTION

- 6.1 In Chapter 1, we explained that section 21 of the Human Rights Act 1993 sets out 13 prohibited grounds of discrimination. The current grounds are: sex; marital status; religious belief; ethical belief (which is defined as the lack of a religious belief); colour; race; ethnic or national origins; disability; age (but only if you are 16 or over); political opinion; employment status; family status; and sexual orientation. You cannot complain about discrimination under the Human Rights Act unless the difference in treatment was linked to one or more of these prohibited grounds.
- 6.2 Section 21 does not refer expressly to people who are transgender or non-binary or who have an innate variation of sex characteristics and does not use related terms such as gender, gender identity, gender expression or intersex status.
- 6.3 In this chapter, we examine whether it is necessary and desirable to amend the prohibited grounds of discrimination in section 21. We address two questions:
- (a) Should the law protect people from discrimination that is linked to the fact (or the discriminator's belief) they are transgender or non-binary or they have an innate variation of sex characteristics?
 - (b) If so, is an amendment to section 21 necessary and desirable to ensure adequate protection? This second question arises because, as we explain further below, it is arguable that discrimination based on gender identity or sex characteristics is already covered by the prohibited grounds of sex or disability.
- 6.4 We reach the preliminary conclusion in this chapter that an amendment to section 21 is necessary and desirable, and we seek feedback on that preliminary conclusion. The further question of how, precisely, to amend section 21 is addressed in Chapter 7.
- 6.5 Whatever the precise wording, an amendment to section 21 will not mean that all differences in treatment based on a person's gender identity or sex characteristics are unlawful. As we explained in Chapter 1, the Human Rights Act does not prohibit all differences in treatment based on the prohibited grounds. For example, Part 2 of the Human Rights Act (which regulates private individuals and organisations) only applies when people engage in certain public-facing activities and, even then, there are many exceptions. In later chapters, we seek feedback on whether any amendments to Part 2 are desirable to ensure the Act appropriately balances relevant rights and interests.

SHOULD NEW ZEALAND LAW PROTECT PEOPLE FROM DISCRIMINATION LINKED TO BEING TRANSGENDER OR NON-BINARY OR HAVING AN INNATE VARIATION OF SEX CHARACTERISTICS?

- 6.6 A key question for this review is whether New Zealand law should protect people from discrimination based on the fact (or the discriminator's belief) they are transgender or non-binary or they have an innate variation of sex characteristics. To help answer that question, we have identified the rationales that have been used on past occasions (both in Aotearoa New Zealand and overseas) to justify bringing new grounds within the protection of anti-discrimination laws. We focused our research on:
- (a) overseas case law from countries where the courts have a role in identifying new prohibited grounds of discrimination, and related academic commentary;
 - (b) international treaties, interpretive statements from the bodies that monitor them and related academic commentary; and
 - (c) the parliamentary debates on the Human Rights Act and earlier anti-discrimination statutes from the 1970s (although we only found occasional discussion in these debates of principles that might underlie an extension of protection to new grounds).
- 6.7 From this research, we have identified six rationales that have been relied on at various times to extend protection (often in combination with each other). As well as these, we also need to consider the implications of te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) for this reform (and vice versa). As we explained in Chapter 4, consideration of Treaty obligations has been an expectation of good policy design in Aotearoa New Zealand for nearly four decades.
- 6.8 No single rationale explains all the protected characteristics in section 21 or provides a unified justification for extending protection to new grounds. Therefore, our approach in this chapter is to assess the extent to which each of the rationales supports the conclusion that people who are transgender or non-binary or who have an innate variation of sex characteristics should be protected by anti-discrimination laws.

History of disadvantage

- 6.9 A common explanation for extending the protection of anti-discrimination laws to a new group is that people in that group have experienced a history of discrimination, disadvantage, prejudice, stigma, vulnerability or stereotyping.¹ This rationale is relied on frequently by overseas judges and international treaty bodies, and we also found hints of it in the New Zealand parliamentary debates.² Many, if not all, of the characteristics already listed in section 21 have been bases in the past for prejudice or discrimination.
- 6.10 This rationale clearly supports extending protection from discrimination to people who are transgender or non-binary or who have an innate variation of sex characteristics. As

¹ For discussion, see Sandra Fredman *Discrimination Law* (3rd ed, Oxford University Press, Oxford, 2022) at 210–218; and Tarunabh Khaitan *A Theory of Discrimination Law* (Oxford University Press, Oxford, 2015) at [3.1.1].

² For example, *Egan v Canada* [1995] 2 SCR 513 at [173]–[175] per Cory J; *San Antonio Independent School District v Rodriguez* 411 US 1 (1973) at 40; *Harksen v Lane NO* [1997] ZACC 12, 1997 (11) BCLR 1489 at [49]; (27 July 1993) 537 NZPD 16965 (Steve Maharey MP); and (27 July 1993) 537 NZPD 16943 (Clem Simich MP). See, similarly, Law Reform Commission of Western Australia *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) at [4.2]. We discuss international treaty bodies further below.

we explained in Chapter 3, people with these characteristics have been subject to long histories of violence, stigmatisation and marginalisation. There are considerable contemporary New Zealand data showing people who are transgender or non-binary continue to experience high levels of discrimination in many different areas of life. Research suggests they also have worse wellbeing indicators than others in the population, including high levels of mental distress and lower household income.

- 6.11 While there are less New Zealand data available on the experiences of people with innate variations of sex characteristics, the information available suggests they too experience discrimination in many areas of life.

Characteristics that are immutable or can only be changed at unacceptable cost

- 6.12 Although a history of stigmatisation or marginalisation provides a strong clue that the protection of anti-discrimination laws is warranted, it may not be enough on its own. For example, murderers or rapists might well experience stigmatisation but might not be thought to warrant the protection of anti-discrimination laws on this basis.
- 6.13 Overseas case law identifies a second explanation.³ Several courts have suggested the protection of anti-discrimination laws should be extended to characteristics that are either:⁴
- (a) immutable (that is, the individual has no power to change them); or
 - (b) so closely tied to a person's sense of identity that they should not be expected to hide or change the characteristic to avoid stigmatisation or discrimination.
- 6.14 The concept of immutability (in the first limb) can generate arid and unhelpful debate about which traits or characteristics truly cannot be altered. For that reason, we prefer to focus on the second limb. We acknowledge, however, that there is case law accepting that gender identity is immutable.⁵
- 6.15 The second limb is grounded in the concern for autonomy that we identified in Chapter 4 as a core value underlying the Human Rights Act.⁶ By prohibiting discrimination based on characteristics that are closely tied to a person's sense of identity, the law seeks to preserve a zone of freedom within which individuals should not be penalised for exercising deeply personal choices.
- 6.16 We think it obvious that an individual's personal experience of gender is so closely tied to their identity that they should not be expected to hide or change it to avoid discrimination. The Superior Court of Québec has reached the same conclusion, holding, for this reason, that gender identity is a prohibited ground under the Canadian Charter of Rights and Freedoms.⁷ The link between gender identity and autonomy has also been

³ For discussion, see Sandra Fredman *Discrimination Law* (3rd ed, Oxford University Press, Oxford, 2022) at 206–210; and Tarunabh Khaitan *A Theory of Discrimination Law* (Oxford University Press, Oxford, 2015) at [3.1.2].

⁴ For example, *Corbiere v Canada* [1999] 2 SCR 203 at [13] per McLachlin and Bastarache JJ for the majority; *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 at [26] per Lady Hale; and *Khosa v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 at [71] per Mokgoro J.

⁵ For example, *Centre for Gender Advocacy v The Attorney General of Québec* 2021 QCCS 191, 481 CRR (2d) 273 at [106]–[109]. See, also, *Hansman v Neufeld* (2023) SCC 14 at [88], expressing apparent approval in obiter.

⁶ See Sandra Fredman *Discrimination Law* (3rd ed, Oxford University Press, Oxford, 2022) at 207.

⁷ *Centre for Gender Advocacy v The Attorney General of Québec* 2021 QCCS 191, 481 CRR (2d) 273 at [109].

relied on by international bodies when exploring the human right to respect for “privacy” or “private life”. For example, the European Court of Human Rights has described gender identity as “a most intimate part of an individual’s life”⁸ and has said the freedom to define one’s own gender identity is “one of the most basic essentials of self-determination”.⁹

- 6.17 In our view, it is equally obvious individuals should not have to undergo intrusive medical interventions to change the sex characteristics with which they were born to avoid discrimination.¹⁰ Apart from anything else, such an expectation would be inconsistent with the right to refuse to undergo medical treatment in section 11 of the New Zealand Bill of Rights Act 1990.

Harms to human dignity

- 6.18 In Chapter 4, we suggested that another core idea underpinning New Zealand’s anti-discrimination laws is advancement of human dignity. Overseas cases about when to recognise a new ground of discrimination often draw on this dignity-enhancing function of anti-discrimination law. For example, in *Egan v Canada*, Cory J said: “The fundamental consideration underlying the ... [decision to recognise a new ground] ... is whether the basis of distinction may serve to deny the essential human dignity of the Charter claimant.”¹¹ In *R (Carson) v Secretary of State for Work and Pensions*, Lord Walker said it was important to consider whether the particular type of discrimination was “intrinsically demeaning” (therefore requiring a high level of scrutiny).¹²
- 6.19 Some overseas courts go so far as to treat harm to human dignity as the overarching test for when to recognise a new ground.¹³ However, we think the dignity rationale primarily serves to reinforce and explain the first two justifications explored above. Differential treatment is more likely to feel demeaning if it unfolds against the background of a history of prejudice.¹⁴ Likewise, differential treatment is more likely to feel demeaning if it penalises a characteristic that is immutable or closely tied to someone’s personal identity.
- 6.20 We think it is clearly demeaning and harmful to human dignity to be denied opportunities to participate in society because of something as deeply personal as your gender identity or your sex characteristics. This is consistent with decisions of overseas courts. For example, the European Court of Justice has said that to tolerate employment discrimination against a transgender person who is intending to undergo gender reassignment would fail to “respect the dignity and freedom to which he or she is entitled”.¹⁵

⁸ *SV v Italy* ECHR (First Section) 55216/08, 11 October 2018 at [62].

⁹ *YY v Turkey* ECHR (Former Second Section) 14793/08, 10 March 2015 at [102]. See, similarly, *G v Australia* UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) (HRC) at [7.2].

¹⁰ There is implicit support for this proposition in *Semenya v Switzerland* ECHR (Third Section) 10934/21, 11 July 2023 at [169] and [187]. This decision is on appeal to the Grand Chamber.

¹¹ *Egan v Canada* [1995] 2 SCR 513 at [171].

¹² *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] AC 173 at [58].

¹³ For example, *Harksen v Lane NO* [1997] ZACC 12, 1997 (11) BCLR 1489 at [46].

¹⁴ See *Harksen v Lane NO* [1997] ZACC 12, 1997 (11) BCLR 1489 at [49].

¹⁵ Case C-13/94 *P v S* [1996] ECR I-2143 at [22]. See, also, *Centre for Gender Advocacy v The Attorney General of Québec* 2021 QCCS 191, 481 CRR (2d) 273 at [328].

Consistency with international law

- 6.21 A fourth rationale for extending the protection of anti-discrimination laws to a new ground is that it is either required by or consistent with developments in international human rights law. This has been a key driver of past reform of anti-discrimination laws in Aotearoa New Zealand. It is also one of the key reform considerations we identified in Chapter 4. Notably, the long title to the Human Rights Act states one of the Act’s aims as “to provide better protection for human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights”.
- 6.22 The current state of international law on relevant issues is quite complex. In sum, there is a large and growing body of international authority that interprets international human rights treaties to which Aotearoa New Zealand is a party as requiring people to be protected from discrimination based on their gender identity or sex characteristics.
- 6.23 Gender identity, sex characteristics or equivalents are not mentioned explicitly as grounds of discrimination in any human rights treaties to which Aotearoa New Zealand is a party. However, three treaties contain an open-ended ground of “other status” under which the committees with responsibility for monitoring these treaties (known as treaty bodies) can periodically recognise new grounds.¹⁶ On that basis, these three treaty bodies have stated repeatedly in interpretive statements (called general comments) that discrimination directed at people who are transgender or intersex violates the respective treaty.¹⁷
- 6.24 One of these bodies — the United Nations Human Rights Committee — has also upheld individual complaints of discrimination by transgender people.¹⁸ We are not aware of any equivalent complaints being taken to the Human Rights Committee by people with an innate variation of sex characteristics. However, the European Court of Human Rights has upheld such a complaint under the European Convention (which also has an “other status” ground).¹⁹
- 6.25 More broadly, the treaty bodies associated with six human rights treaties to which Aotearoa New Zealand is a party make frequent mention in their general comments of the histories of violence, discrimination and exclusion suffered by people who are transgender or intersex. The treaty bodies conclude accordingly that people with these characteristics warrant particularly careful protection under international human rights law.²⁰

¹⁶ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 2(1) and 26; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 2(2); and Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 2(1).

¹⁷ For example, United Nations Human Rights Committee *General Comment No 36: Article 6 – right to life* (3 September 2019) at [23] and [61]; United Nations Committee on Economic, Social and Cultural Rights *General Comment No 20: Non-discrimination in economic, social and cultural rights* (20 July 2009) at [32]; and United Nations Committee on the Rights of the Child *General Comment No 15: on the right of the child to the enjoyment of the highest attainable standard of health* (17 April 2013) at [8]. The treaty bodies do not mention explicitly people who are non-binary.

¹⁸ *G v Australia* UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) (HRC); and *Savolaynen v Russian Federation* UN Doc CCPR/C/135/D/2830/2016 (HRC) (23 July 2023).

¹⁹ *Semenya v Switzerland* ECHR (Third Section) 10934/21, 11 July 2023. This decision is on appeal to the Grand Chamber.

²⁰ For example, United Nations Human Rights Committee *General Comment No 36: Article 6 – right to life* (3 September 2019) at [23]; United Nations Committee on Economic, Social and Cultural Rights *General Comment No 20: Non-*

- 6.26 As far as we know, no individual complaint has yet been taken against Aotearoa New Zealand to one of these treaty bodies about discrimination based on gender identity or sex characteristics. However, the absence of express grounds of protection in section 21 of the Human Rights Act has attracted negative attention in various United Nations reporting processes.²¹ This is likely to continue unless or until there is legislative reform.

Consistency with other liberal democratic societies

- 6.27 A fifth rationale for extending the grounds of discrimination is consistency with other liberal democratic societies with which Aotearoa New Zealand shares a common heritage. For example, in the second reading debate preceding the enactment of the Human Rights Act, the sponsoring minister noted that the Bill “enables us to measure ourselves against other developed nations and to say that we too are a country that places the highest value on the freedom and equality of all our people”.²²
- 6.28 It is therefore notable that most jurisdictions with which we share close legal and cultural ties have wording in their anti-discrimination statutes that specifically protects against discrimination based on a person’s gender identity.²³ This includes:
- (a) Australia and each of Australia’s eight states and territories;
 - (b) Canada and each of Canada’s 13 provinces and territories; and
 - (c) the United Kingdom.
- 6.29 The position in the United States is more varied. We understand, however, that around half of the 50 states have legislation that explicitly prohibits discrimination in employment based on a person’s gender identity.²⁴
- 6.30 Express legislative protection from discrimination based on a person’s sex characteristics or intersex status is common in Australia but not yet in the other jurisdictions mentioned.
- 6.31 Where explicit protection is lacking, the courts, tribunals and human rights bodies in these countries have sometimes filled gaps through interpretation. For example:

discrimination in economic, social and cultural rights (20 July 2009) at [32]; United Nations Committee on the Rights of the Child *General Comment No 20: on the implementation of the rights of the child during adolescence* (6 December 2016) at [33]; United Nations Committee against Torture *General Comment No 2: Implementation of article 2 by States parties* (24 January 2008) at [21]; United Nations Committee on the Elimination of Discrimination against Women *General Comment No 36: on the right of girls and women to education* (23 November 2017) at [45] and [66]; and United Nations Committee on the Rights of Persons with Disabilities *General Comment No 8: on the right of persons with disabilities to work and employment* (7 October 2022) at [22] and [23].

²¹ United Nations Committee on the Elimination of Discrimination against Women *Concluding observations on the eighth periodic report of New Zealand* (25 July 2018) CEDAW/C/NZL/CO/8 (2018) at [11(a)] and [12(a)]; United Nations Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of New Zealand* (26 September 2022) CRPD/C/NZL/CO/2-3 at [8(b)]; and United Nations General Assembly *Report of the Working Group on the Universal Periodic Review* (1 April 2019) A/HRC/41/4 at [10], [122.51] and [122.52].

²² (27 July 1993) 537 NZPD 16904 (Douglas Graham MP). See, similarly, Queensland Human Rights Commission *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022) at 261.

²³ As we explore in Chapter 7, the exact wording varies considerably.

²⁴ See Justia “Employment Discrimination Laws: 50-State survey” (September 2022) <www.justia.com>.

- (a) Ireland’s Equality Tribunal (now the Workplace Relations Commission) has held that discrimination against a transgender person is discrimination based on both gender (which, in the Irish legislation, is used synonymously with sex) and disability;²⁵
- (b) some human rights commissions in Canada have defined existing grounds (such as sex, gender or gender identity) to protect intersex and two-spirited people;²⁶ and
- (c) the United States Supreme Court (as well as some state enforcement bodies in the United States) has said the ground of sex in employment legislation covers discrimination against transgender employees.²⁷

Changing social norms

- 6.32 When expansions to the grounds of discrimination are led by legislatures rather than courts, legislators often rely on changing social norms as a reason for reform. As Graeme Reeves MP said in the debates leading to the enactment of the Human Rights Act: “Things can happen only as societal attitudes become receptive to new ideas, to changing values, and to changing perceptions of what is just.”²⁸
- 6.33 Although we accept parliaments generally only act when they have the broad support of the community, in a review of anti-discrimination laws, caution is needed when relying on social consensus to justify reform. As we suggested earlier in the chapter, a key aim of anti-discrimination laws is to protect groups in the community who have experienced a history of discrimination, disadvantage, stereotyping or prejudice.
- 6.34 To the extent data about changing social attitudes are considered relevant, those attitudes should be ascertained where possible from well-designed and properly administered surveys. We are only aware of one survey in Aotearoa New Zealand that asked a direct question about people’s attitudes to whether people who are transgender should be protected from discrimination. In the Ipsos Survey conducted in 2023, 84 per cent of people agreed that transgender people should be protected from discrimination in employment, housing and access to businesses such as restaurants and stores.²⁹ This is similar to the results in a United Kingdom survey in which 76 per cent of respondents agreed that prejudice against transgender people was always or mostly wrong.³⁰
- 6.35 We are not aware of any comparable data concerning attitudes about discrimination against people with an innate variation of sex characteristics.
- 6.36 There have been data generated on public attitudes to some specific issues and concerns (such as access to bathrooms and competitive sports) with results seeming to vary substantially depending on the way the particular question is posed. As we explained earlier in the chapter, an amendment to section 21 will not mean that all differences in

²⁵ For example, *Hannon v First Direct Logistics Limited* Equality Tribunal (Ireland) DEC-S2011-066, 29 March 2011 at [4.2] and [4.4].

²⁶ For example, Alberta Human Rights Commission “Protected grounds” <albertahumanrights.ab.ca>; and British Columbia’s Office of the Human Rights Commissioner “Human rights in BC” <bchumanrights.ca>.

²⁷ *Bostock v Clayton County* 590 US 644 (2020).

²⁸ (27 July 1993) 537 NZPD 16912.

²⁹ Ipsos *LGBT+ Pride 2023: A 30-Country Ipsos Global Advisor Survey* (2023) at 35.

³⁰ Hannah Morgan and others *Attitudes to transgender people* (Equality and Human Rights Commission, Research Report, Manchester, August 2020) at 7.

treatment based on a person's gender identity or sex characteristics are unlawful. Specific issues and concerns can be dealt with through the Part 2 exceptions that we discuss later in this Issues Paper. We refer to relevant survey data there.

Te Tiriti o Waitangi | Treaty of Waitangi

- 6.37 We also need to consider the implications of the Treaty for whether to amend section 21.
- 6.38 Under article 3 of the Treaty, the Crown undertook to protect Māori and to give them the same rights and duties of citizenship as British subjects — Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.³¹ Article 3 obliges the government to exercise its kāwanatanga (governorship) both to care for Māori and to ensure outcomes for Māori are equivalent to those enjoyed by non-Māori.³² It is a guarantee of equity that obliges the Crown to address disparities between Māori and other New Zealanders.³³ It underpins the Treaty principles of active protection and equity.³⁴
- 6.39 We are interested to understand whether providing protection from discrimination to people who are transgender or non-binary or who have an innate variation of sex characteristics would advance the goals underlying article 3 of the Treaty. As we explained in Chapter 5, Māori who are transgender or non-binary or who have an innate variation of sex characteristics experience discrimination alongside other people in these groups. It is more difficult to establish whether they experience discrimination at higher rates as there is currently an absence of solid data.
- 6.40 One reason for the absence of solid data is that some surveys ask questions about rainbow communities generally (rather than of gender minorities or people who have an innate variation of sex characteristics). Other reasons are that not all seek comparative data between Māori and non-Māori and that, even when these data are sought, sometimes the results are not statistically significant because of the small sample sizes involved.
- 6.41 Based on the 2021 Household Economic Survey, Tatauranga Aotearoa | Stats NZ estimates 2,800 Māori are transgender or non-binary.³⁵ We may have more information about this after the results of the 2023 Census are published.
- 6.42 As we explained in Chapter 5, there are some data suggesting that Māori rainbow young people have worse wellbeing statistics than Pākehā rainbow young people. At a more general level, we know that having more than one minority identity can increase experiences of discrimination, harassment and violence.³⁶ We also know that it can be

³¹ We rely in this Issues Paper on the translation of Sir Hugh Kawharu as appended to the Cabinet Office *Cabinet Manual* 2023 at 157–158.

³² See, for example, Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 33–34.

³³ See, for example, Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22.

³⁴ See, for example, Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 54–55.

³⁵ Tatauranga Aotearoa | Stats NZ “LGBT+ population of Aotearoa: Year ended June 2021” (9 November 2022) <www.stats.govt.nz>.

³⁶ See, for example, Te Kāhui Tika Tangata | Human Rights Commission *PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 10 and 19.

difficult for a person who is experiencing discrimination to pinpoint the cause of the discrimination. As one participant at the wānanga we convened to understand Māori perspectives put it: “It’s not possible to separate parts of yourself.”³⁷

- 6.43 Based on our preliminary research and engagement (including at the wānanga), we understand that many Māori who are transgender or non-binary or who have an innate variation of sex characteristics would welcome having more explicit protection from anti-discrimination laws. We are also aware that one of the claims in the Mana Wāhine kaupapa inquiry being undertaken by Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal refers to the failure of the Human Rights Act to protect takatāpui from discrimination.³⁸
- 6.44 We think article 3 of the Treaty is most obviously relevant to Te Aka Matua o te Ture | Law Commission’s work when the Commission is reviewing laws and policies that have a disproportionate impact on Māori. We have not reached a concluded view on the relevance of article 3 to this review and welcome feedback on this.
- 6.45 We are also interested to understand the implications for this review of article 2 of the Treaty and, specifically, the Crown’s undertaking to protect the exercise by Māori of tino rangatiratanga.³⁹ We think the main issues that arise in respect of article 2 concern the potential for regulation of discrimination under state law to intrude on the exercise of tikanga. Those issues are best addressed later in the Issues Paper once the Human Rights Act’s regime of rules and exceptions has been more thoroughly explained. We address it in Chapter 17.

SHOULD SECTION 21 BE AMENDED?

- 6.46 Based on the above analysis of principle and precedent, we have reached the preliminary conclusion that New Zealand laws should protect people from discrimination that is linked to the fact (or the discriminator’s belief) they are transgender or non-binary or they have an innate variation of sex characteristics. There is, however, a separate question as to whether a legislative amendment is necessary or desirable to achieve this. As we stated in Chapter 4, legislative change should only be undertaken if it is necessary and if it is the most appropriate way to achieve a policy goal.⁴⁰

The case for no amendment to section 21

- 6.47 The argument against amending section 21 hinges on the view that the existing grounds in section 21 are already wide enough to protect people who are transgender or non-binary or who have an innate variation of sex characteristics.
- 6.48 One possibility is that these groups already receive protection under the prohibited ground of sex. In 2006, Te Tari Ture o te Karauna | Crown Law released a reasoned opinion concluding that discrimination based on a person’s gender identity is

³⁷ For further discussion of this wānanga, see Chapter 5.

³⁸ The particular claim is Wai 2843, brought by Ahi Wi-Hongi. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Chief Historian’s Pre-Casebook Discussion Paper for the Mana Wāhine Inquiry* (Wai 2700, July 2020) at 77.

³⁹ We explain the concept of tino rangatiratanga in Chapter 17.

⁴⁰ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [2.3]. See also Cabinet Office *Cabinet Manual 2023* at [7.24]: “unnecessary new legislation” should be avoided.

discrimination based on sex.⁴¹ The opinion focused on discrimination against transgender people who identify as male or female. It did not address how the ground of sex might apply to people who identify outside that gender binary or the position of people who have an innate variation of sex characteristics. However, on later occasions, the government has stated that protection also extends to people who are “gender diverse” or “intersex” (although without explaining its reasons for this view).⁴²

- 6.49 Te Kāhui Tika Tangata | Human Rights Commission also believes that discrimination against people who are transgender or non-binary or who have an innate variation of sex characteristics is sex discrimination. It accepts and mediates complaints on this basis.⁴³
- 6.50 As far as we are aware, no New Zealand court or tribunal has yet determined whether discrimination based on a person’s gender identity or sex characteristics falls under the ground of sex in section 21, although we are aware of two cases currently before Te Taraipūnara Mana Tangata | Human Rights Review Tribunal in which the point is being argued.⁴⁴ Te Mana Whanonga Kaipāho | Broadcasting Standards Authority has held that, in the context of broadcasting standards, sex discrimination includes discrimination against transgender people.⁴⁵ Claims of sex discrimination by transgender complainants have succeeded in several other jurisdictions.⁴⁶
- 6.51 A second possibility is that the three groups are protected by the prohibited ground of disability. Section 21 sets out what the ground of disability means. The definition includes “any ... loss or abnormality of psychological, physiological, or anatomical structure or function”.
- 6.52 In some countries, transgender complainants have successfully relied on the ground of disability (generally in tandem with a sex or gender ground).⁴⁷ We are unaware of overseas cases where a complainant with an innate variation of sex characteristics has relied on the prohibited ground of disability, although we are aware of commentary that raises this possibility.⁴⁸

⁴¹ Letter from Cheryl Gwyn (Acting Solicitor-General) to the Attorney-General “Human Rights (Gender Identity) Amendment Bill” (2 August 2006) at [1] and [30].

⁴² Te Tāhū o te Ture | Ministry of Justice *Proposals against incitement of hatred and discrimination* (2021) at 23.

⁴³ See Te Kāhui Tika Tangata | Human Rights Commission *PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 14.

⁴⁴ See Alex Casey “Deadnaming, insults and harassment: trans Corrections officer brings landmark human rights case against employer” (16 May 2024) The Spinoff <thespinoff.co.nz>; and LAVA “Discrimination claim served on Pride Board” (30 December 2022) <www.lava.nz>.

⁴⁵ *Adam v Radio New Zealand BSA* 2022-067, 27 February 2023 at [35].

⁴⁶ For example, *Chief Constable of West Yorkshire Police v A* [2004] UKHL 21, [2005] 1 AC 51; *Bostock v Clayton County* 590 US 644 (2020); and *Case C-13/94 P v S* [1996] ECR I-2143.

⁴⁷ For example, *Sheridan v Sanctuary Investments Ltd (No 3)* 1999 BCHRT 4, 33 CHRR D/467; and *Hannon v First Direct Logistics Limited* Equality Tribunal (Ireland) DEC-S2011-066, 29 March 2011.

⁴⁸ Tia Frances Koonse “‘There is No There, There’ – How Anti-Discrimination Successes for Trans Litigants under the Categories of Sex and Disability Can Further the Intersex Rights Movement” (2009) 8 Dukeminier Awards: Best Sexual Orientation and Gender Identity LR 333.

- 6.53 We understand the Human Rights Commission has received complaints from transgender people of discrimination on the ground of disability in the past.⁴⁹ As far as we are aware, no New Zealand tribunal or court has ever considered whether people who are transgender or non-binary or who have an innate variation of sex characteristics could fall within the ground of disability.

Legislative amendment is necessary and desirable

- 6.54 Despite these arguments being available, we have reached the preliminary view that legislative amendment 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. Our reasons are as follows.
- 6.55 First, although it is nearly two decades since the Crown Law opinion, there is no decision from any New Zealand court or tribunal clarifying the law. For all that time (and even before then), people in the affected communities have been calling for certainty as to their legal rights. We do not think this uncertainty is satisfactory in relation to a matter as fundamental as a person's right to freedom from discrimination. It also leaves open the possibility that a government may interpret the position differently in future or in the context of a specific policy decision or legal proceeding.
- 6.56 Second, the current approach relies on individual litigants bringing cases to a court or tribunal to clarify the law. This is an unfair burden on individuals from disadvantaged communities.
- 6.57 Third, whether a court or tribunal will ultimately find that a complainant who is transgender or non-binary or who has an innate variation of sex characteristics is protected by existing grounds is a matter of speculation.⁵⁰ It is possible (perhaps even likely) some degree of protection will be extended, especially given the experience in other countries. However, it is by no means certain. The result may depend in part on factors such as the way the case is presented and the evidence that is placed before the court or tribunal.
- 6.58 The precise scope of protection that will ultimately be extended is also a matter of speculation. It is possible protection will extend to all people who fall within the three groups. However, it is also possible protection will be uneven, fact-dependent or incomplete. For example, we have not found overseas authority for extending protection under the ground of sex to complainants who are non-binary or who have an innate variation of sex characteristics. Although some commentators argue persuasively these groups would be entitled to protection, their position is more vulnerable.⁵¹ Another group that might be vulnerable is transgender people who are gender fluid or early in their transition.
- 6.59 There might also be uneven coverage under the disability ground. The cases that have succeeded so far in other countries have relied on a formal diagnosis of gender dysphoria.

⁴⁹ See Te Kāhui Tika Tangata | Human Rights Commission *Human Rights in New Zealand Today* | Ngā Tika Tangata o Te Motu (September 2004) at 360.

⁵⁰ See Elisabeth McDonald "Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993" (2007) 5 NZJPL 301 at 307.

⁵¹ For example, A Russell "*Bostock v Clayton County*: The Implications of a Binary Bias" (2021) 106 Cornell L Rev 1601 at 1603; and Sam Parry "Sex Trait Discrimination: Intersex People and Title VII after *Bostock v Clayton County*" (2022) 97(4) Wash L Rev 1149 at 1150.

It might be more difficult for a person to bring a case of disability discrimination if they have not been able, or have not wished, to access a diagnosis. Again, those in an early stage of transition may face particular difficulties. Although the legislative definition of disability is wide, Te Kōti Matua | High Court has said that a condition needs to have an element of gravity or permanence to qualify.⁵²

- 6.60 Fourth, relying on the disability ground does not sit well with how some people in these groups identify themselves. Some may indeed identify as having a disability (especially bearing in mind the social model of disability, which views a person as being disabled by societal barriers rather than by a condition). Others, however, might see this as medicalising and even offensive.⁵³
- 6.61 Similarly, the sex ground does not sit comfortably with how everyone in these groups identifies themselves. For example, we understand many people with an innate variation of sex characteristics see their variation as something quite separate from their sex.
- 6.62 Fifth, we think the absence of explicit protection may inhibit access to justice for people who are transgender or non-binary or who have an innate variation of sex characteristics. It makes it hard for people to know their rights and, conversely, their legal obligations. It is striking that, despite the data suggesting people in these communities experience high levels of discrimination, no case has yet been determined by the Human Rights Review Tribunal. As we will discuss in Chapter 18, Human Rights Commission data about the number of complaints it receives and mediates show a very low proportion of complaints from these groups. The Commission has said it is consistently told by transgender and non-binary people that they do not feel protected by the existing grounds.⁵⁴
- 6.63 People are more likely to understand their rights and obligations when the law is clear and accessible. Clarity, certainty and accessibility of the law can also make dispute resolution more efficient, for example, by encouraging early settlement.
- 6.64 Finally, we think amending section 21 would have an important educational and symbolic function. It would make a clear statement about what forms of discrimination are not allowed in Aotearoa New Zealand.⁵⁵ This educative and symbolic function has been discussed in other jurisdictions in relation to gender identity and in Aotearoa New Zealand during parliamentary debates preceding the enactment of the Human Rights Act.⁵⁶ For example, gender identity was added as an express ground in Canadian legislation for

⁵² *B v Waitemata District Health Board* [2013] NZHC 1702, [2013] NZAR 937 at [64]–[65].

⁵³ See Dean Spade “Resisting Medicine, Re/modeling Gender” (2003) 18 *Berkeley Women’s LJ* 15 at 35; and Ali Szemanski “When Trans Rights Are Disability Rights: The Promises and Perils of Seeking Gender Dysphoria Coverage under the Americans with Disabilities Act” (2020) 43 *Harvard Journal of Law and Gender* 137 at 160.

⁵⁴ Te Kāhui Tika Tangata | Human Rights Commission *PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 14–15.

⁵⁵ See Elisabeth McDonald “Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993” (2007) 5 *NZJPL* 301 at 314.

⁵⁶ For example, (29 August 2000) Victoria Legislative Assembly *Parliamentary Debates* at 246 (Robert Dean MP); Government of Canada “Gender Identity and Gender Expression: Questions and Answers” (1 September 2021) <www.justice.gc.ca>; and (27 July 1993) 537 *NZPD* 16951 (Sonja Davies MP).

reasons of visibility despite case law that had already found it was covered by the ground of sex.⁵⁷

- 6.65 For all these reasons, our preliminary conclusion is that an amendment to section 21 is necessary and desirable to ensure adequate protection from discrimination to people who are transgender or non-binary or who have an innate variation of sex characteristics. Notably, although the Human Rights Commission thinks protection is already available under the sex ground, it also thinks reform is needed to clarify the law.⁵⁸
- 6.66 This conclusion raises important questions such as how to frame an amendment to section 21 and what exceptions the legislation should specify. We examine those questions in later chapters.

QUESTIONS

Q6

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?

Q7

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?

⁵⁷ Government of Canada “Gender Identity and Gender Expression: Questions and Answers” (1 September 2021) <www.justice.gc.ca>; and Canadian Human Rights Act Review Panel *Promoting Equality: A New Vision* (2000) at 108.

⁵⁸ Te Kāhui Tika Tangata | Human Rights Commission *PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 14–15 and 20. Government documents have expressed the same view: Te Tāhū o te Ture | Ministry of Justice *Proposals against incitement of hatred and discrimination* (2021) at 23.

CHAPTER 7

Options for new grounds

INTRODUCTION

- 7.1 In this chapter, we identify options for amending section 21 of the Human Rights Act 1993 to protect people expressly from discrimination that is linked to the fact (or the discriminator's belief) that they are transgender or non-binary or they have an innate variation of sex characteristics. This chapter follows on from our preliminary conclusion in Chapter 6 that it is necessary and desirable to amend section 21.
- 7.2 We are interested in feedback on which option (or options) is most appropriate. In this chapter, we divide potential options into three broad approaches:
- (a) A new stand-alone ground (or grounds) to provide *asymmetrical* protection. A protection is asymmetrical if it extends to a characteristic held by a disadvantaged minority rather than a characteristic held by everyone.¹ An example is the prohibited ground of disability in section 21(1)(h) of the Human Rights Act. People without a disability do not receive protection. Similarly, the ground of employment status only applies to those who are unemployed, a beneficiary or receiving ACC payments.²
 - (b) A new stand-alone ground (or grounds) that provides *symmetrical* protection. A protection is symmetrical if it extends to a characteristic held by everyone. Examples in section 21 of the Human Rights Act include sex, race and sexual orientation.
 - (c) An amendment to section 21 to clarify the scope of the prohibited ground of sex — for example, to clarify that it protects people from discrimination that is linked to the fact (or the discriminator's belief) they are transgender or non-binary or they have an innate variation of sex characteristics. (This would also provide symmetrical protection.)
- 7.3 These approaches are not mutually exclusive. For example, it could be that one approach is most appropriate to protect people who are transgender or non-binary but that a different approach is more appropriate to protect people who have an innate variation of sex characteristics. If new stand-alone grounds are added (approaches (a) or (b)), we would need to consider whether it is also desirable to clarify when the existing ground of sex continues to apply (approach (c)).

¹ See, for example, Bradley A Areheart "The Symmetry Principle" (2017) 58 BC L Rev 1085.

² Human Rights Act 1993, s 21(1)(k).

STAND-ALONE GROUNDS THAT TAKE AN ASYMMETRICAL APPROACH

- 7.4 As we explained above, an asymmetrical approach singles out for protection a group that has experienced a history of disadvantage, discrimination or marginalisation. In this case, an asymmetrical approach would seek to protect people from discrimination that is linked to the fact (or the discriminator's belief) they are transgender or non-binary or they have an innate variation of sex characteristics. It would not protect people from discrimination that is linked to the fact or discriminator's belief they are cisgender or they have sex characteristics that conform to medical norms for the male or female body.
- 7.5 Possible advantages of an asymmetrical approach include that it promotes a substantive rather than a formal view of equality (by limiting protection to those who most need it), it reduces the possibility of specious claims by people from an advantaged group and it sends a clear signal about which groups in the community are in need of protection.
- 7.6 As we explain further below, possible disadvantages of an asymmetrical approach include difficulties in defining who is covered by the ground and ensuring the language is sufficiently future-proof, and the risk of people missing out on protection because a court or tribunal takes a narrow interpretation of the meaning of particular terms. Because an asymmetrical ground does not apply to everyone, it can also expose minorities to claims of special treatment.
- 7.7 If an asymmetrical protection is considered desirable, we can see two different ways to achieve it.

Use group descriptors

- 7.8 A new ground could use group descriptors to name the people being protected. By group descriptors, we mean generic terms that describe a particular group such as being transgender, non-binary or intersex. Another way to refer to these might be identity terms.
- 7.9 This approach seems relatively uncommon in other countries. We are only aware of a few examples, all from Australia. In New South Wales, legislation prohibits discrimination on “transgender grounds”, whereas “intersex status” is a prohibited ground of discrimination in both federal and South Australian anti-discrimination legislation.³ We are not aware of any examples that use the language of ‘non-binary’.

Possible advantages and disadvantages of a group descriptors approach

- 7.10 The use of group descriptors is the most obvious and straightforward way to achieve asymmetrical protection. On the other hand, we envisage some potential difficulties.
- 7.11 One is that it might be difficult to settle on the appropriate group descriptors to use in legislation given the wide variety of terms that people use to describe themselves. In the *Counting Ourselves* survey (of people in Aotearoa New Zealand who are transgender or non-binary), the most common terms participants used to describe their gender identity were non-binary and transgender. However, participants also used a range of other terms, including trans man, trans woman, genderqueer, gender fluid, gender diverse,

³ Anti-Discrimination Act 1977 (NSW), pt 3A; Sex Discrimination Act 1984 (Cth), s 5C; and Equal Opportunity Act 1984 (SA), s 29(4).

agender and transsexual.⁴ As we discussed in Chapter 2, some people also use culturally specific terms to refer to themselves, including kupu Māori and Pasifika terms.

- 7.12 Using the group descriptor intersex in legislation could also be problematic. As we explained in Chapter 2, we understand not all people who have an innate variation of sex characteristics identify with this term. Some use medical language associated with their particular variation. Others prefer to stick with the term innate variation of sex characteristics, which we discuss further below. Were a ground to refer to being intersex, some people with an innate variation of sex characteristics may not realise they are protected by the ground or might be reluctant to rely on it.
- 7.13 Another potential difficulty is that group descriptors in legislation can quickly become out of date. Australian experience demonstrates this. The Australian Capital Territory introduced the ground of “intersex status” to its anti-discrimination legislation in 2016 but amended the ground to “sex characteristics” four years later.⁵ A report by a non-governmental organisation explained that, while intersex organisations had supported the term intersex status when the ground was introduced, understandings of appropriate terminology had developed since then.⁶ Similarly, in Tasmania, the ground of “intersex variations of sex characteristics” was added in 2013 and changed to “sex characteristics” in 2023.⁷
- 7.14 Finally, to rely on a ground such as being transgender or being intersex, a plaintiff would have to establish this ground applies to them. This leaves room for the possibility that a court or tribunal would take a restrictive approach to who can rely on the ground. For example, a court might take the view that a person must have undergone particular types of gender affirmation to be considered transgender.

An asymmetrical approach that does not rely on group descriptors

- 7.15 It might be possible to achieve asymmetrical protection without using group descriptors. Rather than using a term to describe a group (such as transgender or intersex), a ground could use language to spell out who belongs to that group (such as a person whose gender identity is different to their sex assigned at birth or a person with an innate variation of sex characteristics).
- 7.16 Several overseas countries have grounds of discrimination that refer to a person having taken steps to affirm a sex or gender different from the one assigned at birth:
- (a) In the United Kingdom, the Equality Act has “gender reassignment” as a protected characteristic.⁸
 - (b) In the Australian Capital Territory, the list of prohibited grounds includes the record of a person’s sex having been altered.⁹

⁴ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 7.

⁵ Discrimination Act 1991 (ACT), s 7(1)(v).

⁶ Equality Australia *ACT LGBTQ+ Legal Audit: Reforms for an Inclusive ACT* (2019) at 41.

⁷ Anti-Discrimination Act 1998 (Tas), s 16(eb).

⁸ Equality Act 2010 (UK), ss 4 and 7(1).

⁹ Anti-Discrimination Act 1991 (ACT), s 7(1)(r).

- (c) In Western Australia, gender history is a ground of discrimination.¹⁰ A person has a gender history if they identify as a member of the opposite sex by living, or seeking to live, as a member of that sex.¹¹
- 7.17 These overseas examples may only apply to transgender people who have taken particular steps in their transition. However, it would also be possible to take a broader approach that is not tied to such steps having been taken.
- 7.18 Another example of an asymmetrical protection that does not rely on group descriptors would be to prohibit discrimination based on a variation of sex characteristics or an innate variation of sex characteristics.
- 7.19 We are not aware of any anti-discrimination legislation in comparative jurisdictions that lists having a variation (or innate variation) of sex characteristics as a prohibited ground. However, the term variations of sex characteristics is used in other New Zealand contexts. For example, the term appears in the Integrity Sport and Recreation Act 2023 and Tatauranga Aotearoa | Stats NZ uses it in the relevant data standard.¹²
- 7.20 It might be argued that protecting all variations of sex characteristics casts the net too widely. As well as intersex variations (which are innate), it might include all sex characteristics that are not typical for the person's gender such as a transgender woman who has male sex characteristics.¹³ It might also cover other conditions involving atypical sex characteristics such as hirsutism (excess hair growth) or paediatric breast hypertrophy (which involves atypical and rapid breast growth).
- 7.21 The counter argument would be that discrimination based on the fact or belief a person has a variation of sex characteristics ought to be prohibited regardless of whether the variation is innate. This does not detract from the fact that people with innate variations may face distinct issues and challenges in some circumstances.
- 7.22 Either way, it would be desirable for the Human Rights Act to define what is meant by a variation of sex characteristics (or innate variation).¹⁴ This would not necessarily be straightforward. We understand that, while there is medical consensus on what is considered a difference of sex development,¹⁵ innate variations of sex characteristics is a broader umbrella term and it may not always be clear what falls under it.

Possible advantages and disadvantages of this approach

- 7.23 This approach would retain a focus on groups that have experienced historical disadvantage while avoiding reliance on group descriptors that might become quickly dated. However, a court or tribunal would still need to decide who falls within the

¹⁰ Equal Opportunity Act 1984 (WA), pt IIAA. The Western Australian Law Reform Commission has recommended this ground be replaced with the ground of gender identity: Law Reform Commission of Western Australia *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) at 80–81.

¹¹ Equal Opportunity Act 1984 (WA), s 35AA(1).

¹² Integrity Sport and Recreation Act 2023, s 4(1); and Tatauranga Aotearoa | Stats NZ *Data standard for gender, sex, and variations of sex characteristics* (April 2021).

¹³ See Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 7.

¹⁴ For an example of a statutory definition (albeit not in an anti-discrimination statute), see Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023 (ACT), s 7(1).

¹⁵ See Martine Cools and others “Caring for individuals with a difference of sex development (DSD): a Consensus Statement” (2018) 14 *Nat Rev Endocrinol* 415 at 417.

language used to define the ground. For example, it might need to consider whether a person has a gender identity that is different to their sex assigned at birth (or whether the defendant believed that). In some cases, difficult issues might arise in determining whether someone falls within the ground. It is possible that a court or tribunal might take a narrow interpretation, leading to some people who are transgender or non-binary or who have a variation of sex characteristics falling outside the ground.

STAND-ALONE GROUNDS THAT TAKE A SYMMETRICAL APPROACH

- 7.24 A symmetrical approach is one that protects a characteristic held by everyone — not just those who fall within a disadvantaged minority. In this case, a symmetrical approach would prohibit all discrimination based on, for example, a person's gender identity or sex characteristics. This would include people who are cisgender and who have sex characteristics that conform to medical norms for the male and female body.
- 7.25 Most of the current grounds of discrimination in the Human Rights Act take a symmetrical approach. For example, the ground of sex protects both men and women, the ground of sexual orientation protects people who are lesbian, gay, bisexual or straight and the ground of race protects people of any race.
- 7.26 A symmetrical approach can ensure the widest possible protection from discrimination, may highlight people's commonalities rather than differences and may attract broad community support because it applies to everyone. It acknowledges that some traits or characteristics are so closely tied to personal identity that no one should be expected to hide or change them to avoid stigmatisation or discrimination. Because a symmetrical approach does not rely on identifying specific groups, it may also be more future-proof.
- 7.27 A possible disadvantage of a symmetrical approach is that it may allow people from advantaged majorities to bring discrimination claims that could (in some cases) further disadvantage minority groups. An example might be where a cisgender person claims that an employee network for rainbow staff is discriminatory.¹⁶ This may promote a formal view of equality that fails to recognise some groups face particular disadvantage.
- 7.28 Below, we discuss four options for new grounds that take a symmetrical approach — gender, gender identity, gender expression and sex characteristics. We discuss each option separately, although it is possible to combine some of these together such as “gender identity or expression”.¹⁷
- 7.29 All of these grounds could potentially apply to people who are transgender or non-binary. Sex characteristics is the primary ground that would protect people with an innate variation of sex characteristics under a symmetrical approach. However the other grounds we discuss might be relevant in some circumstances, such as when someone with an innate variation of sex characteristics is discriminated against because of their gender expression or because they are perceived to be transgender.

¹⁶ We note it is possible this would be justified as a “measure to ensure equality”: Human Rights Act 1993, s 73.

¹⁷ For example, Canadian Human Rights Act RSC 1985 c H-6, s 3(1).

Gender

- 7.30 As we discussed in Chapter 2, the term gender is generally used to refer to a person's social identity rather than their physiology. There is a wide variety of terms that can be used to describe someone's gender, including male, female, non-binary, genderqueer and agender.
- 7.31 The ground of gender is not common in anti-discrimination legislation in comparative jurisdictions. While Ireland does have gender as a ground of discrimination, this was originally intended to cover sex discrimination between men and women (there is no separate ground of sex).¹⁸ The ground of gender has subsequently been interpreted as also applying to transgender people.¹⁹ The Irish Government has committed to amending the ground of gender to further clarify that it covers gender identity discrimination.²⁰

Possible advantages and disadvantages of a gender ground

- 7.32 Many people who are transgender describe their gender as male or female.²¹ Therefore, a ground of gender would need to be defined so that it covers both discrimination based on what a person's gender is and discrimination based on having a gender that is different from sex assigned at birth.
- 7.33 A possible disadvantage of this ground is that the term gender is sometimes treated as a synonym for sex. The original draft of the Human Rights Bill had the ground of gender, but this was subsequently changed to sex. Section 67 of the Human Rights Act refers to "jobs with a gender connotation (such as postman or stewardess)". The use of gender in this section seems to mean male or female. There are other examples of references to gender in New Zealand legislation that, in context, may be synonymous with sex.²² There are also overseas examples of gender and sex being treated as synonymous. For example, the Saskatchewan Human Rights Code defines sex as meaning gender.²³
- 7.34 As discussed in Chapter 2, we also know that people ascribe different meanings to the term gender. For example, some view gender as a social construct rather than as an identity.

Gender identity

- 7.35 An alternative to gender would be the ground of gender identity. As we explained in Chapter 2, this term refers to a person's internal and individual experience of gender.

¹⁸ Employment Equality Act 1998 (Ireland), s 6(2)(a); and Equal Status Act 2000 (Ireland), s 3(2)(a).

¹⁹ *Hannon v First Direct Logistics Limited* Equality Tribunal (Ireland) DEC-E2011-066, 29 March 2011 at [4.3] and [4.6]–[4.7]; and *McLoughlin v Paula Smith Charlies Barbers* Workplace Relations Commission ADJ-0001948, 1 May 2018 at 8.

²⁰ See Department of the Taoiseach *Programme for Government: Our Shared Future* (June 2020) <www.gov.ie> at 77.

²¹ See Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 7.

²² For example, Maritime Security Act 2004, s 51(6)(b); and Corrections Act 2004, s 11(6).

²³ The Saskatchewan Human Rights Code SS 2018 c S-24.2, s 2.

- 7.36 Gender identity is a prohibited ground of discrimination in seven Australian jurisdictions.²⁴ In Canada, all 13 provinces and territories have “gender identity” as a prohibited ground of discrimination while “gender identity or expression” is a prohibited ground at the federal level.²⁵

Possible advantages and disadvantages of a gender identity ground

- 7.37 As with the ground of gender, this ground would need to be defined so it covers both discrimination based on a person’s gender identity and discrimination based on having a gender identity that is different from sex assigned at birth. This is because many people who are transgender describe their gender identity as either male or female.
- 7.38 A possible advantage of the ground of gender identity is that it may be less confusing than gender given the range of meanings that is ascribed to the latter. Courts and tribunals would also have overseas case law on which to draw given the prevalence of this ground in Canadian and Australian legislation.
- 7.39 On the other hand, we understand some people do not like the term gender identity on the basis that “one does not simply identify as a gender, but is that gender”.²⁶ Some others consider gender identity to be a “highly westernised concept”.²⁷ We are also aware that some gender-critical people and groups consider gender identity to be a matter of ideology or belief rather than something innate.²⁸

Gender expression

- 7.40 Gender expression refers to a person’s presentation of their gender and can include what they wear and how they speak. As we explained in Chapter 2, a person’s gender expression does not always conform to their gender identity.
- 7.41 In Canada, 11 provinces and territories have “gender expression” as a prohibited ground of discrimination.²⁹ The federal Canadian legislation has “gender identity or expression” as a prohibited ground of discrimination.³⁰ None of these statutes define gender expression.

²⁴ Fair Work Act 2009 (Cth); Sex Discrimination Act 1984 (Cth); Discrimination Act 1991 (ACT); Anti-Discrimination Act 1992 (NT); Anti-Discrimination Act 1991 (Qld); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1998 (Tas); and Equal Opportunity Act 2010 (Vic).

²⁵ Canadian Human Rights Act RSC 1985 c H-6, s 3(1).

²⁶ See Gender Minorities Aotearoa *Trans 101 Glossary: transgender terms and how to use them* (Wellington, 2023) at 4.

²⁷ See Peter Dunne “Framing Equality: Debating Protected Grounds in the Field of Trans and Non-Binary Rights” in Eva Brems, Pieter Cannoot and Toon Moonen (eds) *Protecting Trans Rights in the Age of Gender Self-Determination* (Intersentia, Cambridge, 2020) at 142 (although the author ultimately concludes that gender identity is the best option for a ground of discrimination to protect transgender and non-binary people).

²⁸ See, for example, Speak Up for Women “Terminology” <www.speakupforwomen.nz>. This website defines gender identity as “[t]he belief or inner feeling that you are a boy or a girl, man or woman, which is independent of both socialisation and biological sex”.

²⁹ All except Saskatchewan and Manitoba. In both these provinces, the respective human rights commissions believe the ground of gender identity protects against discrimination based on gender expression: Manitoba Human Rights Commission “Discrimination based on gender identity: A guideline developed under the Human Rights Code” <www.manitobahumanrights.ca> at 3; and Saskatchewan Human Rights Commission “Human Rights of Transgender People” <saskatchewanhumanrights.ca>. There is also a Manitoba case where gender identity was interpreted as including gender expression: *TA v Manitoba* Manitoba Human Rights Adjudication Panel, 4 November 2019 at [32].

³⁰ Canadian Human Rights Act RSC 1985 c H-6, s 3(1).

- 7.42 None of the Australian jurisdictions have gender expression as a stand-alone ground of discrimination in their anti-discrimination legislation. However, all the Australian jurisdictions that have gender identity as a ground define it to include gender expression or gender-related appearance or mannerisms.³¹

Possible advantages and disadvantages of a gender expression ground

- 7.43 A possible advantage of a gender expression ground is that it could protect people who are transgender or non-binary or who have an innate variation of sex characteristics from discrimination related to their outward appearance and presentation. The ground could also protect people who are perceived by others as violating a 'gender norm'. Examples might include a cisgender lesbian who describes herself as 'butch', a cisgender woman who does not like wearing dresses or makeup or a cisgender man who sometimes performs in entertainment venues as a woman. It could also protect people who are in the early stages of transitioning and do not yet wish to disclose that their gender identity is different from their sex assigned at birth. Because it is focused on outward appearance and presentation, a gender expression ground would not cover all types of discrimination that might be experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics. Other grounds would be needed in conjunction with a gender expression ground to achieve wide protection.
- 7.44 A possible disadvantage of a gender expression ground is that it may allow claims that are not closely tied to the rationales we identified in Chapter 6 as justifying new grounds of discrimination. For example, it might allow people to bring claims based on 'gender conforming' types of gender expression. We are aware of two Ontario cases where cisgender men brought gender expression claims relating to stereotypically masculine forms of expression, although neither was successful. In one case, a bearded employee challenged an employer's clean-shaven policy.³² In another, a man who was banned from entering a medical clinic claimed this was due to his "manly" way of expressing himself.³³
- 7.45 While a person's gender-conforming expression may be very important to them, it seems less likely they would have experienced disadvantage, prejudice and stigma on this basis. In some cases, gender expression might not involve a characteristic that can only be changed at unacceptable cost. An example is a student who does not want to comply with school uniform requirements because of personal preference rather than it being closely tied to their sense of identity.
- 7.46 Discrimination provoked by a person's gender expression will often amount to discrimination based on gender identity. This is because the Human Rights Act prohibits discrimination that is based on the belief that a person has a particular characteristic (even if they do not). A gender identity ground may therefore cover many cases of discrimination against people who are transgender or non-binary that is based on their outward expression of gender while avoiding some of the scope issues of a gender expression ground.

³¹ Sex Discrimination Act 1984 (Cth), s 4; Discrimination Act 1991 (ACT), s 2 and dictionary; Anti-Discrimination Act 1991 (Qld), s 4 and sch 1; Anti-Discrimination Act 1992 (NT), s 4; Legislation Act 2021 (SA), s 4; Anti-Discrimination Act 1998 (Tas), s 3; and Equal Opportunity Act 2010 (Vic), s 4.

³² *Browne v Sudbury Integrated Nickel Operations* [2016] HRTO 62.

³³ *Barksey v Four Corners Medical Walk In Clinic/Northwood Medical Clinics Inc* [2016] HRTO 1116.

Sex characteristics

- 7.47 A sex characteristics ground would provide a symmetrical approach to protecting people with an innate variation of sex characteristics. As we explained in Chapter 2, sex characteristics are a person's physical features relating to sex and include genitalia, other sexual and reproductive anatomy, chromosomes, hormones and secondary physical features that emerge from puberty.
- 7.48 The Australian Capital Territory, Queensland, the Northern Territory, Tasmania and Victoria each have sex characteristics as a prohibited ground of discrimination.³⁴
- 7.49 While the ground of sex characteristics would cover people with an innate variation of sex characteristics, it would not be limited to this group. For example, it could apply where someone is discriminated against because of their breast size, amount of body hair or hormone levels. The ground might also cover transgender people. An example might be where a transgender woman is discriminated against because she has facial hair.

Possible advantages and disadvantages of a sex characteristics ground

- 7.50 One benefit of this approach is that it would avoid boundary issues about what intersex or variation means or which variations are protected.³⁵ However, this approach could enable a wide variety of claims, including those that do not involve a history of stigma and disadvantage. The general wording of the ground might also make it less obvious to people with an innate variation of sex characteristics that they are protected by a ground of discrimination.

CLARIFYING THE SCOPE OF THE GROUND OF SEX

- 7.51 A further approach would be to clarify the scope of the ground of sex. This could either be done as an alternative to a stand-alone ground or grounds or alongside stand-alone grounds to clarify the residual meaning of sex discrimination.

Clarifying the scope of the sex ground as an alternative to stand-alone grounds

- 7.52 One option would be to amend the statutory language to clarify that the ground of sex protects people who are transgender or non-binary or who have an innate variation of sex characteristics. The statutory language currently reads: "sex, which includes pregnancy and childbirth". An amended ground might be renamed "sex or gender" and might be given an expanded definition by reference to any of the terms we discussed in previous sections. For example, it might read as follows:

Sex or gender, which includes:

- (a) Pregnancy and childbirth;
- (b) Gender identity;

³⁴ Discrimination Act 1991 (ACT), s 7(1)(v); Anti-Discrimination Act 1991 (Qld), s 7(o); Anti-Discrimination Act 1992 (NT), s 19(1)(ca); Anti-Discrimination Act 1998 (Tas), s 16(eb); and Equal Opportunity Act 2010 (Vic), s 6(oa).

³⁵ For example, we understand there is some debate as to which innate variations of sex characteristics are considered intersex: see Denise Steers "Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics" (PhD thesis, Ōtākou Whakaihū Waka | University of Otago, 2019) at 69.

(c) Gender expression:

(d) Sex characteristics:

- 7.53 This is also a symmetrical approach as everyone has a sex, gender identity, gender expression and sex characteristics.
- 7.54 It might be considered somewhat odd to place concepts like gender identity and expression beside “pregnancy and childbirth”. If so, the latter could be stated separately as a stand-alone ground.
- 7.55 The option of an expansive definition of the ground of sex is not common in other countries but there are some examples to draw from. For example, a Bill that is currently before the United States Senate proposes to amend the definition of sex in the Civil Rights Act to include gender identity and sex characteristics.³⁶ As we explored in Chapter 6, there are examples of courts and tribunals giving the term sex an expansive interpretation to protect people who are transgender in jurisdictions where there is no express ground of discrimination such as gender identity.

Possible advantages and disadvantages of this approach

- 7.56 This approach would acknowledge the interconnectedness between sex, gender and sex characteristics. These concepts are not always separated in other contexts. For example, a person can now apply to have their nominated sex on their birth certificate recorded as non-binary.³⁷ This approach would provide a broad flexible ground that would recognise that people frame their identities in different ways and that there are different views in the community about the relationship between these concepts. It would also recognise that discrimination can sometimes be due to incorrect assumptions. For example, a person with an innate variation of sex characteristics could be discriminated against because someone (wrongly) perceives them as transgender or non-binary.
- 7.57 A possible disadvantage of this approach is that it could appear to conflate concepts that some people see as very different. For example, we understand that some people see their innate variation of sex characteristics as something very separate from their sex or gender. Including new protected characteristics within an existing ground may also make them less visible, so people may not understand the rights and duties they have.

Implications of this approach for exceptions

- 7.58 Another possible disadvantage of a combined sex and gender ground is that it might make applying the Part 2 exceptions more complex. As we explain in Chapter 8, there are numerous exceptions in Part 2 of the Human Rights Act (circumstances in which the Act states that treating someone differently based on a prohibited ground is lawful). Several of those exceptions apply to differences in treatment that are linked to a person’s sex. The difficulty that arises is that not all these sex exceptions would necessarily be appropriate to apply to characteristics such as gender identity, gender expression or sex characteristics. We can see three possible ways of addressing this difficulty.

³⁶ Equality Act HR 15, 118th Congress (2023-2024). See, also, Cal Gov Code § 12926, which provides that sex includes a person’s gender, and that gender means sex and includes a person’s gender identity and expression.

³⁷ Births, Deaths, Marriages, and Relationships Registration Act 2021, ss 24(1)(a) and 25(1)(a); and Births, Deaths, Marriages, and Relationships Registration (Registering Nominated Sex) Regulations 2023, reg 5.

- 7.59 First, each of the sex exceptions could specify that the exception can only be relied on when necessary to advance the exception's underlying policy rationale. That would ensure that, if a particular dimension of 'sex or gender' is not linked to the underlying policy rationale, the exception could not be relied on. This approach would support flexible and context-specific application of the exceptions and is consistent with the idea of proportionality discussed in Chapter 4. However, it would give little guidance to private individuals and organisations about their duties and entitlements. As we have noted elsewhere, it can also be difficult to identify the underlying policy rationale for some exceptions.
- 7.60 A second approach would be for each of the current sex exceptions to specify which aspects of the 'sex or gender' ground are relevant for the particular exception. That would provide far clearer guidance for private individuals and organisations about their obligations under the Human Rights Act. However, if that degree of clarity is needed, it is hard to see why this approach is preferable to adding new stand-alone grounds to section 21.
- 7.61 A third approach would be to refer to 'sex or gender' in relevant exceptions and give no specific guidance as to which aspects of this composite ground are engaged by the particular exception. In one sense, this would replicate the current position. As we explained in Chapter 6, many people (including government agencies) take the view that the sex ground already prohibits discrimination based on gender identity or sex characteristics. That presumably means that, in practice, the sex exceptions already apply to gender identity or sex characteristics to the extent appropriate.
- 7.62 This approach has the advantage of simplicity and avoids difficult questions about how to distinguish between a person's sex and their gender. However, it may result in overreach. This might occur in situations where the underlying policy rationale for the exception makes sense when applied to some dimensions of 'sex or gender' but not others. An example might be an exception that is most relevant to physical sex characteristics and does not make sense when applied to gender identity or gender expression.

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

- 7.63 If new stand-alone grounds are added to the Human Rights Act (whether asymmetrical or symmetrical), a further option would be to amend the ground of sex to clarify the circumstances in which it would continue to apply. Below, we discuss two possible amendments, although we see difficulties with each of them. We also discuss the option of leaving the ground of sex as it is.

Defining sex as biological sex

- 7.64 We are aware of suggestions that the ground of sex should be defined as referring to a person's biological sex and that exceptions in the Act that apply to sex should relate to

biological sex.³⁸ This is an issue that is being discussed in the United Kingdom with respect to the Equality Act 2010.³⁹

- 7.65 We have identified some difficulties with confining the ground of sex to a person's biological sex. One issue is that it would be unclear what the markers of biological sex would be and how they would be assessed. For example, would a person only be able to rely on the ground of sex where all their sex characteristics align with a particular sex? If that were the case, this could raise difficult issues, including for people with an innate variation of sex characteristics.
- 7.66 This approach also raises the possibility of people being asked to prove they are a particular sex. It is unclear what kind of evidence would be required and whether individuals could be asked to provide information that is highly personal and that is, in some cases, unknown to most people (for example, their sex chromosomes).
- 7.67 Another relevant point is that discrimination is often about the defendant's belief about a person rather than their biological characteristics. If an employer advertised a role as being for women only or paid women less, a transgender woman who was not considered for the role or was paid less would experience the same discrimination as a cisgender woman in the same position regardless of their biological characteristics. It may therefore be unnecessary to define the ground of sex in relation to biology.

Defining sex with reference to birth certificates

- 7.68 Another option is that the ground of sex could be defined as meaning the sex marker listed on a person's birth certificate. This would mean that people who are transgender or non-binary who have obtained a birth certificate that lists their nominated sex would be treated as that sex for the purposes of the Human Rights Act.
- 7.69 Where a person's gender identity differs from their sex assigned at birth, this approach would ensure that only people who have taken formal steps to have their nominated sex recognised are regarded as being of that sex for the purposes of the Human Rights Act. Those formal steps will have included making a statutory declaration that they identify as a person of the nominated sex.⁴⁰ This approach would also provide a clear way of determining a person's sex for the purposes of the Act.
- 7.70 One difficulty with this approach is that it might lead to inconsistencies. An example might be a transgender person who was born overseas and cannot obtain a birth certificate in their nominated sex.
- 7.71 Another issue is that a person can have their nominated sex on their birth certificate recorded as non-binary.⁴¹ A Cabinet paper on introducing a self-identification process acknowledged that this approach conflated sex and gender but described it as a

³⁸ See, for example, Prue Hyman "New Zealand Government proposal on 'hate speech': It's a mistake" (December 2021) Lesbian Action for Visibility in Aotearoa <www.lava.nz>; and Speak Up for Women *Briefing to the Incoming Minister of Justice & Attorney General* (13 December 2023) <www.speakupforwomen.nz>.

³⁹ For example, Josh Parry "Tories pledge to tackle 'confusion' over legal definition of sex" (3 June 2024) BBC <www.bbc.com>.

⁴⁰ Births, Deaths, Marriages, and Relationships Registration Act 2021, s 24(1)(b).

⁴¹ Births, Deaths, Marriages, and Relationships Registration Act 2021, ss 24(1)(a) and 25(1)(a); and Births, Deaths, Marriages, and Relationships Registration (Registering Nominated Sex) Regulations 2023, reg 5.

compromise to ensure there were no further delays in implementing the reforms.⁴² If a person's sex for the purposes of the Human Rights Act was restricted to what was on their birth certificate, this would mean some people's sex would be considered to be non-binary, which is an umbrella term associated with gender. This blurring of sex and gender identity may raise difficulties with respect to exceptions given that there may be separate exceptions that apply to sex and gender identity.

- 7.72 If this approach were taken, it may be necessary to clarify the relationship with a provision in the Births, Deaths, Marriages, and Relationships Registration Act 2021 that states that agencies are not limited to considering the information in a birth certificate when ascertaining a person's sex or gender for a particular purpose.⁴³

No amendment to the ground of sex

- 7.73 A third option would be to leave the ground of sex as it is. This would leave it to a tribunal or court to decide in an individual case whether an individual was discriminated against "by reason of" sex and whether any of the exceptions relating to sex apply.
- 7.74 An advantage of this approach is that it would allow fact-specific consideration. It would also recognise that there are different rationales underlying the exceptions that currently apply to the ground of sex. For example, an exception in the Act that allows a barber to only offer men's haircuts has a very different purpose to an exception in the Act that allows competitive sporting events to be restricted to people of one sex.
- 7.75 A disadvantage of this approach is that it may not provide sufficient clarity and certainty. For example, businesses that provide facilities for one sex may be unsure who they are allowed to exclude from those facilities.

QUESTIONS

- Q8** Which of the options discussed in this chapter do you think is best for protecting people who are transgender or non-binary?
- Q9** Which of the options discussed in this chapter do you think is best for protecting people who have an innate variation of sex characteristics?
- Q10** 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?
- Q11** 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?

⁴² Office of the Minister of Internal Affairs "Introducing a self-identification process to recognise gender on birth certificates" (19 May 2021) at [13].

⁴³ Births, Deaths, Marriages, and Relationships Registration Act 2021, s 79(2).

CHAPTER 8

Introduction to Part 2 of the Human Rights Act

INTRODUCTION

- 8.1 Chapters 8 to 15 discuss Part 2 of the Human Rights Act 1993, which regulates private individuals and organisations (those not exercising government functions). In this introductory chapter, we explain how Part 2 works and our approach to reviewing it. We also introduce some recurrent challenges we have encountered when analysing potential options for amending Part 2.
- 8.2 We advise reading this chapter before the other chapters on Part 2.

HOW PART 2 WORKS

- 8.3 Even if a person is treated differently and worse than others based on one of the prohibited grounds of discrimination in section 21 of the Human Rights Act, it does not automatically mean the treatment is unlawful. As we explained in Chapter 1, the Human Rights Act contains two sets of rules to determine whether treatment is unlawful. This chapter discusses the set of rules that relates to private individuals and organisations. There is a separate set of rules for government (Part 1A), which we discuss in Chapter 16.

People and bodies covered by Part 2

- 8.4 In general, Part 2 regulates private individuals and organisations.
- 8.5 In some situations, the Human Rights Act treats private individuals and bodies as if they are government — Part 1A applies to them instead of Part 2. That occurs when they are exercising a “public function, power or duty” that has been conferred on them by law.¹ In this Issues Paper, we call these ‘government functions’. An example might be decisions of an industry regulatory body such as the Advertising Standards Authority.
- 8.6 Conversely, there are some narrow circumstances in which the Human Rights Act treats government agencies as if they are private bodies — Part 2 applies to them instead of Part 1A. The most important one for this review is when they are acting as employers.

¹ Human Rights Act 1993, ss 20J(1) and 21A, drawing on New Zealand Bill of Rights Act 1990, s 3. A person or body might do some things that are government functions and others that are not.

Activities covered by Part 2

- 8.7 Part 2 regulates private individuals and bodies when they take part in certain public-facing activities. Part 2 sets out areas of life that are regulated — things like employment, provision of goods and services, and provision of land, housing and other accommodation. If someone's behaviour does not fall into one of the regulated activities, it is not generally regulated by the Human Rights Act.² The Act leaves significant parts of people's private lives unregulated.
- 8.8 Within each regulated area of life, Part 2 describes the actions that are unlawful if they are taken "by reason of" a prohibited ground of discrimination. Unlike Part 1A, which sets out a general right to "freedom from discrimination", Part 2 uses very specific language to describe the activities it prohibits. For example, where a person applying for a job is "qualified for work of any description", section 22(1)(a) of the Human Rights Act states that it is unlawful for an employer to "refuse or omit to employ the applicant on work of that description which is available" by reason of a prohibited ground.
- 8.9 Cases say that "by reason of" means the prohibited ground must have been a material ingredient in the way the person was treated.³

Dividing line between Part 2 and Part 1A

- 8.10 As we have already explained, Part 2 of the Human Rights Act does not apply to government departments or to private individuals and organisations when they are exercising government functions. This is important to bear in mind as it means the reach of Part 2 is not as extensive as it might at first appear. For example, in Chapter 10, we discuss the Part 2 protections that apply when the public is given access to goods, services, places or facilities. These protections do not, however, apply if providing access to the particular good, service, place or facility is a government function. For example, when local councils make facilities like swimming pools, bathrooms and libraries available to the public, they are likely exercising government functions regulated by Part 1A of the Human Rights Act rather than Part 2.⁴
- 8.11 Another example is education. We think the reach of Part 2 in respect of education may in fact be quite limited. For example, it seems likely based on current case law that the provision of education by tertiary institutions such as universities and wānanga would fall under Part 1A.⁵ As well, leading human rights scholars seem to agree that the provision of education by state schools and state-integrated schools is a government function (but are divided on whether any functions exercised by private schools would qualify).⁶

² There are some exceptions but they are not relevant to this review.

³ For example, *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ and Blanchard and Wilson JJ and [48]–[49] per Tipping J.

⁴ See *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [51] suggesting council services that are "intended for the social well-being of the community" are likely to fall under s 3 of the NZ Bill of Rights (and therefore, by implication, Part 1A).

⁵ See *Waara v Te Wānanga o Aotearoa* HC Wellington CIV-2003-485-2481, 30 September 2004 at [11].

⁶ For example, Paul Rishworth "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum" in Legal Research Foundation (ed) *Education and the Law in New Zealand* (Auckland, 1993) 12 at 18–20; and Andrew Butler "Is this a Public Law Case?" (2000) 31 VUWLR 747 at 768–769.

- 8.12 The line between Part 1A and Part 2 is grey. There is limited case law about what amounts to a government function, and commentators do not always agree on the correct position. This is something that might well benefit from consideration in a general review of the Human Rights Act.

Overlap between Part 2 areas of life

- 8.13 It is also important to appreciate that the Part 2 areas of life are not discrete watertight categories. There can be overlap between them.⁷ For example:
- (a) Part 2 has a section regulating vocational training bodies.⁸ However, a separate section regulates, more generally, “educational establishments” and these are defined to include vocational training bodies.⁹
 - (b) The section in Part 2 regulating provision of accommodation applies to short-term rentals such as hostels and motels, but this kind of accommodation is probably also covered by the section on the supply of goods, facilities or services.¹⁰
- 8.14 In some cases, the extent of overlap between Part 2 areas of life is uncertain. For example, the Human Rights Act has provisions that regulate education and employment. However, it is possible that schools and employers, respectively, also have obligations under a section in the Act that regulates access to places, vehicles and facilities to which “members of the public are entitled or allowed to enter and use”.¹¹ Similarly, schools and employers might have obligations under a section in the Act that regulates the supply of goods, services and facilities to “the public or to any section of the public”.¹²
- 8.15 Whether this overlap exists depends on whether students (in relation to their schools) and employees (in relation to their workplaces) are members of the public or amount to a “section of the public”. This is unclear. There is only one relevant New Zealand court decision of which we are aware, it is quite old and it is not quite on point.¹³

Exceptions

- 8.16 A difference in treatment by reason of a prohibited ground might not be unlawful even if it falls within one of the public-facing activities regulated by Part 2 of the Human Rights Act. Part 2 contains many exceptions. An exception is where different treatment linked to a prohibited ground is lawful even though it falls within a regulated activity. Each of the regulated activities in Part 2 has its own list of exceptions. For example, there are exceptions that relate to employment, exceptions that relate to the provision of goods and services and exceptions that relate to housing.
- 8.17 As we discuss further below, some of these exceptions apply to all the prohibited grounds. More commonly, however, the exceptions apply to one prohibited ground or to

⁷ In the United Kingdom, this problem of overlap is confronted directly in the legislation: Equality Act 2010 (UK), s 28.

⁸ Human Rights Act 1993, s 40.

⁹ Human Rights Act 1993, s 57(2).

¹⁰ Human Rights Act 1993, ss 44 and 53.

¹¹ Human Rights Act 1993, s 42(1)(a).

¹² Human Rights Act 1993, s 44.

¹³ *Coburn v Human Rights Commission* [1994] 3 NZLR 323 (HC).

a few rather than all of them. For example, it is lawful to discriminate when you hire someone to work for a political party but only on the ground of political opinion.¹⁴

8.18 Of particular significance to this review are the many exceptions in Part 2 of the Human Rights Act that apply to the prohibited ground of sex. By way of example, it is lawful to discriminate on grounds of sex:

- (a) when hiring someone for a domestic job in a private household;¹⁵
- (b) when employing someone as a counsellor on very personal things like sexual matters;¹⁶
- (c) when providing separate facilities or services “for each sex on the ground of public decency or public safety”;¹⁷ and
- (d) in competitive sports for people who are 12 or over if “the strength, stamina or physique of competitors is relevant”.¹⁸

8.19 We need to consider carefully in this review whether any of these exceptions ought to be amended to reflect any new prohibited grounds of discrimination we might propose.

8.20 As well, the Human Rights Act contains general exceptions that apply to all regulated activities. The first is for positive discrimination (otherwise known as ‘affirmative action’). This is when you treat someone differently to promote rather than suppress equality. Specifically, section 73(1) of the Human Rights Act says that differences in treatment are lawful if:¹⁹

- (a) they are done in good faith;
- (b) they are to help someone against whom discrimination is unlawful under the Act; and
- (c) it is reasonable to think that person needs help to achieve equality.

8.21 A second general exception is for preferential treatment because of pregnancy, childbirth or family responsibilities. Section 74 clarifies that this does not constitute discrimination.

8.22 Section 97 of the Human Rights Act is also relevant. It allows Te Taraipūnara Mana Tangata | Human Rights Review Tribunal to declare that a particular act, omission, practice, requirement or condition is not unlawful because it is one of the following:

- (a) A genuine occupational qualification. This declaration can be made in respect of discrimination in employment and other employment-related contexts.
- (b) A genuine justification. This declaration can be made in respect of the other areas of life regulated by Part 2.

¹⁴ Human Rights Act 1993, s 31(d).

¹⁵ Human Rights Act 1993, s 27(2).

¹⁶ Human Rights Act 1993, s 27(4).

¹⁷ Human Rights Act 1993, ss 43(1) and 46.

¹⁸ Human Rights Act 1993, s 49(1).

¹⁹ We do not discuss in this Issues Paper section 73(2), which contains general exceptions relating to age, employment status and family status.

- 8.23 Finally, Part 2 does not apply to acts or omissions that are authorised or required by law.²⁰ If the rules in Part 2 come into direct conflict with another statute, the other statute will prevail.
- 8.24 The exceptions in Part 2 serve many overlapping functions. For example, they:
- (a) reinforce the divide between private (unregulated) and public (regulated) activities;
 - (b) recognise that differences in treatment are sometimes needed for people to participate in society on an equal basis; and
 - (c) recognise and protect competing rights (such as freedom of religion) or competing policy concerns (such as national security).
- 8.25 Some exceptions reflect the core values underlying the Human Rights Act that we identified in Chapter 4. Others reflect one-off policy concerns that arise in particular contexts. Some are grounded in pragmatism, custom, compromise or common sense (as assessed through the lens of the Parliament of the time).

Other forms of discrimination

- 8.26 Part 2 of the Human Rights Act also describes some ‘other forms of discrimination’ that it says are unlawful. Three of these are provisions that expand the scope of protection in all the areas of life regulated by Part 2. These enlarging provisions clarify that:
- (a) Part 2 prohibits indirect as well as direct discrimination.²¹ Indirect discrimination is when the treatment was not *because of* a prohibited characteristic but its effect was to disadvantage people who have that characteristic. An example is a job advertisement that requires New Zealand qualifications when they are not really needed to perform the role. This would discriminate indirectly on the ground of national origin.
 - (b) Part 2 prohibits advertisements that indicate an intention to commit a breach of this part.²² An example would be a job advertisement saying only men should apply.
 - (c) People are responsible (and can be liable) in certain circumstances for the actions of their agents and their employees.²³
- 8.27 As well as these enlarging provisions, the subpart entitled “Other forms of discrimination” describes a handful of specific types of conduct that it says constitute unlawful discrimination. Most of the current ‘other forms of discrimination’ are of limited relevance to this review. The exception is sexual harassment.

OUR APPROACH TO PART 2

- 8.28 We discuss Part 2 in eight chapters, including this one. Chapters 9 to 12 group together thematically the public-facing activities (or areas of life) regulated by Part 2. Each chapter

²⁰ Human Rights Act 1993, s 21B(1).

²¹ Human Rights Act 1993, s 65. Indirect discrimination is not, however, unlawful if there was “good reason” for it.

²² Human Rights Act 1993, s 67.

²³ Human Rights Act 1993, s 68.

discusses the scope of protection from discrimination available in respect of the particular area or areas of life as well as any relevant exceptions:

- (a) Chapter 9 discusses discrimination in employment matters and the related contexts of partnerships, industrial and professional associations and qualifying bodies.
 - (b) Chapter 10 discusses discrimination in the provision of goods and services and in access to places, vehicles and facilities.
 - (c) Chapter 11 discusses discrimination in the provision of land, housing and other accommodation.
 - (d) Chapter 12 discusses discrimination by educational establishments and vocational training bodies.
- 8.29 Chapters 13 and 14 single out certain exceptions for closer examination:
- (a) Chapter 13 discusses two exceptions in Part 2 that permit the provision of single-sex facilities in certain circumstances and also discusses the implications of this review for single-sex facilities more generally.
 - (b) Chapter 14 discusses an exception that permits the exclusion of persons of one sex from certain competitive sporting activities.
- 8.30 Chapter 15 discusses other issues arising in respect of Part 2 (including the ‘other forms of discrimination’ discussed above).
- 8.31 We have set aside three issues to discuss later in the Issues Paper (in Chapter 17) because they have implications for other parts of the Human Rights Act as well as Part 2. These are the potential impacts of any reforms we propose on the ability of Māori to live in accordance with tikanga, the regulation of misgendering and deadnaming, and some instances of binary language that thread through the Act.

Analysis of the scope of protection from discrimination in each area of life

- 8.32 As mentioned, the next four chapters group together thematically the public-facing activities (or areas of life) regulated by Part 2. In each of these chapters, we begin by explaining the scope of protection from discrimination that is available in each area of life.
- 8.33 We want to understand whether the scope of protection that is available is sufficient to capture issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. We also want to understand any other relevant implications of adding new prohibited grounds of discrimination. For example, we want to know whether any new exceptions would be desirable to ensure the Human Rights Act appropriately balances relevant rights and interests.

Analysis of existing exceptions that attach to each area of life

- 8.34 As part of our review, we need to understand the implications of any reform for the existing exceptions that attach to each area of life in Part 2 of the Human Rights Act. These exceptions are key mechanisms by which the Act balances the equality rights of particular groups with other rights, interests and concerns that Parliament deemed to be important. We want to understand whether reform of any of these exceptions is desirable to reflect any new prohibited grounds of discrimination we might propose.

Specific exceptions on which we do not seek feedback

- 8.35 We have reviewed each of the specific exceptions in the Human Rights Act to consider whether any amendments are desirable. There are over 40. From our preliminary analysis, it is clear to us that it would not be appropriate to reform some of these exceptions as part of this review. This is for one of two reasons.

Exceptions that apply to all prohibited grounds of discrimination

- 8.36 First, some of the specific exceptions in Part 2 apply to all the prohibited grounds of discrimination. For example, under the area of life of provision of goods and services, there is an exception for private clubs. This exception permits different treatment based on any of the prohibited grounds.²⁴
- 8.37 We have reviewed the exceptions that apply to all the prohibited grounds and consider it inevitable these exceptions will also need to apply to any new grounds we propose. This is because of the need to ensure internal consistency and coherence of the Human Rights Act as discussed in Chapter 4. Given the purpose of these provisions is to create a blanket exception applying to all grounds, we can see no reason to single out new grounds of discrimination for different treatment.
- 8.38 We do not comment on whether the breadth of these exceptions is justified. Nor do we address whether there is any specific rationale for applying these exceptions to people who are transgender or non-binary or who have an innate variation of sex characteristics. It might be desirable to address these issues in a general review of the Human Rights Act.
- 8.39 We acknowledge a contrary argument that exceptions should be narrowly drafted and should not extend to new groups unless there is a good policy justification. Ultimately, we think that concerns about coherence and consistency override this argument.

Exceptions that do not apply to sex

- 8.40 Second, some of the specific exceptions in Part 2 do not apply to the ground of sex. They apply, for example, to age or disability or political opinion or religious belief. We carefully reviewed all these exceptions to assess their relevance to this review. Ultimately, we concluded all of them were based on policy rationales that could not possibly apply to any new grounds we might propose. To give one example, there is an exception in the Human Rights Act allowing qualifying bodies to impose a reasonable and appropriate minimum age for conferring a particular qualification.²⁵ It is hard for us to think of any possible reason to extend it to any new grounds we propose.

Explanatory table inserted into each chapter

- 8.41 Where exceptions fit into one of the two categories just set out, we do not discuss them in this Issues Paper. For transparency, we have included in each of Chapters 9 to 12 a table that sets out the exceptions we do not plan to analyse for the reasons just explained.

²⁴ Human Rights Act 1993, s 44(4).

²⁵ Human Rights Act 1993, s 39(3)(a).

EXCEPTIONS ON WHICH WE DO NOT SEEK FEEDBACK	
Exceptions that apply to all grounds — should extend to any new grounds	
[Section number]	[Description of exception]
Exceptions that do not apply to discrimination on the ground of sex — should not extend to any new grounds	
[Section number]	[Description of exception]

Analysis of specific exceptions

- 8.42 In sum, the exceptions we discuss in this Issues Paper are those that currently apply to the prohibited ground of sex (and that do not apply to all grounds). We want to understand whether it is desirable to amend any of these exceptions to reflect any new grounds we might propose. In preparing this Issues Paper, we focused on two tasks.
- 8.43 The first was to understand the scope and rationale of each exception. We examined the legislative history of each exception to try to work out where it came from and what was intended by it. Many of the exceptions are based on provisions contained in earlier anti-discrimination legislation from the 1970s so we examined the history of that legislation too. As we explained in Chapter 4, it was not always possible for us to identify with certainty the rationale underlying particular exceptions.
- 8.44 The second task was to identify options for reform of each exception to reflect any new grounds we propose. In researching possible options, we considered the approaches taken in other countries with similar anti-discrimination codes. We found Australian legislation (both federal and in the states and territories) particularly useful in reviewing Part 2. The Australian statutes were developed around the same time or shortly before the Human Rights Act and are similarly structured (for example, they specify exceptions at a similar level of detail).
- 8.45 In this Issues Paper, we deliberately consult on a wide range of options. We do not generally express a preference for any particular option, although we do try to identify some implications of adopting each of them. There may be obstacles to pursuing some of the options we consult on (for example, some may raise issues for the internal coherence of the Human Rights Act or may otherwise be difficult to achieve within the limited scope of the review). However, we think it is important to consult widely before reaching any final decision on these issues.
- 8.46 Through the consultation process, we would like to achieve a better understanding of the practical implications of each reform option, of any concerns or perspectives submitters might have about each of them and of any evidence that might exist to support those concerns where relevant. This will help inform our analysis of which options will best ensure the Human Rights Act appropriately balances relevant rights and interests. Ultimately, we intend to review the options for reform in the light of the key reform considerations identified in Chapter 4.

Consequential implications and amendments

- 8.47 Where relevant, we also discuss in the Part 2 chapters the implications of amending the Human Rights Act for other statutes that impact on the relevant areas of life. Those consequential implications arise when other statutes contain specific references to the Act (so that any change to the scope of the Act would indirectly affect the scope of those other laws).
- 8.48 Specifically, we discuss the Employment Relations Act 2000 in Chapter 9 (concerning employment and related contexts), the Residential Tenancies Act 1986 in Chapter 11 (concerning land, housing and other accommodation) and the Education and Training Act 2020 in Chapter 12 (concerning educational establishments and related contexts).

RECURRENT ISSUES AND CHALLENGES

- 8.49 In reviewing the Part 2 areas of life (especially, the Part 2 exceptions), we have encountered some recurring issues or challenges that we think are helpful to signal at the outset.

Uncertainty about the scope of any sex exception that is not explicitly amended to reflect new grounds

- 8.50 In the chapters that follow, we systematically review the exceptions that currently apply to sex and seek feedback on whether they should be amended to reflect any new grounds such as gender identity, gender expression or sex characteristics. Generally, one of the options we identify is to leave the exception untouched. One difficulty we have encountered in understanding the implications of this option of ‘no reform’ is uncertainty as to how the retained sex exception might be interpreted.
- 8.51 To give an example, there is an exception in the Human Rights Act that allows employers to treat people differently based on their sex for reasons of “authenticity”.²⁶ Suppose this exception was not amended to reflect any new grounds. Uncertainty would arise from the possibility that a court or tribunal might find that an employer can still rely on this exception to authorise the adverse treatment of a transgender person because the treatment was based not on their gender identity but on their ‘biological’ sex. We are not suggesting that interpretation is necessarily correct. We are simply signalling the uncertainty that arises from this possibility.²⁷
- 8.52 We want to understand better whether this is a likely possibility and, if so, what the implications are for how exceptions should be worded. As we discussed in Chapter 7, one option is for the Act to define sex, although, as we also discussed, there are some practical difficulties associated with doing so.

²⁶ Human Rights Act 1993, s 27(1).

²⁷ This uncertainty may arise even if a person has changed their birth certificate to reflect their nominated sex. See Births, Deaths, Marriages and Relationships Registration Act 2020, s 79(2).

QUESTION**Q12**

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?

Difficulty of using uniform language to amend the exceptions

- 8.53 One of the challenges in identifying options for amending the Part 2 exceptions is that the current sex exceptions reflect a range of different underlying concerns and appear to relate to different aspects of a person's sex, gender or sex characteristics. For example, some of the current sex exceptions seem to be about shared life experience (exceptions relating to courses and counselling are an example).²⁸ Others seem to be about physical sex characteristics (an exception relating to skill is an example of that).²⁹ Still others are concerned with allowing people to decide who comes into their home (an exception relating to domestic employment is an example of that).³⁰
- 8.54 These differences in underlying rationale mean there may not be uniform language that can be used to reflect new prohibited grounds of discrimination in the Part 2 exceptions where that is considered desirable. It may be necessary for an exception to be specific about the underlying intent — for example, whether it is concerned with a person's sex assigned at birth, their physical sex characteristics or their life experiences as a person who is transgender or cisgender.

Issues of proof

- 8.55 An issue that may arise if any sex exceptions are amended to clarify that they allow different treatment based on a person's sex assigned at birth is how a person would be expected to prove their sex assigned at birth. For example, if the Human Rights Act permitted service providers to exclude people who are transgender from bathrooms and changing rooms that do not align with their sex assigned at birth, we are unsure how that would be policed. Given a person may obtain a birth certificate that reflects their nominated sex, we are not aware of any form of identification in Aotearoa New Zealand that proves a person's sex assigned at birth. In any event, people are not required to carry identification when going about their lives or when entering bathrooms and changing rooms. We are interested to understand whether this would be a practical obstacle to tying exceptions to a person's sex assigned at birth or how this issue could be managed.

²⁸ Human Rights Act 1993, ss 45 and 59.

²⁹ Human Rights Act 1993, s 47.

³⁰ Human Rights Act, s 27(2).

QUESTION**Q13**

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?

Privacy issues

- 8.56 Another recurrent issue we have encountered relates to 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. Privacy issues may arise if a person is expected to disclose these things to others or if another person such as an employer is entitled to disclose that information to a third party such as a customer. Privacy concerns may also arise if the fact of a particular exception seems to sanction intrusive questions about a person's gender identity, sex assigned at birth or sex characteristics. We are interested to understand better whether these concerns are significant and how they might be resolved.

QUESTION**Q14**

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?

Challenges posed by the gender binary

- 8.57 Finally, it has been challenging to identify reform options that address the situation of people who identify outside the gender binary — that is, as neither (or as not exclusively) male or female. As we explained in Chapter 2, a binary concept of sex and gender is deeply embedded in New Zealand law and in legal and social practice. This binary approach pervades the Human Rights Act. For example, it is implicit in the many sex-based exceptions that we discuss throughout the next six chapters.
- 8.58 Where possible, we have sought to identify the implications of the reform options we present for people who identify outside the gender binary. However, a comprehensive approach to addressing the issues faced by people who identify outside the binary would require change that is more fundamental than what we think we can achieve within the scope of this review. For example, we think it would fall outside the scope of this review to remove existing sex exceptions entirely.
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CHAPTER 9

Employment

INTRODUCTION

- 9.1 In this chapter, we discuss the protections in Part 2 of the Human Rights Act 1993 that relate to employment and some closely related contexts. We seek feedback on the implications for these protections of adding new prohibited grounds of discrimination to the Human Rights Act. We identify several exceptions to the Act's employment protections for discussion and feedback. We also identify the implications of the review for employment relations legislation that refers to the Human Rights Act.
- 9.2 We recommend reading this chapter alongside Chapter 8, which explains our approach to reviewing Part 2 of the Human Rights Act.

SCOPE OF PROTECTION

- 9.3 Part 2 of the Human Rights Act prohibits various forms of discrimination in employment and in some closely related contexts (being business partnerships, industrial and professional associations, and qualifying bodies that confer authorisations for professions or trades).

Employment — sections 22 and 23

- 9.4 The main employment protections in the Human Rights Act are sections 22 and 23. As well as employees, these sections protect independent contractors, volunteers and contract workers.¹ These sections are among the handful of provisions in Part 2 of the Human Rights Act that apply to government alongside the private sector.²
- 9.5 Subject to relevant exceptions (discussed later in the chapter), section 22 states that, if a job applicant or employee is “qualified for work of any description”, it is unlawful to do any of the following “by reason of” a prohibited ground of discrimination:
- (a) refuse or omit to employ someone.
 - (b) offer someone less favourable terms of employment, conditions of work, benefits or opportunities.
 - (c) terminate someone's employment or subject them to detriment; or
 - (d) cause an employee to retire or resign.

¹ See Human Rights Act 1993, s 2(1) (definition of employer); and *DML v Montgomery* [2014] NZHRRT 6 at [122]–[123].

² Human Rights Act 1993, ss 20J and 21A. For further discussion, see Chapter 8.

- 9.6 Section 23 applies to application forms, inquiries made to applicants and inquiries made to others about the applicant (such as referees). They must not indicate an intention to discriminate against someone in a manner prohibited by section 22 or be reasonably understood in this way.

Is the scope of protection sufficient?

- 9.7 We are interested to understand better whether the scope of sections 22 and 23 is sufficient to capture employment issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics.
- 9.8 In Chapter 3, we discussed the difficulties experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics in an employment context. They include difficulties finding a job, having personal information disclosed, receiving worse pay or conditions than others, not being promoted, being removed from customer-facing roles, not being allowed to use the bathroom matching their gender, being harassed or bullied, being called by the wrong name or gender (sometimes called deadnaming and misgendering) and losing a job or feeling they had to quit.
- 9.9 We discuss issues associated with access to workplace bathrooms in Chapter 13 and misgendering and deadnaming in Chapter 17. Putting those issues aside for now, we think many of the other issues just listed would potentially fall within one or more of the four types of treatment made unlawful by section 22 (subject, of course, to any relevant exceptions). Many of them might also be regulated by other laws, for example:
- (a) Where an employee is dismissed or forced to resign, this could be unjustified dismissal under the Employment Relations Act 2000. A personal grievance can be brought on this basis (although not within the first 90 days of a trial period).³
 - (b) An employee can also bring a personal grievance under the Employment Relations Act for discrimination, including where the conduct occurred during a trial period.⁴
 - (c) If an employee has experienced disadvantage due to an unjustifiable action of their employer, this, too, can be the basis of a personal grievance under the Employment Relations Act.⁵ This could include an employer's failure to address workplace bullying.⁶
 - (d) If an employer improperly shared personal information about an employee with others, this could amount to an interference with privacy under the Privacy Act 2020.⁷ An employee could complain to Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner.

³ Employment Relations Act 2000, ss 67B, 103(1)(a) and 103A. Dismissal includes constructive dismissal, which is where an employer's action or lack of action makes an employee feel compelled to resign. See *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374–375 (outlining three categories of constructive dismissal).

⁴ Employment Relations Act 2000, ss 67B(3) and 103(1)(c). We discuss the relationship between discrimination protections in the Employment Relations Act 2000 and the Human Rights Act 1993 later in this chapter.

⁵ Employment Relations Act 2000, ss 103(1)(b) and 103A.

⁶ See *Personal Grievances* (online looseleaf ed, Thomson Reuters) at [7.2.09].

⁷ Privacy Act 2020, ss 22 and 69. For example, it could breach Information Privacy Principle 5 (storage and security of personal information) or Information Privacy Principle 11 (limits on disclosure of personal information).

- (e) Employers have obligations under the Health and Safety at Work Act 2015 to ensure the health and safety of workers (so far as reasonably practicable).⁸ This extends to both physical and mental health.⁹ Workplace bullying can be a health and safety risk under this Act.¹⁰
 - (f) If an employer or co-worker sends an employee inappropriate text messages or emails or posts content about them online, the Harmful Digital Communications Act 2015 may be relevant.
 - (g) Harassment protections may be relevant, which we discuss in Chapter 15.
- 9.10 We would also like to understand any implications of sections 22 and 23 applying to new prohibited grounds of discrimination such as the implications for employers and co-workers. We also want to know whether any new exceptions to the provisions about employment and related contexts would be necessary and desirable to ensure the Act appropriately balances relevant rights and interests. (We discuss existing exceptions below.)
- 9.11 We are aware, for example, that South Australia has an exception applying to the ground of gender identity where the discrimination is for the purposes of enforcing standards of appearance and dress reasonably required for the employment.¹¹ We are not sure that such an exception would be needed in Aotearoa New Zealand as we doubt this would amount to discrimination in the first place. However, we are interested to hear submitters' views on that or any other exceptions that may be necessary and desirable.
- 9.12 In Chapter 17, we seek feedback on whether there should be exceptions in the Human Rights Act that protect sex-differentiated activities that are done in accordance with tikanga.

Other contexts closely related to employment — sections 36, 37 and 38

- 9.13 The Human Rights Act also has provisions applying to business partnerships, industrial and professional associations, and qualifying bodies.¹²
- 9.14 Section 36 of the Human Rights Act makes it unlawful, by reason of a prohibited ground of discrimination, to refuse someone a business partnership, offer them a partnership on less favourable terms and conditions, deny a business partner increased status or an increased share in the firm's profits, expel them from the firm or subject them to any other detriment.
- 9.15 Section 37 applies to industrial or professional associations, which are organisations for employees, employers or members of a particular profession, trade or calling. Section 37 makes it unlawful, by reason of a prohibited ground of discrimination, for one of these organisations to refuse someone membership, offer them less favourable membership terms, benefits, facilities or services, deprive them of their membership or suspend them.

⁸ Health and Safety at Work Act 2015, s 36.

⁹ Health and Safety at Work Act 2015, s 16.

¹⁰ See Mahi Haumarū Aotearoa | WorkSafe *Preventing and responding to bullying at work* (March 2017) at 11.

¹¹ Equal Opportunity Act 1984 (SA), s 34(4).

¹² We discuss vocational training bodies, which are regulated in the same subpart, in Chapter 12.

- 9.16 Section 38 applies to qualifying bodies, which are bodies that confirm approvals, authorisations or qualifications needed for people to engage in a profession, trade or calling. Section 38 makes it unlawful, by reason of a prohibited ground, for a qualifying body to refuse to confer, confer on less favourable terms and conditions, withdraw or vary the terms of an approval, authorisation or qualification.
- 9.17 We would like to learn whether there are any issues with these provisions relevant to this review. We have not identified any, other than an issue with gendered language in section 37(1)(c) (which we discuss in Chapter 17). We have not identified any research about the experiences of people who are transgender or non-binary or who have an innate variation of sex characteristics with respect to these areas of life. However, we welcome feedback on these issues.

QUESTIONS

Q15

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?

Q16

Do you have any practical concerns about what the employment protections in the Human Rights Act 1993 would cover if new prohibited grounds of discrimination are added to the Act?

(Later in the chapter, and in Chapter 13, we discuss existing exceptions in the Act that balance relevant rights and interests. You may want to read about these before answering.)

Q17

Are new employment exceptions desirable to accommodate any new grounds we propose?

EXCEPTIONS

- 9.18 There are numerous exceptions in the Human Rights Act relating specifically to employment and related contexts.¹³ We discuss nine of these in this chapter. Where exceptions are very similar, we group these together for discussion.
- 9.19 The Act also contains a general exception for superannuation schemes. This is relevant to employment, but we discuss it in Chapter 15.

¹³ An employer cannot rely on an exception (for example, to deny someone employment) if the policy objective underlying the exception could be met without unreasonable disruption by transferring some of the person's duties to another employee: Human Rights Act 1993, s 35. We are not seeking feedback on section 35 as it applies to all of the employment exceptions in Part 2.

Exceptions on which we do not seek feedback

9.20 As we discuss in Chapter 8, there are two categories of exception on which we do not seek feedback. These are exceptions that apply to all prohibited grounds (and that do not raise issues specific to this review) and exceptions that do not apply to sex. In the table below, we list the exceptions relevant to this chapter that fall into those two categories. We have reviewed all these exceptions and, for the reasons discussed in Chapter 8, have concluded they do not require further consideration.

EXCEPTIONS ON WHICH WE DO NOT SEEK FEEDBACK	
Exceptions that apply to all grounds — should extend to any new grounds	
Employment	
24	Exception for foreign ships or aircraft outside New Zealand.
34	Exception for the Defence Force.
Exceptions that do not apply to discrimination on the ground of sex — should not extend to any new grounds	
Employment	
25	Exception relating to national security for several grounds.
29	Exception relating to disability.
30	Exception relating to age where age is a genuine occupational requirement or where lower rates are paid to those under 20 years.
30A	Exception relating to age for historical retirement benefits.
31	Exception relating to political opinion for a role of a political nature.
32	Exception relating to family status for relatives working together in some circumstances.
Partnerships	
36(3)	Exception relating to disability and age.
36(4)	Exception relating to disability where there is an unreasonable risk of harm.
Industrial and professional associations	
37(2)	Exception that enables different fees depending on age.
37(2A)	Exception in relation to disability where there is an unreasonable risk of harm.
Qualifying bodies	
39(2)	Exception applying to disability.
39(3)	Exception applying to age.

Exception for work performed outside New Zealand — section 26

- 9.21 Section 26 of the Human Rights Act allows differential treatment in employment based on sex if the duties will be performed wholly or mainly outside 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. The exception also applies to religious or ethical belief and age. An example of where this exception might be relevant is where a New Zealand company sends an employee overseas for work.
- 9.22 The rationale for this exception is likely to be practicality and respecting the laws of other countries. Unless the exception was in place, a New Zealand employer that had employees working overseas might be unable to comply with both overseas laws, practice or customs and New Zealand law. In its report to the select committee on the Human Rights Bill, the Department of Justice referred to this exception as “a matter of commonsense”.¹⁴
- 9.23 We know that some countries have laws restricting women from certain roles. According to the World Bank, there are 45 economies where women are prohibited from working in jobs considered dangerous and 59 economies where women are not allowed to work in certain industries.¹⁵ This may explain the desirability of an exception that applies to sex.
- 9.24 We are interested to understand whether this exception should be amended to reflect any new grounds we propose. It would be helpful for us to understand whether any countries have laws, customs or practices that restrict roles to people based on factors relating to their gender identity, gender expression or sex characteristics. We do not know, for example, whether there are overseas positions that are restricted to cisgender people.

QUESTIONS

Q18

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?

Q19

Do you have any additional feedback on the practical implications of amending section 26?

Exception for genuine occupational qualification (authenticity) — section 27(1)

- 9.25 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. The exception also applies to age. The exception does not apply to other prohibited grounds. Notably, it does not apply to race and it does not apply to

¹⁴ Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 23.

¹⁵ World Bank *Women, Business and the Law 2024* (2024) at 31.

characteristics that do not have a direct connection with visual appearance such as sexual orientation or political opinion.

Scope and rationale of the current exception

- 9.26 This exception contains two elements: sex must be a genuine occupational qualification and that must be for reasons of “authenticity”.
- 9.27 We have not located any case law on what a “genuine occupational qualification” means in the context of section 27(1), although case law on other provisions in the Human Rights Act provides some assistance. For example, in *Air New Zealand Ltd v McAlister*, Te Kōti Mana Nui | Supreme Court saw an international rule about retirement age as a genuine occupational qualification because it “very substantially affected” the plaintiff’s ability to perform his duties.¹⁶
- 9.28 The Human Rights Act does not define “authenticity” and we have not found any case law on how the term should be interpreted in section 27(1). Dictionary definitions refer to concepts like being real, true or genuine.
- 9.29 The provision is based on a similar exception in the Human Rights Commission Act 1977 (the 1977 legislation) that allowed preferential treatment based on sex where:¹⁷
- For reasons of authenticity, as in theatrical performances, posing for artists, or being a model for the display of clothes, sex is a bona fide occupational qualification for the position or employment.
- 9.30 Although the current exception does not refer to types of jobs, the legislative history indicates it, too, was intended to apply to roles such as acting and modelling.¹⁸ The only published complaint of which we are aware where a defendant has relied on section 27(1) involved an advertisement seeking a mature female model.¹⁹
- 9.31 Acting or modelling jobs might engage the issue of authenticity where the person needs to look and sound a certain way to fulfil the director’s vision. This might be because the director has a particular character in mind or because the director wants to convey a particular message to the audience.
- 9.32 Beyond how someone looks and sounds, a broader approach to authenticity might see it engaged if the actor or model was well known, making it harder for them to pass to a public audience as having particular characteristics or attributes. If this was the intended scope of the exception, however, it is hard to understand why it would only apply to sex and age. It is notable, for example, that sexual orientation was not added to the exception when it was introduced as a prohibited ground of discrimination in 1993.
- 9.33 An even broader approach to authenticity might see it as relating to a person’s life experiences. An example might be an organisation that advocates for women in medicine and wants to have a female doctor as its director so their advocacy is seen as coming

¹⁶ *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [41] per Elias CJ and Blanchard and Wilson JJ. This case concerned the genuine occupational qualification exception applying to age in section 30 of the Human Rights Act.

¹⁷ Human Rights Commission Act 1977, s 15(3)(a).

¹⁸ See Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 24; and (15 December 1992) 532 NZPD 13213 (Hon Dr Michael Cullen).

¹⁹ *Planet Green (Possum Bikini)* NZASA 99/310, 28 February 2000.

from authentic life experience. However, that goes beyond what is signalled in the legislative history and, again, is inconsistent with the confined scope of the exception (only applying to sex and age).

- 9.34 If there were to be a general review of the Human Rights Act, the reach of this section would benefit from clarification drawing on several useful models from legislation overseas.²⁰ We assume in our analysis below that the narrower approach to authenticity is the correct one — that it primarily relates to how someone looks and sounds.

Should the exception be amended to reflect any new grounds?

- 9.35 We are interested to understand whether the exception in section 27(1) should be amended to reflect any new grounds we propose. A relevant question might be whether there are any jobs where the fact someone is transgender or cisgender, or the fact they have a particular gender identity, gender expression or sex characteristics, is a genuine occupational qualification for reasons of authenticity. We have focused primarily on jobs such as acting and modelling as these were the original rationale for the exception.
- 9.36 Consistent with the rationale for section 27(1) we identified, it is possible a director would only want to cast someone who visibly appears to be cisgender for the role of a cisgender man or woman, or someone who visibly appears to be transgender for the role of a transgender man or woman. Similarly, we know that some innate variations of sex characteristics relate to appearance (such as some variations affecting breast development). This might support an amendment to the exception to reflect the addition of new grounds.
- 9.37 A danger of such an extension may be that people could be rejected for roles on a broader basis than simply appearance. For example, it could lead to a situation where transgender actors are only ever cast in transgender roles without proper consideration of whether they can authentically play a cisgender character (in terms of how that character should look and sound). We understand it can be hard for transgender actors to build a career out of the very small number of transgender roles available.²¹

QUESTION

Q20

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?

²⁰ For example, clarification could be achieved by defining authenticity, by replacing it with another concept (such as “having particular physical characteristics” (see Equal Opportunity Act 2010 (Vic), s 26(2)(a)) or by indicating the jobs to which the exception applies (see, for example, Sex Discrimination Act 1984 (Cth), s 30(2)(b)). The section could also be amended to add a further limitation such as requiring the discrimination to be reasonable, proportionate and justifiable in the circumstances (see, for example, Discrimination Act 1991 (ACT), s 33B(1)(b)).

²¹ See Equity “Guidelines for entertainment professionals working with LGBT+ performers” <www.equity.org.uk>.

QUESTION**Q21**

Do you have any additional feedback on the practical implications of amending section 27(1)?

Exception for domestic employment in private households — section 27(2)

9.38 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. The exception also applies to the grounds of religious belief, ethical belief, disability, age, political opinion and sexual orientation. There were similar exceptions in the 1977 legislation that applied to the grounds of sex and age.²²

Scope and rationale of the current exception

9.39 The term “domestic” is not defined in the Act but dictionary definitions suggest it relates to the home, house or family. Domestic employment in a private household could include work as a nanny, a cleaner or a caregiver for a disabled person.

9.40 We think the most likely rationale for the exception was designating a private sphere where the Human Rights Act does not apply. As we discussed in Chapter 4, the Act draws a line between public conduct (which it regulates) and private conduct (which it generally does not). According to the Department of Justice, the idea behind the domestic employment exception was that “some preference should be given to the privacy of a person’s home”.²³

9.41 If this is the rationale, it would be logical for the exception to apply to all the prohibited grounds in the Human Rights Act. Although the exception applies broadly, several current grounds are omitted.²⁴ The reason for this (and the logic behind which grounds are covered) is not clear to us.

Should the exception be amended to reflect any new grounds?

9.42 We are interested to understand whether the exception in section 27(2) should be amended to reflect any new grounds we propose. The argument in favour of extending the exception to reflect new grounds would be based on autonomy of the private sphere rather than there being a good reason for private employers to discriminate based on characteristics such as gender identity or being transgender.

9.43 On the other hand, as noted above, the basis on which the domestic employment exception applies to some grounds and not others is unclear to us. Given not all grounds are covered, there might be an argument for not extending the exception further in the absence of a clear rationale. We welcome feedback on this.

²² Human Rights Commission Act 1977, ss 15(3)(c) and 15A(1)(a).

²³ Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 24.

²⁴ Race, colour, ethnic and national origin, marital status, employment status and family status.

QUESTIONS

Q22

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?

Q23

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

Privacy exception – section 27(3)(a)

- 9.44 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”.

Scope and rationale of the current exception

- 9.45 The provision is based on an exception in the 1977 legislation that provided:²⁵

In the case of a position such as that of attendant in a public lavatory or as a person responsible for the fitting of clothes to customers or others, the position needs to be held by one sex to preserve reasonable standards of privacy.

- 9.46 Examples of job duties that we think might be relevant include:
- (a) strip searches, such as those performed by a prison guard or Customs agent;²⁶
 - (b) beauty therapy services such as massage or intimate waxing;
 - (c) supervision of a women-only swimming session;
 - (d) a sonographer carrying out internal pelvic scans;
 - (e) personal care of a disabled or elderly person such as helping with showering and dressing; and
 - (f) fitting bras to customers in a lingerie store.
- 9.47 These are situations where the employee would be interacting with an individual who is only partially clothed. In some of these situations, the employee would need to touch private areas of the person’s body. Some individuals would feel highly vulnerable in this situation and might feel more comfortable if they were interacting with an employee of a particular sex. Some individuals might also have religious beliefs that prevent them from being undressed in front of a person of the opposite sex. For example, we have read of

²⁵ Human Rights Commission Act 1977, s 15(3)(b).

²⁶ Current Customs guidelines state that a search must be conducted in the presence of at least two officers of the same gender identity as the person being searched: Te Mana Ārai o Aotearoa | New Zealand Customs Service “Guidelines for Strip Searches” <www.customs.govt.nz>.

an instance of Muslim women requesting women-only swimming sessions at their local pool because of religious requirements that prevent men from seeing their bodies.²⁷

- 9.48 We think the exception is grounded in deeply ingrained social and cultural assumptions about nudity and whether it is acceptable to expose your body to people of the same sex or who are a different sex.²⁸
- 9.49 This exception does not mean an employer can automatically deny someone a job just because some of the duties involve intimate contact with a person of another sex. The employer must consider whether the situation could be resolved without unreasonable disruption to them by transferring some of the person's duties to another employee.²⁹ For example, a male beauty therapist might carry out manicures and facials on all customers but not intimate waxing on women.
- 9.50 In some situations, an alternative to restricting particular duties to employees of one sex might be to make a chaperone available. For example, Pacific Radiology provides a chaperone when a transvaginal scan is carried out by a male sonographer.³⁰
- 9.51 We think the scope of this exception could be clearer as the concept of "reasonable standards of privacy" could be interpreted as applying more widely than just in situations involving nudity.³¹ This is an issue that could be considered on a general review of the Human Rights Act.

Should the exception be amended to reflect any new grounds?

- 9.52 We are interested to understand whether the exception in section 27(3)(a) should be amended to reflect any new grounds we propose. We think the issue here is whether the exception should be amended to clarify people are entitled to treat someone differently based on their sex characteristics or sex assigned at birth. The argument in favour of amending the exception is that there may be situations where a person is not comfortable with someone of a different sex assigned at birth or sex characteristics providing them with very personal and private services. If the rationale for the exception is to allow the individual to feel comfortable in a highly private situation, an exception might be justified even if the person's lack of comfort is based on prudishness, irrational fear or prejudice. Control over the extent to which others have access to one's naked body has been described as a core aspect of the right to privacy we discussed in Chapter 4.³²
- 9.53 On the other hand, as we explained in Chapter 8, a general concern with which we need to grapple is the potential for exceptions that turn on sex characteristics or sex assigned at birth to create privacy issues of their own. That concern is clearly present here. Extending the exception in this way may result in employers asking job applicants to disclose information about their sex assigned at birth or sex characteristics, or asking

²⁷ Virginia Fallon "Porirua City's Muslim community float women-only swimming sessions" (22 May 2018) <www.stuff.co.nz>.

²⁸ See Lawrence Friedman and Joanna Grossman "A Private Underworld: The Naked Body in Law and Society" (2013) 61 Buff L Rev 169; and Danielle Keats Citron "Sexual Privacy" (2019) 128 Yale LJ 1870.

²⁹ Human Rights Act 1993, s 35.

³⁰ Pacific Radiology "Pregnancy Ultrasound: What to Expect" <www.pacificradiology.com>.

³¹ For example, some jurisdictions have exceptions that list the particular jobs to which the exception applies: Sex Discrimination Act 1984 (Cth), s 30(2)(c)–(e) and (g); and Equal Opportunity Act 2010 (Vic), s 26(2)(b)–(e).

³² See Danielle Keats Citron "Sexual Privacy" (2019) 128 Yale LJ 1870 at 1880.

employees to disclose such information to clients. It could also lead to employers making assumptions about clients' discomfort with gender diversity.

QUESTIONS

Q24

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 privacy exception in section 27(3)(a) be amended to reflect those new grounds?

Q25

Do you have any additional feedback on the practical implications of amending section 27(3)(a)?

Exceptions for employer-provided accommodation — sections 27(3)(b) and 27(5)

- 9.54 In some situations, the nature and location of employment means that employees need to live in accommodation provided by the employer. An example might be where the employment is on a small island or a ship. Section 27(3)(b) of the Human Rights Act allows different treatment on the grounds of sex if 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.
- 9.55 Some jobs allow the person to live in employer-provided premises as a term or condition of employment. Section 27(5) of the Human Rights Act allows an employer to omit to apply that term or condition to employees of a particular sex if, in all the circumstances, it is not reasonably practicable for the employer to provide accommodation.

Scope and rationale of the current exceptions

- 9.56 These exceptions are modelled on provisions in the 1977 legislation.³³ At that time, the Minister of Justice gave the example of homes for female nurses as a situation where it might not be practicable to provide accommodation for each sex.³⁴ Other situations we can think of where an employer might provide accommodation include seasonal work, cruise ships, the armed forces, live-in support roles and boarding schools.
- 9.57 These exceptions have reasonableness requirements built into them. An employer could only rely on the exception if they could prove it was not reasonable to provide suitable accommodation for the employee.

Should these exceptions be amended to reflect any new grounds?

- 9.58 We are interested to understand whether the exceptions in sections 27(3)(b) and 27(5) should be amended to reflect any new grounds we propose. It would be helpful for us to understand better whether there is a current need for an accommodation exception. It

³³ Human Rights Commission Act 1977, ss 15(3)(d) and 15(11).

³⁴ (20 July 1977) 411 NZPD 1475.

may be that shared sleeping quarters (such as bunkrooms) are less common than they were in the 1970s. Larger employers may also have developed policies on housing employees who are transgender or non-binary or who have an innate variation of sex characteristics (an example is Te Ope Kātua o Aotearoa | New Zealand Defence Force).³⁵

- 9.59 We are interested to know whether there could nevertheless be situations where employers have difficulty in providing appropriate accommodation for employees who are transgender or non-binary or who have an innate variation of sex characteristics.
- 9.60 If that is the basis for an extension, it may not be engaged by all possible grounds. For example, we can envisage a situation where an employer has difficulty in providing accommodation for a non-binary employee who does not want to stay in a men's or women's bunkroom. It seems less likely that accommodation issues would arise due to someone's gender expression or whether they have an innate variation of sex characteristics.

QUESTIONS

Q26

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?

Q27

Do you have any additional feedback on the practical implications of amending sections 27(3)(b) and 27(5)?

Exception for counsellor on highly personal matters — section 27(4)

- 9.61 The Human Rights Act allows different treatment in employment based on sex, race, ethnic or national origins, or sexual orientation where the position is for a counsellor on highly personal matters such as sexual matters or the prevention of violence.³⁶ An example might be a rape crisis centre that only hires female counsellors.

Scope and rationale of the current exception

- 9.62 The likely rationale for this exception is that a client needs to feel comfortable with a counsellor so they can discuss highly personal and sensitive matters with them. Some clients may feel more comfortable with a counsellor of the same sex, race or sexual orientation. An organisation may therefore need to hire counsellors based on these grounds to meet the needs of their clients.

Should the exception be amended to reflect any new grounds?

- 9.63 We can see the logic for extending this rationale to potential new grounds. It is possible that a person who is transgender or non-binary or who has an innate variation of sex

³⁵ See Te Ope Kātua o Aotearoa | New Zealand Defence Force *Gender Transition: A Handbook for Commanders/Managers and Transitioning Personnel* at 22.

³⁶ Human Rights Act 1993, s 27(4).

characteristics would prefer a counsellor who is similarly situated. It is also possible that a cisgender woman who has experienced sexual violence might want counselling from another cisgender woman. It seems less likely that a client would seek a counsellor with a particular gender expression or who does not have an innate variation of sex characteristics.

QUESTIONS

Q28

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?

Q29

Do you have any additional feedback on the practical implications of amending section 27(4)?

Exceptions for organised religion — sections 28(1) and 39(1)

- 9.64 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. An example might be a position as a Catholic priest or bishop that can only be filled by a man.
- 9.65 There is a related exception in section 39(1) that applies to qualifying bodies. This exception can be relied on when an authorisation or qualification that is needed for an organised religion is limited to persons of one sex or to persons of that religious belief to comply with the doctrines, rules or established customs of that religion.

Scope and rationale of current exceptions

- 9.66 These exceptions are based on provisions in the 1977 legislation.³⁷
- 9.67 The likely rationale for these exceptions is protecting the right to freedom of religion.³⁸ Te Taraipūnara Mana Tangata | Human Rights Review Tribunal has described the purpose of section 39(1) as being “to preserve the institutional autonomy of organised religions in relation to their decisions concerning the appointment of clergy and ministers”.³⁹ It has commented that “[a]n aspect of religious liberty as a collective right is the right of a church to choose its own ministers and leaders”.⁴⁰

³⁷ Human Rights Commission Act 1977, ss 15(6) and 21(2).

³⁸ See New Zealand Bill of Rights Act 1990, ss 13 and 15.

³⁹ *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland* [2013] NZHRRT 36, (2013) 9 HRNZ 612 at [92].

⁴⁰ *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland* [2013] NZHRRT 36, (2013) 9 HRNZ 612 at [43].

Should the exceptions be amended to reflect any new grounds?

- 9.68 We are interested to understand whether the exceptions in sections 28(1) and 39(1) should be amended to reflect any new grounds we propose. It would be helpful for us to understand better whether there are organised religions in Aotearoa New Zealand that exclude people from religious office based on the fact they are transgender or their gender identity, gender expression or sex characteristics. Our current understanding is there may be some religions that do not allow people whose gender identity is different from their sex assigned at birth to be appointed to religious office. We are not aware of any religions that expressly exclude people who identify outside the gender binary from religious office (although they may be effectively excluded where roles are limited to one sex).
- 9.69 We doubt it is appropriate for us to revisit the balance reached in sections 28(1) and 39(1) of the Human Rights Act between freedom from discrimination and freedom of religion in this review. For that reason, we tend towards the view that this exception will need to cover any new grounds we propose.

QUESTIONS

Q30

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?

Q31

Do you have any additional feedback on the practical implications of amending sections 28(1) and 39(1)?

IMPLICATIONS OF THIS REVIEW FOR THE EMPLOYMENT RELATIONS ACT 2000

- 9.70 As we mentioned earlier in this chapter, under the Employment Relations Act, an employee can take a personal grievance if they experience various forms of discrimination in employment. One element of the definition of discrimination contained in the Employment Relations Act is that the discrimination must be “by reason directly or indirectly” of one of the “prohibited grounds of discrimination set out in section 21(1) of the Human Rights Act”.⁴¹ The Employment Relations Act then replicates the prohibited grounds contained in section 21.⁴²
- 9.71 If section 21 of the Human Rights Act is amended, a consequential amendment to the Employment Relations Act will be required to update that list of prohibited grounds. Otherwise, there would be an internal inconsistency in the Employment Relations Act — it would refer to the “prohibited grounds of discrimination set out in section 21” but then replicate an incomplete list.

⁴¹ Employment Relations Act 2000, ss 104–105.

⁴² Employment Relations Act 2000, s 105.

- 9.72 All but one of the employment exceptions in the Human Rights Act apply to discrimination under the Employment Relations Act as well.⁴³ Therefore, if any of the employment exceptions in Part 2 of the Human Rights Act are amended to apply to new grounds, this will also affect discrimination claims under the Employment Relations Act. If any *new* employment exceptions are added to the Human Rights Act, it would need to be decided whether to amend the Employment Relations Act to ensure those exceptions also apply.
- 9.73 We note that the protections from employment discrimination in the Employment Relations Act apply in slightly narrower circumstances than those in the Human Rights Act. For example, they do not apply to independent contractors, volunteers or prospective employees.
- 9.74 The Employment Relations Act does, however, provide a parallel set of remedies (alongside those available in the Human Rights Act) for employees who experience workplace discrimination. Instead of complaining to Te Kāhui Tika Tangata | Human Rights Commission (and, subsequently, the Human Rights Review Tribunal), they can choose to lodge a personal grievance with Te Ratonga Ahumana Taimahi | Employment Relations Authority.⁴⁴
- 9.75 We are interested in feedback about whether there are other implications of this review for the Employment Relations Act that we have not understood or difficulties we have not identified.
- 9.76 Although our review is largely limited to the Human Rights Act, we may make recommendations about any consequential amendments that would be needed to the Employment Relations Act.
- 9.77 It is also possible that consequential amendments to the Employment Relations Act would have implications for other employment legislation. For example, the Equal Pay Act 1972 says that, if a term or expression in that Act is undefined, it has the meaning in the Employment Relations Act.⁴⁵

QUESTION

Q32

Do you have any feedback about the implications of this review for the Employment Relations Act 2000?

⁴³ Employment Relations Act 2000, s 106. The exception is Human Rights Act 1993, s 30A, concerning retirement benefits.

⁴⁴ A person must choose one or other: Employment Relations Act 2000, s 112; and Human Rights Act 1993, s 79A.

⁴⁵ Equal Pay Act 1972, s 2(3).

CHAPTER 10

Goods, services, facilities and places

INTRODUCTION

- 10.1 In this chapter, we discuss the protections in Part 2 of the Human Rights Act 1993 that relate to access to places and vehicles, and to provision of goods, services and facilities. These are found in sections 42 and 44. We seek feedback on the implications for sections 42 and 44 of adding new prohibited grounds of discrimination to the Human Rights Act. We also identify three exceptions for discussion and feedback.
- 10.2 Where access to goods, services, facilities or places is controlled by a government department or is considered to be a government function, Part 1A of the Human Rights Act will apply instead. We discuss Part 1A in Chapter 16.
- 10.3 We recommend reading this chapter alongside Chapter 8, which explains our approach to reviewing Part 2 of the Human Rights Act.

SCOPE OF PROTECTION

- 10.4 Together, sections 42 and 44 apply to discrimination in access to goods, services, facilities and places by private individuals or organisations. There is considerable overlap between the two sections.

Access by the public to places, vehicles and facilities — section 42

- 10.5 Section 42 prohibits discrimination in access by the public to places, vehicles and associated facilities. The section makes it unlawful to do the following based on a prohibited ground:
- (a) refuse to allow someone to access or use any place or vehicle that members of the public can access or use;
 - (b) refuse to allow someone to use facilities that members of the public can use in that place or vehicle; or
 - (c) require someone to leave or stop using that place, vehicle or facility.
- 10.6 This section applies to places like supermarkets, gyms, restaurants, pools and shopping centres, to transport such as charter buses, aeroplanes and taxis, and to facilities within these places or vehicles.

- 10.7 A notable feature of section 42 is that it applies to “any person” who carries out one of the prohibited activities. In theory, it could be a member of the public who is preventing another from using or accessing a place, vehicle or facility. Another notable feature is that, under section 134 of the Act, activity that is unlawful under section 42 also amounts to a criminal offence.¹ We are not aware of any cases where a prosecution has been brought under section 134 nor under the equivalent provision in earlier legislation.²

Provision of goods, facilities or services — section 44

- 10.8 Section 44 of the Human Rights Act applies when a person supplies goods, facilities or services to the public or to any section of the public. The reference to “facilities” means section 44 overlaps with section 42, but the facilities referred to in section 44 can also be for banking, insurance, grants, loans, credit or finance.³
- 10.9 It is unlawful to refuse or fail on demand to provide a person with goods, facilities or services by reason of a prohibited ground of discrimination. It is also unlawful to treat a person less favourably in connection with the provision of goods, facilities or services than would otherwise be the case by reason of a prohibited ground.
- 10.10 This section applies to businesses such as shops, restaurants, healthcare providers, banks, insurers, gyms and sports centres.
- 10.11 Two features of section 44 provide some limitations. One is that the goods, facilities or services must be provided “to the public or any section of the public”. As we discussed in Chapter 8, it may be unclear whether a group of people is a “section of the public”.
- 10.12 A second feature is that section 44 has limited application to members’ clubs. It only applies when a club (or its branch or affiliate) grants privileges to members of another club, branch or affiliate.⁴ Otherwise, section 44 does not apply to membership of a club or to the provision of services or facilities to club members.⁵ The clubs exception was first introduced into New Zealand’s anti-discrimination legislation in 1977 with the apparent rationale of ensuring that single-sex clubs could continue.⁶ We are not reviewing the clubs exception as it applies to all prohibited grounds and reflects an underlying policy trade-off that we do not think is open to us to revisit in this review.

Is the scope of protection sufficient?

- 10.13 We are interested to understand whether the scope of sections 42 and 44 is sufficient to capture issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics in relation to public access to goods, services, facilities and places. As we discussed in Chapter 3, we understand these issues include being discriminated against in shops and restaurants or when seeking health care, being prevented from using a bathroom or changing room, being unable to participate in a sports team that aligns with a person’s gender and being discriminated against when

¹ A prosecution under section 134 requires the Attorney-General’s consent: Human Rights Act 1993, s 135.

² Race Relations Act 1971, s 24.

³ Human Rights Act 1993, s 44(2).

⁴ Human Rights Act 1993, s 44(3).

⁵ Human Rights Act 1993, s 44(4).

⁶ Human Rights Commission Act 1977, s 24(9). See (7 July 1977) 411 NZPD 1246 (John Richard Harrison MP).

on a street or in a public place. We think sections 42 and 44 are likely to cover these forms of discrimination (although their application to competitive sports and access to bathrooms and changing rooms is constrained by exceptions that we discuss in later chapters).

- 10.14 We would also like to learn about any other implications for sections 42 and 44 of adding new prohibited grounds of discrimination. For example, we want to understand the implications for businesses, and we want to know whether any new exceptions to section 42 and 44 would be desirable to ensure the Human Rights Act appropriately balances relevant rights and interests. We have not thought of any but welcome feedback on this issue. (We discuss existing exceptions below.)

QUESTIONS

Q33

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?

Q34

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?

(Later in the chapter, and in Chapters 13 and 14, we discuss existing exceptions in the Act that balance relevant rights and interests. You may want to read about these before answering.)

Q35

Are new exceptions relating to access to goods, services, facilities or places desirable to accommodate any new grounds we propose?

EXCEPTIONS

- 10.15 In the sections below, we discuss three exceptions in the Human Rights Act that relate to section 44 (provision of goods, services and facilities). Other exceptions relating to single-sex facilities and competitive sport are discussed in Chapters 13 and 14.

Exceptions on which we do not seek feedback

- 10.16 As we discussed in Chapter 8, there are two categories of specific exception on which we do not seek feedback. These are exceptions that apply to all grounds (and that do not raise issues specific to this review) and exceptions that do not apply to sex. In the table below, we list the exceptions relevant to this chapter that fall into those two categories. We have reviewed all these exceptions but do not discuss them further.

EXCEPTIONS ON WHICH WE DO NOT SEEK FEEDBACK	
Exceptions that apply to all grounds – should extend to any new grounds	
Provision of goods and services	
44(4)	Exception for membership of clubs and for goods and services provided to members of a club.
Exceptions that do not apply to discrimination on the ground of sex – should not extend to any new grounds	
Access to places, vehicles and facilities	
43(2) and (4)	Exception relating to disability.
Provision of goods and services	
49(3)	Exception for competitive sport relating to disability where risk of harm.
49(4)	Exception for competitive sport relating to disability and age.
50	Exception for travel services relating to age.
51	Exception for reduced rate relating to age, disability and employment status.
52	Exception relating to disability.

Courses and counselling exception – section 45

- 10.17 If courses or counselling involve highly personal matters such as sexual matters or violence prevention, section 45 of the Human Rights Act allows these to be limited to persons of a particular sex, race, ethnic or national origin, or sexual orientation.
- 10.18 There is a similar exception in section 59 that allows an educational establishment to hold or provide counselling of this kind. Our discussion on whether to amend section 45 to reflect new grounds applies equally to that exception.

Scope and rationale of the current exception

- 10.19 We have found it hard to determine the rationale for section 45. The legislative history provides only limited information on why the exception was introduced in 1993 and the previous legislation did not contain a comparable provision.
- 10.20 One possibility is that the exception anticipates situations with multiple participants such as courses and group counselling. Examples might be a course on sexuality and healthy relationships or a group therapy class for survivors of sexual abuse. In these circumstances, the rationale for an exception might be to enable participants to feel comfortable and participate freely. There might be public interests served by securing attendance at such courses in certain circumstances (for example, a course for offenders on living without violence) and in securing full therapeutic benefits.
- 10.21 The legislative history suggests this was the likely rationale for section 45. In 1990, the Department of Justice indicated that a new exception should be drafted “to cover the

holding of courses, or the provision of counselling, on matters which are of common interest to a group and which are of some intimacy”. It gave as examples “sexual matters of any kind and anger management”.⁷

- 10.22 If this is the sole rationale, however, one would expect the exception to apply solely to group courses or counselling. The language of the exception is broader than that.
- 10.23 Another possible rationale (which could also be relevant to individual counselling) might relate to expertise and specialisation. For example, a counsellor might have specific expertise in counselling migrant and refugee women from particular communities. If that is the rationale, however, we wonder if the exception is even needed. A counsellor who lacks necessary expertise would have an ethical obligation to refuse to provide the service and/or to refer elsewhere.⁸ We are aware of a case where Te Taraipūnara Mana Tangata | Human Rights Review Tribunal found a health provider did not breach the Human Rights Act by declining to provide treatment to a patient where this was contrary to their professional obligations.⁹

Should the exception be amended to reflect any new grounds?

- 10.24 One argument for amending the exception to reflect new prohibited grounds of discrimination is that some people who are transgender or non-binary or who have an innate variation of sex characteristics might feel more comfortable discussing highly personal topics with people from the same community, and some counsellors may specialise in providing counselling to these groups. Some organisations already have counselling and courses tailored for these groups. For example, OutLine has counsellors who specialise in “rainbow-affirming counselling” and InsideOUT Kōaro holds a course on respectful relationships that is designed to support rainbow rangatahi (young people).¹⁰
- 10.25 Depending on the wording of any new grounds, extending the exception might also allow courses and counselling to be restricted to people who are cisgender. It is possible some cisgender men or women might prefer to attend a course or counselling on highly personal matters with other cisgender men or women. For example, some cisgender female survivors of sexual violence may prefer to attend a course with other cisgender women. It is also possible a counsellor might feel they have insufficient expertise to assist a client who is transgender or non-binary or who has an innate variation of sex characteristics with particular issues.
- 10.26 An argument against extending the exception is that, if courses and counselling were limited to cisgender people, this might well make it difficult for transgender and non-binary people to access services — particularly where they do not live in a major city. Research

⁷ Letter from Margaret Nixon (Secretary for Justice) to Chief Parliamentary Counsel regarding review of Human Rights Commission Act 1997 and Race Relations Act 1971 (12 February 1990) at 15.

⁸ Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, right 4(2); and Te Roopu Kaiwhiriwhiri o Aotearoa | New Zealand Association of Counsellors *Code of Ethics: A Framework for Ethical Practice 2002*, cls 4.8 and 5.3. The Code of Ethics also states counsellors should avoid discriminating against clients on the basis of characteristics such as gender: cl 5.2(d).

⁹ *Jacobsen v Zhou* [2015] NZHRRT 38 at [37]–[43], applying Human Rights Act 1993, s 21B.

¹⁰ Outline Aotearoa “Our Counsellors” <outline.org.nz>; and InsideOUT Kōaro “Respectful Relationships Programme” <insideout.org.nz>

has found that transgender and non-binary people can face barriers in getting professional help when they experience partner or sexual violence.¹¹

QUESTIONS

Q36

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?

Q37

Do you have any additional feedback on the practical implications of amending section 45?

Skill exception – section 47

- 10.27 There is an exception in section 47 of the Human Rights Act that applies where the nature of a skill varies depending on whether it is exercised in relation to men or to women. In this situation, a person does not breach the Act if they exercise the skill in relation to one sex only, in accordance with their normal practice.

Scope and rationale of the current exception

- 10.28 The Human Rights Commission Act 1977 (the 1977 legislation) had a very similar exception, with the provision listing the example of hairdressing.¹² Other examples of where the current exception might apply include a beauty salon that offers services such as waxing or laser hair removal to women but not men and a tailor who specialises in men's suits.
- 10.29 One possible rationale for this exception might be to allow professionals to develop expertise in particular kinds of services. However, the legislative history from the 1970s suggests this exception also reflects ideas about practicability, custom and common sense.¹³ In the 1970s (and perhaps even the 1990s), it was simply seen as absurd to suggest that certain industries such as hairdressing should be prevented from providing single-sex services.
- 10.30 Separate considerations might apply to the provision of intimate services such as massage or intimate waxing. In those situations, an additional rationale might be the comfort and privacy rights of the provider. In some cases, a person's religious beliefs may also be relevant.

Should the exception be amended to reflect any new grounds?

- 10.31 We do not think section 47 has aged very well. We doubt that a crude division of services between men and women is now sufficient to underlie a skills-based exception. For

¹¹ Sandra Dickson *Trans and Gender Diverse Responses: Building Rainbow communities free of partner and sexual violence* (Hohou Te Rongo Kahukura | Outing Violence, 2017) at 23–25.

¹² Human Rights Commission Act 1977, s 24(5). The section began “Where the nature of a skill such as hairdressing ...”.

¹³ See (9 December 1976) 408 NZPD 4687 (David Thomson MP); and (7 July 1977) 411 NZPD 1246 (John Richard Harrison MP).

example, while we think a barber should be entitled to decline to cut long hair based on their expertise, we do not think this justifies a refusal to serve a woman or non-binary person who happens to want a buzz cut.

- 10.32 In some cases (such as assumptions around hairstyles) the rationale for section 47 seems to be about gender expression rather than sex. In others (such as intimate waxing) it may be more about sex characteristics.
- 10.33 We need to consider what should happen to section 47 should new prohibited grounds be added to the Human Rights Act. We see some merit in removing section 47 altogether as we doubt it is needed. It seems unlikely that a hairdresser or barber who only offered certain types of haircuts or a tailor who only made certain types of suits would be in breach of the Act so long as they supplied these services to any customer who wanted them. However, we think removing an existing exception is outside the scope of our review and would need to await a general review of the Human Rights Act. Therefore, we are not presenting this as an option for consultation.
- 10.34 One option that might be more achievable within the scope of this review would be to replace section 47 with a narrower exception stating 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. The term sex characteristics is broad and can include both primary sex characteristics such as genitals and secondary sex characteristics such as breast development and body hair. This might, for example, authorise a beauty salon to offer intimate waxing in relation to some parts of the body and not others.
- 10.35 A second option would be to replace the exception with one that applies to services where the customer is fully or partially unclothed. This would allow providers to set their own comfort level in intimate situations. In other intimate contexts, the law recognises that it is important for individuals to set their own boundaries.¹⁴ We consider such an exception would need to be restricted to contexts such as beauty therapy rather than settings such as hospitals or aged care facilities.
- 10.36 We appreciate the options that we propose in relation to this exception go further than simply adding (or not) new prohibited grounds. This is because we think the assumptions on which this exception are grounded have dated particularly poorly.

QUESTIONS

Q38

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?

Q39

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

¹⁴ For example, Prostitution Reform Act 2003, s 17(1). This provides that a person has the legal right to refuse to provide, or to continue to provide, a commercial sexual service to any other person.

Insurance exception – section 48

- 10.37 Section 48 of the Human Rights Act allows insurers to offer or provide annuities and insurance policies (including accident and life insurance) to individuals or groups on different terms or conditions for each sex. The exception also applies to age and disability.
- 10.38 To rely on this exception in relation to sex, two requirements must be met. First, the different treatment must be based on actuarial or statistical data relating to life expectancy, accidents or sickness and it must be reasonable to rely on that data.¹⁵ Second, the different treatment must be reasonable having regard to the application of that data, and any other relevant factors, to the particular circumstances.¹⁶

Scope and rationale of the current exception

- 10.39 A person's sex, age or disability may affect the likelihood they will make an insurance claim and the nature of that claim. For example, women have a longer life expectancy than men, and young male drivers are more likely to make a car insurance claim than young female drivers.¹⁷ The rationale for the exception is to facilitate fair pricing by limiting the extent to which those who pose a lower risk of claims are cross-subsidising those who pose a higher risk.¹⁸
- 10.40 The exception is based on a similar provision in the 1977 legislation.¹⁹ Retention of the exception in 1993 was controversial.²⁰ We would expect the justifications for and against it to be closely scrutinised in the event of a general review of the Act.

Should the exception be amended to reflect any new grounds?

- 10.41 We are interested to understand whether this exception should be amended to clarify how it applies to people who are transgender or non-binary or who have an innate variation of sex characteristics. We think there are two distinct issues.

Clarification of how current exception relating to sex should be applied

- 10.42 The first is whether the current exception applying to the ground of sex should clarify how it applies to customers who are transgender or non-binary or who have an innate variation of sex characteristics, and how sex is to be determined.
- 10.43 As we discussed above, a person's sex may affect the likelihood they will make an insurance claim and the nature of that claim. However, we suspect the precise basis for this may differ depending on the type of insurance. For example, a person's sex characteristics might be relevant when determining their likelihood of making a health insurance claim (such as whether they have a risk of ovarian cancer or testicular cancer).

¹⁵ Human Rights Act 1993, s 48(1)(a).

¹⁶ Human Rights Act 1993, s 48(1)(b).

¹⁷ See Tatauranga Aotearoa | Stats NZ "Deaths increase by ten percent in 2022" (20 February 2023) <www.stats.govt.nz>; and Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand "Insurance Pricing" (October 2019) <www.icnz.org.nz>.

¹⁸ See Department of Justice *Human Rights Bill: Clauses 62, 82–84 – Report of the Department of Justice* (1993) at 2–3.

¹⁹ Human Rights Commission Act 1977, s 24(6).

²⁰ Hansard records that the select committee had a lengthy debate on this issue and the recommendation to retain the exception was not unanimous: (27 July 1993) 536 NZPD 16908 (Lianne Dalziel MP); and (27 July 1993) 536 NZPD 16911 (Graeme Reeves MP).

Southern Cross says it asks applicants to provide their “biological sex” when seeking health insurance because it provides a person with cover for their “total anatomy”. It says that, if a person has undergone surgical gender affirmation, they can ask to have their biological sex amended on an existing insurance policy. Southern Cross also advises that “for an intersex member, our health insurance cover applies to both ‘male’ and ‘female’ organs”.²¹

- 10.44 For other types of insurance, there could be social factors that contribute to men and women having a differential likelihood of making an insurance claim such as differences in risk-taking, alcohol consumption or smoking rates.
- 10.45 We are not aware of other jurisdictions having an insurance exception that expressly allows insurers to offer different terms and conditions based on a person’s sex assigned at birth or sex characteristics. However, New South Wales has an exception applying to superannuation that allows a transgender person to be treated as the opposite sex to which they identify.²²
- 10.46 An argument for allowing insurers to rely on sex assigned at birth or sex characteristics when applying the current sex exception is that it may be consistent with the current rationale (that reflecting differential risk in insurance premiums facilitates fair pricing by limiting cross-subsidisation). For example, it would allow an insurer to consider whether a customer has a risk of ovarian cancer or testicular cancer. If insurers cannot offer differentiated premiums on the basis of those risks, this may lead to an increase in premiums for all customers or a reduction in the cover offered by an insurer.
- 10.47 On the other hand, the underlying rationale is already applied inconsistently. There is no similar exception for race, colour, or ethnic or national origin even though life expectancy can vary depending on ethnicity. This recognises there can be social and moral reasons that override the objective of minimising cross-subsidisation. For example, if particular social groups can be charged higher insurance premiums, this can compound disadvantage by making it less likely they will take out insurance. We understand that, when the Race Relations Bill was being considered, the life insurance industry sought an exception to allow racial discrimination. This was rejected by the select committee because of a concern that insurers could charge Māori higher life insurance rates due to their higher mortality rate (as well as concerns about insufficient data).²³
- 10.48 There may also be privacy reasons for not allowing insurers to rely on a person’s sex assigned at birth or sex characteristics when applying the sex exception. It could be distressing for a customer to have to provide an insurer with personal details of that kind — perhaps especially outside the context of health insurance (for example, when insuring a car).
- 10.49 Relying on sex characteristics to determine insurance pricing could also be very complex because of the many different characteristics that could be involved. As we discussed in Chapter 2, primary and secondary sex characteristics include genitalia, other sexual and

²¹ Southern Cross Health Insurance “Diversity and Inclusion” <www.southerncross.co.nz>.

²² Anti-Discrimination Act 1977 (NSW), s 38Q.

²³ Letter from Margaret Nixon (Secretary of Justice) to Minister of Justice regarding Human Rights Commission Act 1977: discrimination in insurance and superannuation (7 August 1990) at 3.

reproductive anatomy, chromosomes, hormones and secondary features that emerge at puberty.

- 10.50 In order for an insurer to rely on the sex exception, any different treatment would have to be based on actuarial or statistical data relating to life expectancy, accidents or sickness and would also have to be reasonable. These requirements may mean, in practice, that insurers need to treat customers in line with their self-identified sex.

Differential terms based on being transgender or non-binary or having an innate variation of sex characteristics

- 10.51 A second issue is whether the Human Rights Act should allow insurers to offer differential terms and conditions based on whether someone is transgender or non-binary or has an innate variation of sex characteristics. We do not know if the fair pricing rationale would support distinctions of this kind as we have no information on how these variables affect insurance risk.
- 10.52 As with an exception tied to sex assigned at birth, potential arguments against an exception along these lines might relate to social and moral concerns such as privacy and not compounding disadvantage for vulnerable communities. The privacy argument would be strongest for policies such as car insurance where it is less common for insurers to obtain highly personal information.
- 10.53 We wonder, too, if there might be limited actuarial or statistical data currently available about people who are transgender or non-binary or who have an innate variation of sex characteristics. For example, life expectancy data provided by Tatauranga Aotearoa | Stats NZ is broken down by sex, ethnicity and region, not by whether someone's gender identity aligns with their sex assigned at birth.
- 10.54 In relation to disability, section 48 currently specifies that, if actuarial or statistical data is not available, the different treatment can be based instead on reputable medical or actuarial advice or opinion.²⁴ If the insurance exception were to be extended to reflect new grounds, it might be necessary to make similar provision.
- 10.55 Finally, it is relevant that insurers would already receive a degree of protection from the fact the exception in section 48 also applies to disability. For example, if an innate variation of sex characteristics is associated with a medical condition that affects the likelihood of making certain claims, the insurer could rely on the disability exception to adjust insurance premiums.

QUESTION

Q40

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?

²⁴ Human Rights Act 1993, s 48(1)(a)(ii).

QUESTIONS**Q41**

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 someone is transgender or non-binary or has an innate variation of sex characteristics?

Q42

Do you have any additional feedback on the practical implications of amending the insurance exception in section 48 or creating a new insurance exception?

CHAPTER 11

Land, housing and accommodation

INTRODUCTION

- 11.1 In this chapter, we discuss the protections in Part 2 of the Human Rights Act 1993 that relate to land, housing and accommodation. These are found in section 53. We seek feedback on the implications for section 53 of adding new prohibited grounds of discrimination to the Human Rights Act. We identify one exception to section 53 for discussion and feedback. We also identify the implications of our review for the Residential Tenancies Act 1986.
- 11.2 We recommend reading this chapter alongside Chapter 8, which explains our approach to reviewing Part 2 of the Human Rights Act.

SCOPE OF PROTECTION

- 11.3 Section 53(1) of the Human Rights Act sets out five activities that are prohibited when done by reason of a prohibited ground:
- (a) refusing or failing to dispose of land or accommodation to someone;
 - (b) disposing of land or accommodation on less favourable terms;
 - (c) different treatment of someone who is seeking land or accommodation;
 - (d) denying someone the right to occupy any land or accommodation; and
 - (e) terminating someone's interest in any land or right to occupy any accommodation.
- 11.4 There is overlap between these five subsections. Examples of activities prohibited by section 53(1) include: refusing to sell or lease a house to someone, to sublet them a room or to book them a room in a hotel; charging someone a higher rent than others; subletting a room on less favourable conditions than are available to others; and evicting someone or terminating their lease.
- 11.5 The apparent scope of section 53(1) is narrowed significantly by a broad exception in section 54 for residential accommodation that is to be “shared with the person disposing of the accommodation”. This would include, for example, flatmates and boarders.
- 11.6 Section 53(2) of the Human Rights Act prevents a person (such as a landlord) from requiring a person occupying their land or accommodation (such as a tenant) to limit the people who can come onto the property based on a prohibited ground of discrimination.

- 11.7 Section 53 is not the only provision in the Act relevant to land, housing and accommodation. As we explained in Chapter 8, discrimination by government departments or agencies exercising government functions would instead fall under Part 1A. Examples might be discrimination by Kāinga Ora | Homes and Communities when providing public housing¹ or by Te Papa Atawhai | Department of Conservation when selling passes to huts and lodges. In situations where a service provider, school, university or employer provides accommodation, other provisions in Part 2 may also apply.

Is the scope of protection sufficient?

- 11.8 We want to understand better whether the scope of section 53 is sufficient to capture issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. We understand the exception for flatmates and boarders may be an issue of particular concern to some people. However, for reasons discussed more fully elsewhere in the paper (especially Chapters 4 and 8), we think amendments to that exception would be outside the scope of our review. It applies to all prohibited grounds and reflects an underlying policy trade-off that we do not think is open for us to revisit.
- 11.9 Putting aside the exception for flatmates and boarders, we think section 53 is likely to cover the other main types of discrimination that might be experienced by people who are transgender or non-binary or who have innate variations of sex characteristics in relation to land, housing and accommodation. As we discussed in Chapter 3, these include being denied a home or flat and being evicted.
- 11.10 We would also like to learn about any other implications for section 53 of adding new prohibited grounds of discrimination. For example, we want to understand the implications for landlords or boarding house operators, and we want to know whether any new exceptions to section 53 would be desirable to ensure the Act appropriately balances relevant rights and interests. We have not thought of any but welcome feedback on this issue. (We discuss existing exceptions below.)

QUESTIONS

Q43

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?

Q44

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?

(Later in the chapter, we discuss existing exceptions in the Act that balance relevant rights and interests. You may want to read about these before answering.)

¹ See *Winther v Housing New Zealand Corporation* [2010] NZCA 601, [2011] 1 NZLR 825 at [31].

QUESTION

Q45

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

EXCEPTIONS

- 11.11 There are three exceptions in the Human Rights Act relating specifically to land, housing and accommodation. We are only seeking feedback on one of them (section 55).

Exceptions on which we do not seek feedback

- 11.12 As we discussed in Chapter 8, there are two categories of specific exception on which we do not seek feedback. These are exceptions that apply to all grounds (and that do not raise issues specific to this review) and exceptions that do not apply to the ground of sex. In the table below, we list the exceptions relevant to this chapter that fall into those two categories. We have reviewed all these exceptions but do not discuss them further.

EXCEPTIONS ON WHICH WE DO NOT SEEK FEEDBACK	
Exceptions that apply to all grounds — should extend to any new grounds	
54	Exception for shared residential accommodation such as flatmates and boarders.
Exceptions that do not apply to discrimination on the ground of sex — should not extend to any new grounds	
56	Exception relating to disability.

Shared accommodation exception — section 55

- 11.13 Section 55 of the Human Rights Act is an exception for shared accommodation such as hostels. It says section 53 does not apply to accommodation in a hostel or establishment for people of the same sex, marital status, religious belief or ethical belief, people with a particular disability or people in a particular age group. The provision gives hospitals, clubs, schools, universities, religious institutions and retirement villages as examples of “establishments”. It does not define “hostel”.

Scope and rationale of the current exception

- 11.14 The departmental report on the Bill that became the Human Rights Act said this exception was for “positive discrimination” to allow people in certain groups to live together.² As we explained in Chapter 8, positive discrimination refers to differences in treatment that are aimed at helping a group that has suffered past discrimination. We note, however, that the terms of the exception go well beyond positive discrimination. For example, they

² Department of Justice *Human Rights Bill — Report of the Department of Justice* (28 May 1993) at 40.

allow male-only hostels just as much as female-only hostels and hostels that exclude elderly people just as much as retirement homes.

- 11.15 Although the reference in the departmental report suggests the exception was supposed to apply to permanent living arrangements, the word “hostel” could apply to temporary accommodation such as in a backpackers’ hostel, as well as longer-term accommodation such as a university hostel.
- 11.16 Other jurisdictions have similar exceptions relating to hostel-style accommodation, although the scope of the exception varies and tends to be narrower than the New Zealand exception.³

Should the exception be amended to reflect any new grounds?

- 11.17 We are interested to understand whether the exception in section 55 should be amended to reflect any new grounds we propose.
- 11.18 An argument for amending the exception to reflect new grounds is that it would be consistent with the positive discrimination rationale described above. For example, it might enable university hostel accommodation to be provided specifically for people who are transgender or non-binary or who have an innate variation of sex characteristics. This might enable people to live in an environment in which they feel safe and free from harassment and in which they can provide each other with mutual support.
- 11.19 We are interested to hear whether there is a perceived need for such accommodation for people who are transgender or non-binary or who have an innate variation of sex characteristics. If there is such a need, we are interested to know whether such accommodation is likely to be provided in practice given the relatively small number of people in these groups.
- 11.20 Depending on the wording of any new grounds, extending the exception to those new grounds might also permit shared accommodation to be restricted to people who are cisgender. Again, we are interested to hear whether there is a perceived need for such an exception. We are also interested to understand current practice. For example, we understand that many safe houses in Aotearoa New Zealand (for women escaping family violence) are inclusive of transgender women.⁴ We are interested to hear whether places like refuges and temporary or emergency accommodation have identified a need to limit accommodation to people who are cisgender and, if so, why.
- 11.21 One concern about extending the exception to new grounds is that it could be used in an overly broad range of scenarios (going well beyond the positive discrimination rationale) to limit accommodation options for a disadvantaged minority. This concern would not arise if any new prohibited grounds added to section 21 only applied to characteristics held by a disadvantaged group (such as ‘being transgender’) rather than to everyone (such as ‘gender identity’).⁵
- 11.22 Finally, for reasons we discussed in Chapter 8, there is some uncertainty about what would happen if the current sex exception was not amended to reflect any proposed new

³ For example, Equality Act 2010 (UK), sch 23, para 3; and Sex Discrimination Act 1984 (Cth), ss 23(3) and 34(2).

⁴ Phoebe Ellen McHardy Moir “Transforming Women-Only Spaces: Law, Policies and Realities of Trans Inclusion in Women-Only Safe Houses in Aotearoa New Zealand” (2022) 6 NZWLJ 43 at 66–68.

⁵ We discussed the different options for amending section 21 in Chapter 7.

grounds. It is possible that a court or tribunal might hold the exception nevertheless entitles accommodation providers to restrict accommodation based on a person's sex assigned at birth.

QUESTIONS

- Q46** 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?
- Q47** Do you have any additional feedback on the practical implications of amending section 55?

IMPLICATIONS OF THIS REVIEW FOR THE RESIDENTIAL TENANCIES ACT 1986

- 11.23 The Residential Tenancies Act contains a provision about discrimination in residential accommodation that refers specifically to the Human Rights Act. Section 12 prohibits the following in respect of the grant, continuance, extension, variation, termination or renewal of a tenancy agreement:
- (a) discriminating against any person in contravention of the Human Rights Act;
 - (b) as a landlord, instructing a person to discriminate in contravention of the Human Rights Act; and
 - (c) as a landlord, stating an intention to discriminate in contravention of the Human Rights Act.
- 11.24 Because section 12 refers specifically to “contravention of the Human Rights Act”, any amendment to the prohibited grounds of discrimination in section 21 of the Human Rights Act would have consequential implications for the Residential Tenancies Act.
- 11.25 On our preliminary analysis, however, the only additional implication (beyond the implications discussed earlier in this chapter) is that the Residential Tenancies Act opens up an alternative complaints mechanism. In practice, activity that is unlawful under section 12 of the Residential Tenancies Act is also unlawful under section 53 of the Human Rights Act. However, a person who believes they have experienced discrimination in relation to a residential tenancy can choose to bring a claim to the Tenancy Tribunal under the Residential Tenancies Act instead of pursuing a complaint under the Human Rights Act.⁶
- 11.26 If new grounds of discrimination were added to section 21 of the Human Rights Act, this would clarify that complaints under the Residential Tenancies Act can be pursued on the basis of those additional grounds.
- 11.27 We are interested in feedback about whether there are other implications of this review for the Residential Tenancies Act.

⁶ A person is not entitled to invoke both procedures: Residential Tenancies Act 1986, s 12A. We discuss the Human Rights Act complaints procedures in Chapter 18.

QUESTION**Q48**

Do you have any feedback about the implications of this review for the Residential Tenancies Act 1986?

CHAPTER 12

Education

INTRODUCTION

- 12.1 In this chapter, we discuss the protections in Part 2 of the Human Rights Act 1993 that relate to educational establishments, including vocational training bodies. These are found in sections 40 and 57. We seek feedback on the implications for sections 40 and 57 of adding new prohibited grounds of discrimination to the Human Rights Act. We identify two exceptions for discussion and feedback. We also seek feedback on the implications of our review for the Education and Training Act 2020.
- 12.2 We recommend reading this chapter alongside Chapter 8, which explains our approach to reviewing Part 2 of the Human Rights Act.

SCOPE OF PROTECTION

- 12.3 Section 40 applies to organisations or associations that provide vocational training (which is training to help prepare a person for employment). Vocational training bodies cannot refuse or omit to provide someone with training (or facilities or opportunities for training), provide those on less favourable terms and conditions, or terminate someone's training or facilities or opportunities for training by reason of a prohibited ground of discrimination.
- 12.4 Section 57 applies to people and bodies involved in the control and management of, and teaching at, educational establishments. It prohibits the following actions if done by reason of a prohibited ground of discrimination:
- (a) refusing or failing to admit a student;
 - (b) admitting a student on less favourable terms;
 - (c) denying or restricting a student's access to any benefits or services; and
 - (d) excluding a student or subjecting them to any other detriment.
- 12.5 Sections 40 and 57 overlap. This is because section 57(2) specifies that an “educational establishment” includes vocational training bodies.
- 12.6 The Human Rights Act does not otherwise define educational establishment. There is a large variety of educational establishments in Aotearoa New Zealand. Some examples are: early childhood education centres and kōhanga reo; primary, intermediate and secondary schools; tertiary institutions such as universities, wānanga, institutes of technology and polytechnics; and training establishments set up to serve particular industries or professions (like the Royal New Zealand Police College).

- 12.7 Whether sections 40 and 57 regulate these various establishments and in what circumstances depends on whether the particular establishment is exercising a government function (and is therefore regulated by Part 1A of the Human Rights Act). As we explained in Chapter 8, case law and commentary suggests many education providers are likely to be exercising government functions. Therefore, the role for Part 2 in regulating education providers may be quite limited.

Is the scope of protection sufficient?

- 12.8 We want to understand better whether the scope of sections 40 and 57 is sufficient to capture issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. In Chapter 3, we discussed the difficulties reported by students who are transgender or non-binary or who have an innate variation of sex characteristics in an education setting. They include difficulties with admission to single-sex schools, participation in school sports, accessing safe and appropriate bathrooms and changing rooms, misgendering, deadnaming, bullying, challenges associated with gendered uniforms, and school activities that group students into boys and girls.
- 12.9 We discuss issues associated with access to bathrooms and changing rooms in Chapter 13 and misgendering and deadnaming in Chapter 17. Putting those issues aside for now, some of the remaining concerns identified above might be covered under section 57 as it is currently worded. For example, requiring a transgender female student to wear a male uniform might amount to a detriment in breach of section 57.¹
- 12.10 Some of these concerns may also be addressed by other existing laws. For example:
- (a) All teachers must be registered with and certified by Matatū Aotearoa | Teaching Council of Aotearoa New Zealand and comply with professional responsibilities set by the Teaching Council.² A teacher may be disciplined by the Teaching Council for serious misconduct, and this can include having their registration cancelled.³ Under the Education and Training Act, every employer in the education service has an obligation to ensure that employees maintain proper standards of integrity, conduct and concern for the wellbeing of students attending the place of education.⁴
 - (b) The primary objectives of boards in state schools (and state-integrated schools) include ensuring the school “is a physically and emotionally safe place for all students and staff”, “takes all reasonable steps to eliminate racism, stigma, bullying, and other forms of discrimination within the school” and “is inclusive of, and caters for, students with differing needs”.⁵ The criteria for registration as a private school requires the

¹ Human Rights Act 1993, s 57(1)(d).

² Education and Training Act 2020, s 485; Matatū Aotearoa | Education Council New Zealand *Our Code Our Standards: Code of Professional Responsibility and Standards for the Teaching Profession* | Ngā Tikanga Matatika Ngā Paerewa Ngā Tikanga Matatika mō te Haepapa Ngaio tangā me ngā Paerewa mō te Umanga Whakaakoranga (June 2017).

³ Serious misconduct is defined in s 10(1)(a) of the Education and Training Act 2020.

⁴ Education and Training Act 2020, s 597(3)(b).

⁵ Education and Training Act 2020, s 127(1).

school to have suitable premises and to be a physically and emotionally safe place for students.⁶

- (c) There are obligations on school boards, principals and teachers under the Health and Safety at Work Act 2015 to ensure the health and safety of students, including their psychological health. Bullying is a known hazard, and Te Tāhuhu o te Mātauranga | Ministry of Education issues guidance on how to prevent and respond to bullying.⁷
- (d) If a student is being bullied on social media or some other digital format, the Harmful Digital Communications Act 2015 might be relevant. With the consent of the affected student, a school principal can bring proceedings under this Act.⁸

- 12.11 We would also like to understand any other implications for sections 40 and 57 of adding new prohibited grounds of discrimination. For example, we want to understand the implications for educational establishments and vocational training providers, and we want to know whether any new exceptions to sections 40 and 57 would be desirable to ensure the Human Rights Act appropriately balances relevant rights and interests. (We discuss existing exceptions below.)
- 12.12 We are aware, for example, that in Victoria, there is an exception allowing educational authorities to set and enforce reasonable standards of dress, appearance and behaviour.⁹ We are not sure that such an exception would be needed in Aotearoa New Zealand as we doubt this would amount to discrimination in the first place. However, we are interested to hear submitters' views on that or any other exceptions that may be desirable.
- 12.13 In Chapter 17, we seek feedback on whether there should be exceptions in the Human Rights Act that protect sex-differentiated activities that are done in accordance with tikanga.

QUESTIONS

Q49

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?

Q50

Do you have any practical concerns about what the education protections in the Human Rights Act 1993 would cover if new prohibited grounds of discrimination are added to the Act?

(Later in Chapter 12, and in Chapter 13, we discuss existing exceptions in the Act that balance relevant rights and interests. You may want to read about these before answering.)

⁶ Education and Training Act 2020, sch 7, cl 2(a) and (h).

⁷ See, for example, Te Tāhuhu o te Mātauranga | Ministry of Education *Health and Safety at Work Act 2015: A practical guide for boards of trustees and school leaders* (August 2017) at 50.

⁸ Harmful Digital Communications Act 2015, s 11(1)(c).

⁹ Equal Opportunity Act 2010 (Vic), s 42. In the case of schools, the educational authority must take into account the views of the school community in setting the standard for what is reasonable.

QUESTION**Q51**

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

EXCEPTIONS

- 12.14 There are two exceptions relating to education on which we seek feedback. These relate to educational establishments for particular groups, and courses and counselling.

Exceptions on which we do not seek feedback

- 12.15 As we discussed in Chapter 8, there are two categories of specific exception on which we do not seek feedback. These are exceptions that apply to all grounds (and that do not raise issues specific to this review) and exceptions that do not apply to sex. In the table below, we list the exceptions relevant to this chapter that fall into those two categories. We have reviewed all these exceptions but do not discuss them further.

EXCEPTIONS ON WHICH WE DO NOT SEEK FEEDBACK	
Exceptions that apply to all grounds — should extend to any new grounds	
None relevant.	
Exceptions that do not apply to discrimination on the ground of sex — should not extend to any new grounds	
Vocational training bodies	
41(1)	Exceptions for preferential access to training for people who have been out of work.
41(4)–(6)	Exceptions for particular age groups.
41(2)–(3) and (7)–(8)	Exceptions relating to disability.
Educational establishments	
58(2)	Exceptions for preferential access to training for people who have been out of work.
58(3)–(5)	Exceptions for particular age groups.
60	Exceptions relating to disability.

Single-sex schools exception — section 58(1)

- 12.16 Section 58(1) 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. In this section, we refer to ‘schools’ rather than

‘educational establishments’ because we have not come across any other single-sex educational establishments.¹⁰

Scope and rationale of the current exception

- 12.17 This exception only applies to decisions about admission. It does not apply to the other forms of discrimination prohibited by section 57.
- 12.18 The legislative history does not explain the policy rationale behind section 58(1) or the equivalent provision in earlier legislation.¹¹ The exception reflects a longstanding tradition in Aotearoa New Zealand of schools set up for students of a particular sex, race, religion, age or disability. We suspect the rationale for section 58(1) lies in part in the continuance of tradition. However, the exception might also be seen to accommodate the specific educational needs and preferences of students and their parents. For example, it allows learning environments to be tailored to language, religious and cultural needs or specific disability needs. It may also reflect ideas linked to positive discrimination — the assumption that, in certain circumstances, children from marginalised communities might excel more in environments of their peers. We are not clear whether there is, or continues to be, an evidence base for that assumption. That is something that might be revisited on a general review of the Human Rights Act.

Should the exception be amended to reflect any new grounds?

- 12.19 We are interested to understand whether this exception should be amended to reflect any new grounds we propose.
- 12.20 We are not aware of whether any single-sex schools currently refuse admission to students who are transgender or non-binary or who have an innate variation of sex characteristics based on an assessment of their sex assigned at birth. We are also unaware of how many would want the ability to do so in future (if any). If some schools do refuse admission on that basis, we are interested to understand what evidence they rely on to identify a student’s sex. We understand that many schools require a child’s birth certificate for enrolment, but we do not know whether schools rely exclusively on the sex marker recorded on the birth certificate to make enrolment decisions.¹²
- 12.21 We wonder if section 58(1) may have very limited impact in practice. As explored in Chapter 8, it is possible many (possibly even all) school admissions fall under Part 1A of the Human Rights Act. Even if (as may be the case) private schools are regulated by Part 2, we understand there are only 19 single-sex private schools in Aotearoa New Zealand.¹³ We understand some transgender and non-binary students may prefer to

¹⁰ We are aware of some tertiary institutions and institutes that limit certain courses to only males or females. We think these would likely be governed by Part 1A.

¹¹ Human Rights Commission Act 1977, s 26(2).

¹² Te Tari Taiwhenua | Department of Internal Affairs *Final Report of the Working Group for reducing barriers to changing registered sex: Recommendations to the Minister of Internal Affairs* (2020) at [63].

¹³ Education Counts “New Zealand Schools: Schools Directory Builder” <www.educationcounts.govt.nz>. One of these schools is co-educational for primary-aged students.

attend a co-educational school instead of a single-sex school if there is a local option available to them.¹⁴

Option 1: do nothing

- 12.22 If new prohibited grounds of discrimination were to be included in section 21, one option is to make no change to the exception (including leaving sex undefined). This is the approach taken in most Australian jurisdictions.¹⁵ In practice, this may have little impact for the reasons we explained above. However, until a court or tribunal considers the matter, it may create uncertainty about which students schools can lawfully refuse to admit and may lead to different schools taking different approaches.

Option 2: clarify that section 58(1) does not entitle schools to refuse to admit transgender students whose gender identity aligns with the school's designated sex

- 12.23 This option would provide greater clarity than option 1 and maximise choice and educational opportunities for transgender students.
- 12.24 This option would restrict a school's ability to refuse a student admission based on a difference between their gender identity and their sex assigned at birth. We are interested to hear feedback from single-sex schools on whether this might cause any difficulties in practice. If so, we are interested to understand the reasons (if any) why they might want to refuse admission to transgender students whose gender identity aligns with that school's designated sex.

Option 3: clarify that section 58(1) entitles schools to refuse to admit students whose sex assigned at birth does not align with the school's designated sex

- 12.25 This option would also provide greater clarity than option 1.
- 12.26 This option would maximise the freedom schools have to make their own admission decisions. Conversely, it would reduce the options available to transgender students. It might therefore exacerbate difficulties they have in accessing education. We are interested to understand better how significant those impacts might be.
- 12.27 There may be some practical problems with this option. As we discussed in Chapter 8, there is no current form of identification in Aotearoa New Zealand that records a person's sex assigned at birth (we discuss birth certificates in the next option). We would like to understand better what forms of evidence single-sex schools currently rely on to establish a student's sex and how they would continue to do so under this option.
- 12.28 This option may also create difficulties for some people with an innate variation of sex characteristics if their sex was incorrectly assigned at birth due to ambiguity in their external sex characteristics.

¹⁴ Te Tāhuhu o te Mātauranga | Ministry of Education *Briefing Note: Access to co-education for gender-diverse students* (22 December 2021). According to that note, there are currently four areas in Aotearoa New Zealand where students are restricted to single-sex schooling options.

¹⁵ For example, Discrimination Act 1991 (ACT), s 36; Anti-Discrimination Act 1977 (NSW), s 31A; Anti-Discrimination Act 1992 (NT), s 30; Anti-Discrimination Act 1991 (Qld), s 41; Equal Opportunity Act 1984 (SA), s 37; and Equal Opportunity Act 2010 (Vic), s 39.

Option 4: clarify that section 58(1) entitles schools to refuse to admit students whose sex recorded on their birth certificate does not align with the school's designated sex

- 12.29 Under this option, students seeking admission to a single-sex school may need to have obtained a birth certificate. This means that transgender students might be refused admission if they have not obtained a birth certificate that aligns with their gender identity. This might preclude students who are in an early stage of transitioning. It would also preclude students who do not have the support of a guardian or (in the case of students who are 16 or 17) are unable to access the support of a “suitably qualified third party”.¹⁶
- 12.30 This option avoids the issues of proof associated with option 3 because the school could make the admission decision by relying on a form of identification that specifies a person's sex. On the other hand, this option may lead to some inconsistencies and anomalies. For example, transgender students born in another country could be precluded from admission if they have not been able to change the sex on their birth certificate. It might also limit options for students who have their nominated sex on their birth certificate recorded as non-binary.¹⁷
- 12.31 If this approach were taken, it may be necessary to clarify the relationship with a provision in the Births, Deaths, Marriages, and Relationships Registration Act 2021 that states that agencies are not limited to considering the information on a birth certificate when ascertaining a person's sex or gender for a particular purpose.¹⁸

Are additional amendments to section 58(1) required to accommodate students who identify outside the gender binary?

- 12.32 Single-sex schools, by definition, are not designed to cater for students who have a gender identity that is outside the binary of male or female. We are interested to understand whether this is a significant problem in practice. It is possible students who identify outside the gender binary may not wish to attend single-sex schools. On the other hand, some students may not live within the zone of a co-educational school.
- 12.33 We are interested to hear submitters' views on whether there should be any additional amendments to section 58(1) to accommodate students who identify outside the gender binary. For example, should the law clarify that the section 58(1) exception does not enable educational establishments to refuse admission to these students?

QUESTION

Q52

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?

¹⁶ See Births, Deaths, Marriages, and Relationships Registration Act 2021, ss 23 and 24; and Births, Deaths, Marriages, and Relationships Registration (Registering Nominated Sex) Regulations 2023, reg 6. This could be a counsellor, medical practitioner, nurse or nurse practitioner, psychologist, psychotherapist or social worker.

¹⁷ Births, Deaths, Marriages, and Relationships Registration Act 2021, ss 24(1)(a) and 25(1)(a); and Births, Deaths, Marriages, and Relationships Registration (Registering Nominated Sex) Regulations 2023, reg 5.

¹⁸ Births, Deaths, Marriages, and Relationships Registration Act 2021, s 79(2).

QUESTIONS

- Q53** Are additional amendments to section 58(1) required to accommodate students who have a gender identity that is not exclusively male or female?
- Q54** Do you have any additional feedback on the practical implications of amending section 58(1)?

Courses and counselling exception — section 59

- 12.34 There is an exception in section 59 of the Human Rights Act that allows an educational establishment to hold or provide a course or counselling on highly personal matters that is restricted to people of a particular sex, race, ethnic or national origin, or sexual orientation. The section refers to sexual matters or the prevention of violence as examples of highly personal matters.
- 12.35 The section is almost identically worded to section 45, which contains an exception for courses and counselling in relation to the provision of goods and services. We discussed section 45 in Chapter 10.
- 12.36 We think the scope and rationale of these two exceptions is identical except that, because section 59 applies to educational establishments, the kind of courses it enables may be a little different. It might support separating school students by sex to provide classes on relationships and sexuality education for example.
- 12.37 We think the arguments for and against extending section 59 to new grounds are likely the same as those set out in Chapter 10 in relation to section 45. We do not repeat those arguments here. We are interested in feedback on whether any different considerations apply under section 59.

QUESTIONS

- Q55** 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?
- Q56** Do you have any additional feedback on the practical implications of amending section 59?

IMPLICATIONS OF THIS REVIEW FOR THE EDUCATION AND TRAINING ACT 2020

- 12.38 The Education and Training Act contains two provisions that refer to the Human Rights Act.
- 12.39 Section 127 (which we discussed above) sets out the primary objectives of boards in state schools when governing schools. One of these objectives is to ensure that the school gives effect to relevant student rights set out in the Education and Training Act, the New Zealand Bill of Rights Act 1990 and the Human Rights Act.¹⁹
- 12.40 Section 217 sets out the meaning of a serious dispute between a student and the board of the student's school and this includes a dispute about "any racism or other form of discrimination that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993 experienced by the student while at the school".²⁰ The Education and Training Act provides a framework for establishing dispute resolution panels to resolve serious disputes between students and school boards but these are not yet in operation.²¹
- 12.41 Amending section 21 of the Human Rights Act would clarify that the scope of a board's objectives in section 127, and what constitutes a "serious dispute" under section 217, includes discrimination against people who are transgender or non-binary or who have an innate variation of sex characteristics. On our preliminary analysis, we do not think this would have significant implications in practice. As we explained above, the primary objectives of school boards already refer to non-discrimination and inclusion.²² School boards must also have particular regard to the Statement of National Education and Learning Priorities (NELP) issued by the Minister of Education.²³ The NELP currently refers to creating "a safe and inclusive culture where diversity is valued and all learners/ākonga and staff, including those who identify as LGBTQIA+ ... feel they belong".²⁴

QUESTION

Q57

Do you have any feedback about the implications of this review for the Education and Training Act 2020?

¹⁹ Education and Training Act 2020, s 127(1)(b)(ii).

²⁰ Education and Training Act 2020, s 217(e).

²¹ Education and Training Act 2020, s 644. A briefing to Minister of Education in November 2022 said that the Ministry expected the panels could be operational in 2025: Te Tāhuhu o te Mātauranga | Ministry of Education *Briefing Note: Update on Dispute Resolution Panels* (3 November 2022) at 1.

²² Education and Training Act 2020, s 127(1).

²³ Education and Training Act 2020, s 127(2)(a).

²⁴ Te Tāhuhu o te Mātauranga | Ministry of Education *The Statement of National Education and Learning Priorities (NELP) & Tertiary Education Strategy (TES)* (2020) at 4.

CHAPTER 13

Exceptions for single-sex facilities

INTRODUCTION

- 13.1 The Human Rights Act 1993 has two exceptions that allow for single-sex facilities when private individuals or organisations are providing certain kinds of facilities to the public.¹ These are sections 43(1) and 46. In this chapter, we discuss the scope of and rationale for these exceptions and seek feedback on whether they should be amended to reflect any new grounds of discrimination we propose. We also seek feedback on some related issues:
- (a) whether an additional amendment to the Human Rights Act is desirable to encourage the provision of single-stall unisex facilities; and
 - (b) whether the position that is settled on in respect of sections 43(1) and 46 should also be reflected elsewhere in the Act (for example, in the sections on education and employment).
- 13.2 In the chapters on employment matters and land, housing and accommodation, we discussed exceptions that allow for some single-sex accommodation. We do not discuss those exceptions in this chapter, although we acknowledge they may overlap with the provisions we do discuss.
- 13.3 We recommend reading this chapter alongside Chapter 8, which explains our approach to reviewing Part 2 of the Human Rights Act.

SCOPE OF THE EXCEPTIONS

- 13.4 In Chapter 10, we discussed protections in the Human Rights Act that relate to access to places, vehicles and associated facilities (section 42) and to the provision of goods, services and facilities (section 44). In relation to each of these areas of life, there are exceptions allowing for single-sex facilities.
- 13.5 Section 42 of the Human Rights Act makes it unlawful to refuse a person access to or use of places or vehicles available to other members of the public, or any associated facilities,

¹ We use 'single-sex' and 'unisex' in this chapter as they are the most commonly used terms to describe the different approaches to these kinds of facilities. We acknowledge there are different views about the best terminology to use.

by reason of a prohibited ground. Section 43(1) has an exception that allows the maintenance of separate facilities for each sex “on the ground of public decency or public safety”.

- 13.6 Section 44 of the Human Rights Act makes it unlawful to discriminate when providing goods, facilities or services to the public. Section 46 provides an exception where separate facilities or services are maintained or provided for each sex, again “on the ground of public decency or public safety”.²
- 13.7 These exceptions only apply to conduct that would otherwise be a breach of sections 42 and 44, respectively. As we have explained elsewhere, this means they would not apply to facilities maintained by public bodies such as local councils. This would likely amount to a government function so the permissibility of single-sex facilities would be determined under the tests in Part 1A.
- 13.8 These exceptions would also not apply to facilities to which the public does not have access (because those would fall outside the terms of sections 42 and 44). As explained in Chapter 8, that means it is unclear whether these exceptions would apply to facilities provided by employers to their employees or by schools to their pupils.³
- 13.9 We think the most common application of these exceptions would be to facilities in places like cafés, restaurants, shops and gyms and to situations where someone would be partially or fully unclothed such as bathrooms, changing rooms, hostel accommodation and saunas.

RATIONALE FOR THE EXCEPTIONS

- 13.10 Two rationales are clear from the language of these exceptions: “public decency” and “public safety”. We think the public decency rationale is grounded in the right to privacy that we explored in Chapter 4, especially the dimension of the right that is about people having control over who gets to see their naked body and see or hear their intimate activities.⁴ Like some other exceptions in the Act, the public decency rationale is also grounded in social and cultural assumptions about whether it is acceptable to expose your body and intimate functions to people who are a different sex. Those cultural assumptions may have different significance for different people. They may, for example, have heightened significance for people with religious beliefs relating to modesty.
- 13.11 There are no clues in the Act about what is meant by public safety. At a minimum, it would seem to involve protection from physical harm such as assault.
- 13.12 We think these exceptions also reflect practical and historical considerations. The social reality at the time the legislation was enacted was that many public bathrooms and changing rooms were separated into men’s and women’s facilities. During legislative debates preceding the Human Rights Commission Act 1977, which contained a similar

² Although section 46 mentions “services” as well as “facilities”, in this chapter we tend to refer solely to facilities as we think this is now the primary application of the exception.

³ This exception may, in any event, have limited application to schools because, as also explained in Chapter 8, some functions exercised by public schools (and possibly also private schools) are government functions regulated by Part 1A.

⁴ See Danielle Keats Citron “Sexual Privacy” (2019) 128 Yale LJ 1870. This dimension of the right to privacy is itself grounded in ideas of autonomy and dignity that we also explore in Chapter 4.

provision, the chair of the select committee that considered the Bill noted that public decency was linked to “common sense or practice”.⁵

DIFFERING PERSPECTIVES

13.13 We know that the question of whether people who are transgender or non-binary or who have an innate variation of sex characteristics should be able to access single-sex bathrooms and changing rooms that align with their gender identity is of particular concern to some people in the community. We are interested to understand these concerns better.

13.14 We understand that bathrooms, changing rooms and other facilities where people are partially or fully unclothed can be challenging and unsafe places for people who are transgender or non-binary or who have an innate variation of sex characteristics. Te Kāhui Tika Tangata | Human Rights Commission has described the issue in this way:⁶

Trans men and women faced difficulties when they wanted access to toilets or changing rooms. Trans women said they would be refused access to the female toilets, but using a male toilet was both inappropriate and unsafe. Inability to access public toilets had a major, daily impact on many trans people. Fear of these situations and the embarrassment they created led some trans people to limit the places they would go.

13.15 As we discussed in Chapter 3, 70 per cent of *Counting Ourselves* participants (a survey of people who are transgender or non-binary) had avoided using a public bathroom in the last 12 months because they were afraid of problems using them due to being transgender or non-binary.⁷ In another survey, difficulties accessing changing rooms was a reason frequently given by transgender and non-binary participants for why they did not play sport despite wanting to.⁸

13.16 We know less about the experiences of people with an innate variation of sex characteristics. However, in an Australian study, some participants reported discrimination in public places or facilities and gave examples like being escorted out of bathrooms.⁹ Another publication observed that access to bathrooms was a “huge” issue for students with an innate variation of sex characteristics.¹⁰

13.17 We understand that access to single-sex bathrooms and changing rooms is also an issue of particular concern for some other people in the community.¹¹ The concerns mainly

⁵ (7 July 1977) 411 NZPD 1246 (Richard Harrison MP).

⁶ Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuītanga mō Aukaitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008) at [4.25].

⁷ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 75.

⁸ John Fenaughty and others *Identify Survey: Community and Advocacy Report* (2022) at 41.

⁹ Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 164.

¹⁰ Te Tāhuhu o te Mātauranga | Ministry of Education *National Education & Learning Priorities: Treat kids like they're gold* (August 2019) at 49 and 70.

¹¹ See, for example, Tanya Unkovich MP *Fair Access to Bathrooms Bill* (10 May 2024) <www.bills.parliament.nz> at 1.

focus on access by transgender women to female-only spaces. Some of the concerns we have seen expressed are that:¹²

- (a) cisgender women and girls may feel uncomfortable or have privacy concerns if sharing spaces with transgender women in which they need to remove their clothes;
- (b) transgender women may pose a safety risk to cisgender women; and
- (c) cisgender men may enter single-sex spaces (under the guise of being transgender).

13.18 We are not aware of similar concerns being raised about sharing single-sex spaces with people who have an innate variation of sex characteristics.

13.19 We are interested to understand these concerns better and to learn about what evidence there is in Aotearoa New Zealand to support them.

13.20 These concerns are not universal. For example, we understand that some cisgender women do not have concerns or worries about sharing single-sex spaces with people who are transgender or non-binary (although the results that are generated by surveys on this issue can vary substantially depending on the way the question is posed).¹³

THE POTENTIAL OF UNISEX FACILITIES

13.21 As we have explained, the public policy rationales underlying sections 43(1) and 46 of the Human Rights Act are safety and privacy. At the time the Act was enacted, single-sex facilities were seen as the logical way to advance these rationales. We are interested to explore whether these rationales can be advanced in a different way — through provision of unisex facilities. We are also interested to understand whether the Human Rights Act should play a role in furthering a move towards unisex facilities.

13.22 By unisex facilities, we mean facilities that are designed to be equally private and accessible to people of any sex or gender identity. We understand some service providers in Aotearoa New Zealand already have unisex facilities, although we do not know what proportion. The Building Code sets out requirements for unisex bathrooms if people want to choose that option when building or renovating.¹⁴ Many clothing stores have unisex changing rooms that involve individual cubicles. Unisex changing rooms may be less common for sports facilities because these often involve open 'locker-room' type facilities. While these changing rooms may have some private stalls that can be used by people who are self-conscious or have privacy concerns, a person would generally need to walk through the open locker room to access them.

Advantages and disadvantages of unisex facilities

13.23 Based on our preliminary research, we understand that some advantages of unisex facilities relevant to this review are that all people can use a bathroom or get changed in

¹² For example, Helen Toyce *Trans* (Oneworld Publications, London, 2021) at 153–159; Speak Up for Women “Response to media questions” (7 May 2023) <www.speakupforwomen.nz>; and Holly Lawford-Smith “Women-only spaces and the right to exclude” (January 2021) <www.philpapers.org> at 5–6.

¹³ See Ipsos *LGBT+ Pride 2023: A 30-Country Ipsos Global Advisor Survey* (2023); and Marc Daalder “Race relations among most divisive issues in election – poll” (3 November 2023) Newsroom <newsroom.co.nz>.

¹⁴ Te Tari Kaupapa Whare | Department of Building and Housing *Compliance Document for New Zealand Building Code Clause G1: Personal Hygiene – Second Edition* (2011) at [1.1.8]; and Te Mana Tautikanga o Aotearoa | Standards New Zealand *NZS 4241:1999 Public toilets* (1999).

safety and privacy and without contact with strangers. They also provide a more appropriate option for people who identify outside the gender binary.

- 13.24 At present, unisex facilities are sometimes provided instead of single-sex facilities and sometimes alongside them. In the latter case, they can provide an option that people (of any sex or gender identity) can choose based on their own assessment of privacy and safety considerations. (Whether people who are transgender can be or should be required to use a unisex facility when a single-sex one is also available is a different issue that we discuss later in the chapter.)
- 13.25 We have also heard of other benefits of unisex facilities that are less directly relevant to this review.¹⁵ For example, the Building Code requires fewer overall bathrooms if unisex bathrooms are provided.¹⁶ The units can be separately maintained. They provide a more convenient option for caregivers of a different sex or gender identity to the person for whom they are caring. They also mean children do not need to change alongside adults they do not know.
- 13.26 To be completely safe and private, unisex facilities need to be well designed. We have read various criticisms of unisex bathrooms.¹⁷ Those criticisms tend to contemplate existing single-sex facilities being converted without careful attention to design into shared unisex bathrooms (for example, with multiple stalls and shared hand basins).
- 13.27 For bathrooms in new builds and in buildings undergoing substantial renovations, this issue is addressed in the Building Code. It requires unisex toilets to be fully enclosed with floor to ceiling doors and walls and to include their own handbasin.¹⁸
- 13.28 We are not aware of any disadvantages for users associated with well-designed unisex bathrooms, although we welcome feedback from submitters on this. We appreciate there are financial and practical barriers to converting existing single-sex facilities, which we discuss further below.

Should the Human Rights Act mandate the provision of unisex facilities?

- 13.29 We are interested to explore whether it would be desirable to amend the Human Rights Act to require service providers that make facilities such as bathrooms or changing rooms available to the public to have a unisex option (whether instead of or alongside any single-sex facilities). To do so, we need to understand the potential advantages and disadvantages of such a reform.
- 13.30 As we have discussed above, well-designed unisex facilities can provide a safe and private option for people of any sex or gender to use. This option could therefore be an

¹⁵ For example, Te Kāhui Whaihangā | New Zealand Institute of Architects *Practice Note: Beyond the Binary Bathroom: A Guide for All-Gender Bathroom Facilities* (PN 5.203, May 2024) at 5–6; and Te Kaunihera ā Takiwā o Waikato | Waikato District Council *Public Toilet Strategy* (13 July 2015) at [4.1.2].

¹⁶ See Building Regulations 1992, sch 1; and Te Tari Kaupapa Whare | Department of Building and Housing *Compliance Document for New Zealand Building Code Clause G1: Personal Hygiene – Second Edition* (2011).

¹⁷ For example, Sheila Jeffreys “The politics of the toilet: A feminist response to the campaign to ‘degender’ a women’s space” (2014) 45 *Women’s Studies International Forum* 42; and Kemi Badenoch “Building Regulations: Statement made on 4 July 2022” <www.questions-statements.parliament.uk>.

¹⁸ Te Tari Kaupapa Whare | Department of Building and Housing *Compliance Document for New Zealand Building Code Clause G1: Personal Hygiene – Second Edition* (2011) at [1.1.8]; and Te Mana Tautikanga o Aotearoa | Standards New Zealand *NZS 4241:1999 Public toilets* (1999).

effective way of protecting the equality values that underlie the Human Rights Act while also accommodating other relevant interests (such as safety and privacy).

- 13.31 We understand that the main disadvantage of compelling a move to unisex facilities may be the cost and practical barriers associated with converting existing facilities. There are many single-sex facilities across Aotearoa New Zealand. In some cases, the costs of conversion might be substantial, particularly for larger facilities like changing rooms. The costs might be especially onerous for smaller organisations. Businesses that rent their premises may also have little control over the facilities provided within it.
- 13.32 We are interested to understand these issues more fully. However, we suspect it would be impractical to introduce an immediate requirement for all service providers that make bathrooms or changing rooms available to the public to have a unisex option.
- 13.33 There may also be a question about whether the Human Rights Act is the most appropriate regulatory vehicle for achieving such change. For example, an alternative lever for promoting change might be reform of building regulation.¹⁹
- 13.34 It may, however, be appropriate to regulate this issue in the Human Rights Act if that is the most effective way to protect the equality values that underlie the Act while also accommodating other relevant interests. The Human Rights Act does already contain some provisions that anticipate businesses may need to bear some costs and burdens to advance the Act's vision of substantive equality. These are called 'reasonable accommodation' provisions.
- 13.35 The term reasonable accommodation describes an expectation that, in some cases, people must take reasonable measures to adapt an environment to make it accessible to certain groups. The Human Rights Act contains several reasonable accommodation provisions. Most relate to disability,²⁰ but there are also some that relate to sex and to religious or ethical belief.²¹
- 13.36 There are reasonable accommodation provisions in the Human Rights Act that relate to access to goods, services, places and facilities. Specifically, various exceptions for disability can only be relied on if it would be unreasonable to expect the service provider to supply the disabled person with the special services or facilities they require.²² Those provisions sit alongside section 118 of the Building Act 2004. It requires that, if a building to which members of the public will have access is being constructed or altered, reasonable and adequate access and facilities must be made for people with disabilities.²³
- 13.37 It might be appropriate to model a requirement to provide unisex bathrooms or changing rooms along similar lines.²⁴ For example, a requirement to provide unisex facilities might only apply where that is reasonable or might only apply where a building is being constructed or substantially renovated.

¹⁹ For example, Department for Levelling Up, Housing and Communities *The Building Regulations: Approved Document T, Requirement T1: Toilet accommodation* (2024) <www.assets.publishing.service.govt.uk>; and Tanya Unkovich MP *Fair Access to Bathrooms Bill* (10 May 2024) <www.bills.parliament.nz>.

²⁰ Human Rights Act 1993, ss 29, 36, 37, 39, 41, 43, 52, 56 and 60.

²¹ Human Rights Act 1993, ss 27(3) and (5) and 28(3).

²² Human Rights Act, ss 43 and 52.

²³ See, also, Human Rights Act, s 43(3).

²⁴ We are not sure a requirement of this kind would be well suited to other single-sex facilities such as saunas.

- 13.38 Another way to mitigate the impact of a requirement to provide unisex facilities would be to provide that the new requirement does not take effect immediately. When the Human Rights Commission Act came into effect in 1977, there was a temporary exception in section 17 that applied where it was not reasonably practicable to provide workplace facilities for both men and women. This exception expired in 1982. The intention was to allow employers time to undergo any necessary renovations where facilities did not adequately provide for female employees.
- 13.39 In the next section, we present some options for amending the two exceptions for single-sex facilities. A requirement to provide unisex facilities, if introduced, could sit alongside any of these options.

QUESTION

Q58

Is an amendment to the Human Rights Act 1993 desirable to encourage the provision of unisex facilities and, if so, what should it require?

SHOULD THE EXCEPTIONS BE AMENDED?

- 13.40 We want to understand whether the exceptions in sections 43(1) and 46 should be amended to reflect any new grounds we propose. As explained, these exceptions currently permit the provision and maintenance of separate facilities for “each sex” on the grounds of public decency and public safety.
- 13.41 We have identified a wide spectrum of options below to encourage a full range of feedback.

Option 1: leave sections 43(1) and 46 unchanged

- 13.42 Under this option, service providers could continue to provide separate facilities for men and women. This option would not explicitly entitle them to exclude a transgender person from a facility based on their sex assigned at birth. However, as we discussed generally in Chapter 8, this approach might perpetuate some uncertainty about whether a service provider could lawfully exclude someone on this basis. For example, a provider that wanted to exclude a transgender woman from a female toilet might argue that the exclusion was based on the person’s ‘biological’ sex rather than her gender identity.
- 13.43 This approach (of having an exception for the ground of sex but not specifying its implications for people who are transgender) is taken by the Canadian provinces that have an exception related to single-sex facilities.²⁵

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

- 13.44 Option 2 would clarify that the exceptions for single-sex facilities do not entitle service providers to prevent someone from using a facility that aligns with their gender identity. We are interested to understand better how much difference this option would make in

²⁵ Human Rights Code RSBC 1996 c 210, s 8(2)(a); The Saskatchewan Human Rights Code S 2018 c S-24.2, s 12(2); Human Rights Code RSO 1990 c H 19, s 20(1); and Human Rights Act NL 2010 c H-13.1, s 11(3)(b).

practice. We think it would probably be consistent with the status quo, which is, in practice, that people select the bathroom with which they are most comfortable.

- 13.45 We are not aware of precedents for this approach in comparable anti-discrimination statutes.
- 13.46 This option would clarify the legal rights of people who are transgender. This might help to address concerns relating to people who are transgender being accosted in, or prevented from using, bathrooms or other facilities.
- 13.47 Unless it was paired with a requirement to introduce unisex facilities, this option would not address explicitly the situation of a person who identifies outside the gender binary (that is, as neither male nor female).
- 13.48 This option would not address safety and privacy concerns some people have raised about cisgender women and girls sharing single-sex facilities with transgender women.

Option 3: clarify that facilities can be separated based on sex assigned at birth

- 13.49 The third option is to clarify that sections 43(1) and 46 permit service providers to exclude people from single-sex facilities that do not align with their sex assigned at birth.
- 13.50 We are interested to understand better how much difference this would make in practice. We are not aware of places in Aotearoa New Zealand that currently specify that transgender people are unwelcome in a bathroom that accords with their gender identity (although we accept some may exist). We are not sure how many providers would take the opportunity to do that should the law clarify that it is permissible.
- 13.51 If providers did make use of this option, that would meet the safety and privacy concerns some people have raised about cisgender women and girls sharing bathrooms with transgender women. On the other hand, it may increase risks of bathroom use for people who are transgender or non-binary or who have a non-typical gender presentation for any other reason. As we have explained, people who are transgender or non-binary can be placed in danger when required to use bathrooms or changing rooms associated with their sex assigned at birth.
- 13.52 We wonder if this option might have some unintended consequences. As we discussed in Chapter 8, we are not aware of any current form of identification in Aotearoa New Zealand that proves a person's sex assigned at birth. There is no requirement in any event that people carry identification when going about their lives or when entering bathrooms and changing rooms. Therefore, this exception would likely be policed informally based on assumptions people make about the 'biological' sex of others based on their physical appearance. Even if this option was not intended to affect people with an innate variation of sex characteristics, we think it might do so to the extent they had a non-typical gender presentation. It might also affect other cisgender people who happen to have a non-typical gender expression. For example, we are aware of instances overseas of cisgender women being accosted in bathrooms by people who assume they are transgender because of the way they look and dress.

Option 4: clarify that facilities can be separated based on sex recorded on birth certificate

- 13.53 The fourth option is to clarify that sections 43(1) and 46 permit service providers to exclude people from single-sex facilities that do not align with the sex recorded on their birth certificate.
- 13.54 This option would mean that someone who has gone through the process in the Births, Deaths, Marriages and Relationships Registration Act 2020 to change the sex recorded on their birth certificate would be legally entitled to use a facility aligning with their nominated sex.
- 13.55 This would mean that some transgender people could use a facility that aligned with their gender identity, but not all. We understand that not all transgender people go through the process of changing their sex recorded on their birth certificate whether due to preference or barriers to access (for example, for people born overseas or young people). As a result, this option would have a mixed application. It would only partially meet the safety and privacy concerns some people have raised about cisgender women and girls sharing facilities with transgender women, and it would only partially meet the safety and accessibility concerns of people who are transgender or non-binary. It may also cause issues for people who have their nominated sex on their birth certificate recorded as non-binary.
- 13.56 As with option 3, we are interested to understand better how much difference this option would make in practice. We are also interested to understand better how it might operate given people in Aotearoa New Zealand are not usually asked to present identification when entering a bathroom or changing room.

Possible additional requirements alongside option 3 or 4

- 13.57 Because options 3 and 4 would extend the scope of the current exceptions, if one of these were adopted, it might be worth considering one or more additional reforms to mitigate the risks posed to people who are (or who may be perceived as) transgender or non-binary.

Change the threshold for the exceptions in sections 43(1) and 46 to apply

- 13.58 It may be worth considering whether to supplement or replace the current threshold of “on the ground of public decency or public safety” with a requirement of reasonableness. There are overseas models for this. For example, in Ireland, an exception to the prohibition on gender discrimination with respect to goods and services applies where embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender.²⁶ The United Kingdom has an exception permitting gender reassignment discrimination where single-sex services are provided but only if the discrimination is a proportionate means of achieving a legitimate aim.²⁷
- 13.59 A reasonableness threshold might ensure a more nuanced balancing of relevant rights and interests. The downside would be uncertainty for the providers and users of such

²⁶ Equal Status Act 2000 (Ireland), s 5(2)(g).

²⁷ Equality Act 2010 (UK), sch 3 para 28.

facilities because what is reasonable or proportionate would ultimately need to be determined by a court or tribunal.

Combine option 3 or 4 with a requirement to provide unisex facilities

- 13.60 As we explained above, a requirement to provide unisex facilities could sit alongside any of the options for reform of sections 43(1) and 46. However, the case for introducing such a requirement could be stronger if option 3 or 4 was adopted. That is because these options would expand the scope of the exceptions and could increase safety risks for people who are (or who look like they are) transgender.
- 13.61 If option 3 or 4 was combined with a requirement to provide unisex facilities, service providers could either ensure all their facilities were unisex or provide a combination of single-sex and unisex facilities. To the extent they retained single-sex facilities, they would be entitled to require that people only use a single-sex facility that aligns with their sex assigned at birth (option 3) or birth certificate (option 4).
- 13.62 The wider availability of unisex facilities would help to mitigate the safety concerns associated with options 3 and 4 for people who are (or who look like they are) transgender but may not address them entirely. We have heard anecdotally, for example, about the dangers for transgender young people of being ‘outed’ if they are not permitted to use a bathroom aligning with their gender identity and instead must use a unisex facility.²⁸ We have also heard of young people having to cross large distances across a school campus to use the only available unisex facility. We would like to understand better whether these issues arise primarily in schools or whether they also arise in the contexts that are covered by sections 42 and 44.
- 13.63 Other criticisms we have read about banning people who are transgender from facilities associated with their gender and requiring them to use a unisex facility are that it is ‘othering’ and that it displaces people from their gender identities.²⁹

QUESTIONS

Q59

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?

Q60

If options 3 or 4 are adopted, are other reforms desirable to mitigate the potential risks of these options for people who are transgender or non-binary?

Q61

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

²⁸ See also *Whitaker v Kenosha Unified School District No 1 Board of Education* 858 F 3d 1034 (7th Cir 2017) at 1040–1041.

²⁹ Megan Nicolaysen “The Bathroom Stall: How Legal Indecision Regarding Transgender Bathroom Access Has Led To Discrimination” (2022) 61 U Louisville L Rev 175 at 187.

SINGLE-SEX FACILITIES IN SCHOOLS AND WORKPLACES

13.64 The analysis in this chapter so far has focused on sections 42 and 44 (relating to access for the public to goods, services, facilities and places) and the exceptions to them. Single-sex facilities are, however, also common in employment and education settings, which are regulated by other sections in the Human Rights Act. There are some differences in how the Act treats access to single-sex facilities in these contexts. In this section, we explore the current position and ask whether reform is desirable.

Educational establishments

- 13.65 In Chapter 12, we set out the forms of discrimination that are unlawful for educational establishments under section 57 of the Human Rights Act. These include denying or restricting a student's access to any "benefits or services" and subjecting a student to a "detriment".³⁰ We are interested to understand better whether excluding a transgender student from a single-sex facility that aligns with their gender identity would fall within that wording and therefore be in breach of section 57.
- 13.66 The lack of an exclusion from section 57 to permit single-sex facilities might suggest the drafters did not consider that requiring students to use a bathroom that aligns with their sex constitutes a detriment or restricts access to a benefit or service within the terms of section 57. However, the drafters were unlikely to have had transgender students in mind. Different issues arise when a transgender person (as opposed to a cisgender person) is excluded from a bathroom or changing room that aligns with their gender identity. It is possible this may constitute a detriment or, alternatively, a denial or restriction of access to a service (although, as always, the answer is likely to be fact and context dependent).
- 13.67 We are unaware of any New Zealand case law on this point. However, there are decisions from various overseas courts and tribunals suggesting that denial of access to a bathroom aligned with a transgender person's gender identity may meet similar tests in human rights statutes such as "denial" of a service, "discrimination", "adverse treatment" and "less favourable treatment".³¹
- 13.68 Specifically in the context of education, we are aware of numerous challenges that have been taken in the United States where schools have prevented transgender students from using facilities that align with their gender identity. Although the outcomes of cases have varied, we understand that some appellate courts have found this is capable of constituting discrimination under the relevant law.³²
- 13.69 We are interested to learn about any practical implications of the lack of an express exception from section 57 for single-sex facilities. For example, we would like to know whether it is causing any problems in practice and, if so, what ought to be done about it

³⁰ This language is slightly different from the language in sections 42 and 44.

³¹ *Sheridan v Sanctuary Investments Ltd* 1999 BCHRT 4, 33 CHRR D/467; *Lewis v Sugar Daddys Nightclub* 2016 HRT0 347, 83 CHRR D/111; *Brook v Tasker* County Court Halifax, 7 March 2014; and *Taylor v Jaguar Land Rover Ltd* UK Employment Tribunal 1304471/2018, 26 November 2020 at [182]–[186] and [212]. We have only been able to access a summary of the *Brook* decision and not the full decision.

³² *AC v Metropolitan School District of Martinsville* 75 F 4th 760 (7th Cir 2023); *Grimm v Gloucester County School Board* 972 F 3d 586 (4th Cir 2020); and *Whitaker v Kenosha Unified School District No 1 Board of Education* 858 F 3d 1034 (7th Cir 2017). But contrast *Adams v School Board of St Johns County* 57 F 4th 791 (11th Cir 2022).

within the context of this review. One possibility might be to align the legal position with whatever position is settled on in respect of sections 43(1) and 46 (the exceptions applying to goods, services and facilities discussed earlier in the chapter). The issues discussed above with respect to unisex facilities may also be relevant in education settings.

- 13.70 While recommending a completely new sex exception might be beyond the scope of our review, we are interested to receive feedback on these issues before we decide.
- 13.71 As we have discussed elsewhere, it is possible section 57 has very little practical application as many acts of educational establishments would likely amount to government functions covered by Part 1A of the Human Rights Act.³³

QUESTION

Q62

Do you have any feedback on the implications of this review for single-sex facilities in education?

Employment matters

- 13.72 Similar issues arise in respect of workplaces. In Chapter 9, we set out the forms of discrimination that are unlawful for employers under section 22 of the Human Rights Act. These include subjecting an employee to a “detriment”.
- 13.73 The absence of any exclusion from section 22 to permit single-sex facilities in the workplace might again suggest the drafters did not consider that requiring employees to use a bathroom that aligns with their sex constitutes a detriment within the terms of section 22. Again, however, the drafters were unlikely to have had transgender employees in mind.
- 13.74 We think excluding a transgender employee from a single-sex facility in the workplace that aligns with their gender identity might constitute a “detriment” within the terms of section 22 (although, again, the answer would be fact and context dependent). We are unaware of any New Zealand case law on this point. However, the overseas case law discussed above in the context of education would be relevant. We are also aware of some overseas decisions directly concerning workplaces. In the United Kingdom, the Employment Tribunal has held that requiring a gender fluid employee to use a disabled bathroom is gender reassignment discrimination.³⁴ There are also United States cases saying that an employer’s refusal to allow a transgender employee to use the bathroom consistent with their gender identity can be gender identity discrimination (including when a gender-neutral toilet was available).³⁵
- 13.75 As with educational establishments, we are interested to learn about any practical implications of the lack of an express exception from section 22 for single-sex facilities —

³³ We note, however, that the specific question would be whether the provision of bathrooms and changing rooms by educational establishments is a government function. We are reluctant to speculate on the answer to this question.

³⁴ *Taylor v Jaguar Land Rover Ltd* UK Employment Tribunal 1304471/2018, 26 November 2020 at [212].

³⁵ *Hobby Lobby Stores Inc v Sommerville* (2021) IL App (2d) 190362 at [33]–[34]; and *Roberts v Clark County School District* 215 F Supp 3d 1001 (D Nevada 2016) at 1015–1016.

for example, whether it is causing any problems in practice and, if so, what ought to be done about it within the context of this review. We invite feedback on whether it is desirable to align the legal position with whatever position is settled on in respect of sections 43(1) and 46 (the exceptions for single-sex facilities discussed earlier in the chapter). The issues discussed above with respect to unisex facilities may also be relevant in an employment context.

- 13.76 Again, while recommending a completely new sex exception might be beyond the scope of our review, we are interested to receive feedback on this issue before we decide.

QUESTION

Q63

Do you have any feedback on the implications of this review for single-sex facilities in employment?

CHAPTER 14

Competitive sports

INTRODUCTION

- 14.1 The Human Rights Act 1993 has an exception in section 49(1) that allows competitive sports to be limited to one sex in some circumstances. In this chapter, we discuss the scope of and rationale for this exception and seek feedback on whether it should be amended to reflect any new grounds of discrimination we propose.
- 14.2 We recommend reading this chapter alongside Chapter 8, which explains our approach to reviewing Part 2 of the Human Rights Act.

SCOPE OF THE EXCEPTION

- 14.3 Section 49(1) of the Human Rights Act allows people of one sex to be excluded from participating in a competitive sports activity in which the strength, stamina or physique of competitors is relevant. It is an exception to section 44, which prohibits discrimination in the provision of goods, services and facilities. We discussed section 44 in Chapter 10.
- 14.4 There are several important points to note about the scope of the exception in section 49(1). The exception applies to “competitive” sports activities, although it does not define this. Ihi Aotearoa | Sport New Zealand has defined competitive sports or activities as involving participation through an organised structure such as in a league or club competition, a tournament or competitive event.¹ The exception could therefore apply to sports at a wide range of levels ranging from secondary school sport and social leagues right through to national-level tournaments and Olympic qualifying events.
- 14.5 The exception does not allow people to be excluded from coaching, umpiring, refereeing or sports administration.² In addition, the exception does not apply to sporting activities for children under 12 years old.³
- 14.6 It is also relevant to note that section 49(1) only provides an exception to conduct that would otherwise be a breach of section 44. As we have explained elsewhere, this means section 49(1) would not apply if the discriminatory treatment was by a government

¹ Ihi Aotearoa | Sport New Zealand *Active NZ: Changes in Participation – The New Zealand Participation Survey 2021* (June 2022) at 4.

² Human Rights Act 1993, s 49(2)(a)–(c).

³ Human Rights Act 1993, s 49(2)(d).

department or involved the exercise of a government function.⁴ Instead, the permissibility of any differences in treatment would be determined by the tests in Part 1A of the Human Rights Act.

- 14.7 This also means section 49(1) will only be relevant where the sporting activity is available to “the public or to any section of the public”.⁵

RATIONALES FOR THE EXCEPTION

- 14.8 The legislative history does not clearly indicate the rationale for section 49(1). However, we have identified four likely rationales from the history, context and language of the provision.
- 14.9 First, like many of the other exceptions we have discussed in this Issues Paper, we think the rationale behind section 49(1) may be linked in part to custom. There is a long history of competitive sports being separated into men’s and women’s categories both in Aotearoa New Zealand and internationally.⁶
- 14.10 The Human Rights Commission Act 1977 had an exception that allowed people of one sex to be excluded from a competitive sporting event or activity “in which persons of one sex generally compete separately from persons of the other”.⁷ This appears to have been based on social reasons for separate competition. The legislative history referred to examples such as a women’s bowling club or a tennis tournament where it was customary for each sex to compete separately.⁸
- 14.11 However, the introduction of the phrase “strength, stamina or physique of competitors” in 1993 suggests that custom was no longer considered sufficient on its own to justify sex-separated sports. These words suggest two further rationales.
- 14.12 One is fair competition. We think the logic underlying section 49(1) is that men have advantages in some sports due to their “strength, stamina or physique” and so sex-separated competitive sports are necessary to ensure fair competition for women. The legislative history indicates that section 49(1) was modelled on a very similar Australian exception that had this rationale.⁹
- 14.13 Another is safety. The logic here is that due to men’s “strength, stamina and physique”, female athletes might be injured if they competed in events with men. This concern might arise in contact sports such as rugby, wrestling and boxing.

⁴ See, especially, Chapters 8 and 16. For an example of a sporting body exercising a government function, see *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [5].

⁵ For example, as we explained in Chapter 8, it is unclear whether students at a school would count as the public or a section of the public in relation to a good or service offered by that school.

⁶ For example, most Olympic events are split into men’s and women’s categories: International Olympic Committee “Factsheet: Women in the Olympic Movement” (18 April 2024) <olympics.com> at 6.

⁷ Human Rights Commission Act 1977, s 24(7).

⁸ (17 August 1977) 412 NZPD 2294 (Allan Martyn Finlay MP); (7 July 1977) 411 NZPD 1246 (Richard Harrison MP); and (20 July 1977) 411 NZPD 1475 (David Thomson MP).

⁹ See Letter from Margaret Nixon (Secretary for Justice) to Chief Parliamentary Counsel regarding review of Human Rights Commission Act 1997 and Race Relations Act 1971 (12 February 1990) at 15; House of Representatives Standing Committee on Legal and Constitutional Affairs *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (Australian Government Publishing Service, Canberra, April 1992) at [6.7.17].

- 14.14 These two rationales of fair competition and safety were reflected in a submission on the Human Rights Bill from the New Zealand Assembly for Sport, a body established by national sporting organisations.¹⁰ It wanted the exception to apply from the age of 10 years because it considered girls would perform better in single-sex activities, some boys might “substantially outweigh and outreach girls of the same age”, some sports involved physical contact and risk, and international rules required separate competitions for males and females.¹¹
- 14.15 We think these rationales of fair competition and safety ultimately link back to a broad underlying goal of supporting participation in sport for a marginalised group — specifically, women. The historical exclusion of women from sport provides important context. Modern sport, which emerged around the middle of the nineteenth century, has been described as “primarily designed ... to be for and about (white) boys and men”.¹² Several rationales have historically been used to exclude women’s participation in sport. It was thought sport would be harmful to women’s health (particularly reproductive), that it was unattractive and that sport would “masculinise” female athletes.¹³ Further, since most sports were developed “in the relative absence of women”, they were mainly designed to “test the abilities and capacities of the male body”.¹⁴ The creation of women’s sub-categories was a common strategy to overcome this historical disadvantage and secure female participation in competitive sports.¹⁵
- 14.16 This participation rationale aligns with the ideas of equality and fair play that we identified in Chapter 4 as values underlying the Human Rights Act.

CURRENT PRACTICE

- 14.17 We are interested to understand whether section 49(1) should be amended to reflect any new grounds we propose. In particular, we need to consider how section 49(1) should apply to people who are transgender or non-binary or who have an innate variation of sex characteristics.
- 14.18 It is helpful to first understand current practice at the international and domestic level with respect to participation of athletes who are transgender or non-binary or who have an innate variation of sex characteristics in single-sex sports. The overall picture is complicated as there are many different sporting organisations, each taking different approaches.

¹⁰ The departmental report indicates this was the sole submission that commented on the exception: Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 38.

¹¹ The New Zealand Assembly for Sport “Submission to the Justice and Law Reform Committee on the Human Rights Bill 1993”.

¹² Jaime Schultz “A Brief History of Women’s Sport” in Jaime Schultz (ed) *Women’s Sports: What Everyone Needs to Know* (Oxford University Press, Oxford, 2018) 10 at 14.

¹³ See Jaime Schultz “A Brief History of Women’s Sport” in Jaime Schultz (ed) *Women’s Sports: What Everyone Needs to Know* (Oxford University Press, Oxford, 2018) 10 at 16–20.

¹⁴ Irena Martinkova and others “Sex and gender in sport categorization: aiming for terminological clarity” (2022) 49 *Journal of the Philosophy of Sport* 134 at 138.

¹⁵ See Irena Martinkova and others “Sex and gender in sport categorization: aiming for terminological clarity” (2022) 49 *Journal of the Philosophy of Sport* 134 at 139.

- 14.19 Where sporting bodies do have restrictions that apply to athletes who are transgender or non-binary or who have an innate variation of sex characteristics, fair competition is often put forward as the rationale. Other stated rationales include protecting the integrity of women's sport, ensuring equal opportunity to participate and succeed in the sport, and participant safety. Complying with international rules is often a rationale for domestic policies.

International — determined by each sport

- 14.20 While the International Olympic Committee (IOC) initially took a position on when transgender athletes may compete in men's and women's sporting events,¹⁶ it now considers this should be left to individual sports to determine. In 2021, the IOC issued a framework with principles for sporting organisations to consider when developing and implementing eligibility rules for athletes who are transgender or non-binary or who have an innate variation of sex characteristics. These principles are inclusion, prevention of harm, non-discrimination, fairness, no presumption of advantage, evidence-based approach, primacy of health and bodily autonomy, stakeholder-centred approach, right to privacy and periodic reviews.¹⁷
- 14.21 Many international sporting bodies have developed a policy on participation of transgender athletes in their code, typically following a process of reviewing relevant evidence.¹⁸ Policies vary widely depending on the sport, and some are more restrictive than others. However, almost all the international policies we have seen impose some kind of restrictions on transgender athletes.

Domestic — level of competition often relevant

- 14.22 In Aotearoa New Zealand, it is also up to individual sports to develop policies for their codes on transgender participation. Some national sporting bodies already have policies in place while others are in the process of developing one.¹⁹
- 14.23 Most of the New Zealand policies we have seen specify that the rules of the international governing body apply to international or selection competitions. Many organisations take a more inclusive approach to domestic events, although this is not always the case.

¹⁶ In 2003, it recommended that transgender athletes must have completed "surgical anatomical changes", have legal recognition of their sex and have undergone hormone therapy: International Olympic Committee *Statement of the Stockholm consensus on sex reassignment in sports* (2003). In 2015, it said transgender women should demonstrate their testosterone level has been below a certain level for at least 12 months to be eligible to compete in the women's category: International Olympic Committee *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015) at [2.2].

¹⁷ International Olympic Committee *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations* (2021) at 2–6.

¹⁸ For example, Union Cycliste Internationale "The UCI adapts its rules on the participation of transgender athletes in international competitions" (14 July 2023) <www.uci.org>.

¹⁹ According to one report, 18 sporting codes currently have a transgender inclusion policy in place, while 45 codes do not. Of those 45 sporting codes, 21 are currently developing a policy: Liam Napier "New Zealand Government revises status on transgender athletes in community sport" (18 June 2024) *The New Zealand Herald* <www.nzherald.co.nz>.

- 14.24 For community-level sport, guiding principles published by Sport New Zealand suggest that inclusion should be an overarching principle, meaning:²⁰

Every New Zealander has the right to participate in Sport and to be treated with respect, empathy and positive regard. Transgender people can take part in sports in the gender they identify with.

- 14.25 The other guiding principles are: wellbeing and safety; privacy and dignity; anti-discrimination, anti-bullying and anti-harassment; listening and responding; and education.²¹
- 14.26 We understand that several sporting organisations are currently working with Sport New Zealand to develop policies on transgender inclusion in community sport based on these guiding principles. We also understand that some sporting organisations may already have less formal practices (including, in some cases, practices that are inclusive of transgender athletes).²²
- 14.27 Sport New Zealand says that, at the elite level, sports are generally guided by the international sporting body for the sport.²³ It can be unclear when competitive sport is considered community level and when it is considered elite level as the dividing line can differ between sports.²⁴ As we explained above, the exception in section 49(1) can apply to both community and elite level sport.

Restrictions are generally focused on transgender women

- 14.28 In the policies applying to individual sports we have seen, it is common for sports to restrict the participation of transgender women in women's sporting competitions (particularly at the international level). The type of restriction depends on the sport but can include complete exclusion of transgender women and non-binary athletes who have undergone male puberty or requiring athletes to maintain testosterone levels below a certain level. By comparison, many sports allow transgender men to compete in men's sports subject to signing an assumption of risk form and obtaining a therapeutic use exemption if taking hormones.
- 14.29 It seems uncommon for policies to specifically refer to athletes who identify outside the gender binary. However, restrictions applying to transgender athletes will usually apply to such athletes if they wish to compete in a category that differs from their sex assigned at birth.

²⁰ Ihi Aotearoa | Sport New Zealand *Guiding Principles for the Inclusion of Transgender People in Community Sport* (December 2022) at 8.

²¹ At 8.

²² For example, New Zealand Cricket does not currently have a published policy on transgender participation but has said that it prioritises inclusivity and that it accommodates transgender women in women's cricket at the community, amateur and social levels: Liam Napier "Transgender athletes could be banned from publicly funded women's sport under new Government policy" (21 December 2023) *The New Zealand Herald* <www.nzherald.co.nz>.

²³ See Ihi Aotearoa | Sport New Zealand *Guiding Principles for the Inclusion of Transgender People in Community Sport* (December 2022) at 9.

²⁴ See Ihi Aotearoa | Sport New Zealand *Guiding Principles for the Inclusion of Transgender People in Community Sport* (December 2022) at 4 and 22.

- 14.30 We are only aware of two international sporting bodies with rules on participation of athletes with an innate variation of sex characteristics — World Athletics and World Aquatics.²⁵ These rules only apply to some innate variations of sex characteristics.
- 14.31 The guiding principles for community sport developed by Sport New Zealand do not specifically address participation of athletes with an innate variation of sex characteristics.

DIFFERING PERSPECTIVES

- 14.32 We understand that the question of whether transgender athletes can compete in the sports category that aligns with their gender identity is an issue of particular concern to some people in the community. We are interested to understand better the different community perspectives on this issue and to learn what evidence there is in Aotearoa New Zealand to support them.
- 14.33 As we discussed in Chapter 3, transgender and non-binary athletes have much lower rates of participation in competitive sport than others in the community. Rules that restrict participation and fear of restrictions likely contribute to this. Difficulty in accessing safe and appropriate bathrooms and changing rooms when playing sport can also be an issue. We discussed the issue of single-sex facilities such as bathrooms in Chapter 13.
- 14.34 We do not know whether athletes with an innate variation of sex characteristics are being excluded from competitive sport in Aotearoa New Zealand or face barriers to participation. At the international level, we know that some athletes with innate variations that affect testosterone levels have faced restrictions on their ability to compete in women's events.²⁶
- 14.35 In our preliminary research and engagement, we heard of several concerns arising from the restrictions that are imposed on athletes who are transgender or non-binary or who have an innate variation of sex characteristics before they can participate in some single-sex competitive sports. These include:
- (a) side effects from being asked to take testosterone-lowering medication;²⁷
 - (b) invasive assessments such as genital examinations, chromosomal testing and scanning of sex organs;²⁸
 - (c) fear of restrictions or adverse reactions (sometimes leading to athletes withdrawing from sports);²⁹

²⁵ World Athletics *Eligibility Regulations For the Female Classification (Athletes with differences of sex development)* (23 March 2023); and World Aquatics *Policy on Eligibility for the Men's and Women's Competition Categories* (19 June 2022).

²⁶ See, for example, Human Rights Watch *"They're Chasing Us Away from Sport": Human Rights Violations in Sex Testing of Elite Women Athletes* (December 2020).

²⁷ For example, Rebecca M Jordan-Young, Peter H Sönksen and Katrina Karkazis "Sex, health, and athletes" (2014) 348 *BMJ* g2926 at 2.

²⁸ For example, Katrina Karkazis and Morgan Carpenter "Impossible 'Choices': The Inherent Harms of Regulating Women's Testosterone in Sport" (2018) 15 *J Bioethical Inq* 579 at 583.

²⁹ For example, Owen Hargie, David Mitchell and Ian Somerville "'People have a knack of making you feel excluded if they catch on to your difference': Transgender experiences of exclusion in sport" (2017) 52 *International Review for the Sociology of Sport* 223 at 232; and Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of*

- (d) athletes feeling they have to choose between participating in a sport they love and being who they are;³⁰ and
 - (e) lack of meaningful competition opportunities for athletes due to being restricted to an open category, where these exist.³¹
- 14.36 We also know that some people and groups have concerns about transgender women being allowed to participate in women’s competitive sport (either some or all of the time). These concerns generally relate to the potential impact of participation by transgender women on the fair competition and safety rationales that underlie section 49(1) and, ultimately, on female participation in competitive sports. More specifically, some concerns we have seen expressed are that:
- (a) transgender women will have an inherent advantage over other female athletes;³²
 - (b) if transgender women can compete against cisgender women, this might erode a space that was “painstakingly built” to allow cisgender women’s inclusion in sport;³³
 - (c) cisgender women may not feel comfortable playing alongside transgender women or sharing a changing room;³⁴ and
 - (d) playing alongside transgender women may pose a safety risk to cisgender women, particularly in contact sports.³⁵
- 14.37 These concerns are not universal. We understand some people in the community do not have concerns about transgender people participating in competitive sports in line with their gender identity, although survey results can vary depending on how the question is framed.³⁶
- 14.38 Most of the concerns we have seen expressed relate to participation of transgender women (or non-binary people who were assigned male at birth) in women’s sport rather than participation of transgender men in men’s sport or participation of athletes who have an innate variation of sex characteristics. However, we also welcome feedback on these issues.

trans and non-binary people in Aotearoa New Zealand (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 66.

³⁰ Liam Napier “Transgender athletes could be banned from publicly funded women’s sport under new Government policy” (21 December 2023) *The New Zealand Herald* <www.nzherald.co.nz>.

³¹ See Sean Ingle “Swimming World Cup category for transgender athletes cancelled after no entries received” (3 October 2023) *The Guardian* <www.theguardian.com>.

³² For example, Alison Heather “Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology” (2022) 19 *Int J Environ Res Public Health* 9103 at 9110.

³³ Taryn Knox, Lynley Anderson and Alison Heather “Transwomen in elite sport: scientific and ethical considerations” (2019) 45 *J Med Ethics* 395 at 400.

³⁴ Save Women’s Sport Australasia “Submission to Sport NZ on Draft Guiding Principles for Transgender Participation” (June 2021) at 2.

³⁵ See Boxing New Zealand “Boxing New Zealand announces support for the establishment of an open category in Olympic style boxing” (press release, 29 August 2022) <www.boxingnz.org.nz>; and Ihi Aotearoa | Sport New Zealand *Summary of Feedback received through the final phase of external consultation on the Guiding Principles for the Inclusion of Transgender People in Community Sport* at 2.

³⁶ Compare, for example, Te Kaunihera Wahine o Aotearoa | National Council of Women of New Zealand *Aotearoa New Zealand Gender Attitudes Survey 2023* (July 2023) at 77; and Marc Daalder “Race relations among most divisive issues in election – poll” (3 November 2023) *Newsroom* <newsroom.co.nz>.

EVIDENCE BACKDROP

- 14.39 We want to understand better how these differing perspectives are supported by the evidence. Our understanding based on our preliminary research is that the evidence is both emerging and incomplete. There is not room in this Issues Paper for detailed discussion of all the studies we have read nor to discuss how different sporting bodies have approached this evidence. Instead, we identify some of the key themes that emerge from the evidence we have considered.

Some sporting advantages associated with male bodies

- 14.40 Evidence suggests cisgender men have an advantage over cisgender women in sports requiring aerobic endurance, muscular strength, power and speed, with exposure to high levels of testosterone during puberty being the primary cause.³⁷ As a result of this testosterone, at a population level, cisgender men have greater muscle mass, less body fat, higher blood haemoglobin concentration and mass, a larger heart, larger airways and lungs, greater height and longer limbs than cisgender women.³⁸ Some studies have found differences in male and female athletic performance start to emerge around the age of 12 years.³⁹ There is some evidence to show there can be differences in the athletic performance of boys and girls even prior to puberty,⁴⁰ although these differences may be minimal.⁴¹
- 14.41 The extent of any male performance advantage will differ depending on the sport. For example, an analysis of men's and women's performances in 82 Olympic events found the gender gap in world records ranged from 5.5 per cent (800 m freestyle swimming) to 36.8 per cent (weightlifting).⁴² Differences may be minimal for sports that rely on motor skills more than strength, power or aerobic capacity, such as archery and shooting.⁴³ A study of elite show jumping performances (an event that is not separated by sex) found that overall there were no statistically significant differences between the final ranking or points of male and female riders.⁴⁴

³⁷ See, for example, Sandra K Hunter and others "The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine" (2023) 55 Med Sci Sports Exerc 2328 at 2349.

³⁸ See, for example, Sandra K Hunter and others "The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine" (2023) 55 Med Sci Sports Exerc 2328 at 2349.

³⁹ For example, David Handelsman "Sex differences in athletic performance emerge coinciding with the onset of male puberty" (2017) 87 Clinical Endocrinology 68 at 70–72; and Espen Tønnessen and others "Performance Development in Adolescent Track and Field Athletes According to Age, Sex and Sport Discipline" (2015) 10(6) PLOS ONE e0129014 at 7.

⁴⁰ For example, Konstantinos Tambalis and others "Physical fitness normative values for 6–18-year-old Greek boys and girls, using the empirical distribution and the lambda, mu, and sigma statistical method" (2016) 16 Eur J Sport Sci 736 at 739.

⁴¹ For example, Espen Tønnessen and others "Performance Development in Adolescent Track and Field Athletes According to Age, Sex and Sport Discipline" (2015) 10(6) PLOS ONE e0129014 at 7.

⁴² Valérie Thibault and others "Women and men in sport performance: The gender gap has not evolved since 1983" (2010) 9 Journal of Sports Science and Medicine 214 at 222.

⁴³ See Jonathon Senefeld and Sandra Hunter "Hormonal Basis of Biological Sex Differences in Human Athletic Performance" (2024) 165 Endocrinology bqae036 at 2.

⁴⁴ Tim Whitaker, Alison Hargreaves and Inga Wolfram "Differences in elite showjumping performance between male and female riders" (2012) 12 International Journal of Performance Analysis in Sport 425.

Whether transgender women may have an advantage over cisgender women

- 14.42 Whether transgender women athletes have an advantage over cisgender female athletes appears to be a more complex question. When considering this issue, it is helpful to differentiate between three different groups of athletes.

Transgender women who have not experienced male puberty

- 14.43 The first group is transgender women who have not experienced male puberty due to taking puberty blockers. Such athletes will not have a performance advantage associated with male puberty. We are not aware of research that specifically looks at whether transgender women athletes who have not been through male puberty may have a competitive advantage over cisgender female athletes. Several international sporting organisations have different rules depending on whether a transgender woman athlete has experienced male puberty.⁴⁵

Transgender women who have experienced male puberty and are not undergoing gender-affirming hormone therapy

- 14.44 The second group is transgender women who have experienced male puberty and who are not undergoing gender-affirming hormone therapy (oestrogen supplementation and testosterone suppression). As a group, such athletes would be expected to have a performance advantage over cisgender women as a group.⁴⁶ Most of the international sporting policies we have seen prevent athletes in this category from competing in women's sports.

Transgender women who have experienced male puberty and who are undergoing gender-affirming hormone therapy

- 14.45 The third group is transgender women who have experienced male puberty and who have subsequently commenced gender-affirming hormone therapy. A critical question in relation to athletes in this category is the extent to which gender-affirming hormone therapy may mitigate the biological effects of male puberty. Evidence on this issue is still emerging, and there are some significant limitations to the evidence that is currently available. One is that there are very few studies of transgender athletes. Most of the studies that are available look at changes in non-athletes who have undergone gender-affirming hormone therapy. There is also a lack of sport-specific research. The studies we have seen generally test specific measures such as grip strength, jump height and number of press ups, and it may not be straightforward to apply the findings of such studies to a particular sport. Another limitation is a lack of longitudinal research on the long-term impacts of gender-affirming hormone therapy.

⁴⁵ For example, some sporting bodies do not allow transgender women who have experienced male puberty to participate in women's categories but will allow transgender women who have not experienced male puberty to participate if they comply with conditions such as undergoing hormone therapy. For example, World Athletics *Eligibility Regulations for Transgender Athletes* (version 2, 23 March 2023) at [3.2.2]; and World Aquatics *Policy on Eligibility for the Men's and Women's Competition Categories* (19 June 2022) at 8.

⁴⁶ We acknowledge, however, that there is some research suggesting there are physical differences (on a population basis) between transgender women who have not undergone hormone replacement therapy and cisgender men: for example, Joanna Harper "Transgender Athletes and International Sports Policy" (2022) 85(1) *Law and Contemporary Problems* 151 at 159–160.

- 14.46 Evidence suggests that taking gender-affirming hormone therapy affects body composition and physical performance. For example, studies have shown that transgender women who have undergone hormone therapy for a certain period have decreased strength, lean body mass, muscle area, muscular strength and haemoglobin.⁴⁷ However, there is differing evidence as to whether taking gender-affirming hormone therapy can completely mitigate the effects of male puberty on sporting performance. Some studies show transgender women continue to perform better compared to cisgender women on a range of measures, others show very little difference and still others show worse performance on some measures.⁴⁸ The results seem to depend in part on the particular attribute that is being measured and the length of time for which hormone therapy is taken.

Safety considerations

- 14.47 We are not aware of studies that assess whether cisgender women have an increased risk of injury when they are playing sport with transgender women. We imagine there may be difficulties in carrying out this kind of research.
- 14.48 World Rugby carried out modelling to assess the safety implications of transgender women playing women's rugby. This appears to be based on data on cisgender rugby players rather than transgender players. Its modelling suggested that elite men's rugby involved head and neck forces that were 20 to 30 per cent greater than in women's elite rugby while scrum forces in men's rugby were 40 to 120 per cent higher than in women's rugby.⁴⁹
- 14.49 Some concerns about safety risks may be based on differences in height and weight. A recent laboratory study that compared transgender and cisgender athletes commented that "[o]ne of the most noticeable disparities between gender groups was in height and mass".⁵⁰ The transgender women in the study were, on average, taller and heavier than the cisgender women.⁵¹
- 14.50 Differences in height and weight can also arise when cisgender athletes are competing. In some sports, weight bands and age brackets are used to ameliorate these concerns.

⁴⁷ For example, Joanna Harper and others "How does hormone transition in transgender women change body composition, muscle strength and haemoglobin? Systematic review with a focus on the implications for sports participation" (2021) 55 Br J Sports Med 865.

⁴⁸ For example, Timothy Roberts, Joshua Smalley and Dale Ahrendt "Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organisations and legislators" (2021) 55 Br J Sports Med 577; Leonardo Azevedo Mobilia Alvares and others "Cardiopulmonary capacity and muscle strength in transgender women on long-term gender-affirming hormone therapy: a cross-sectional study" (2023) 56 Br J Sports Med 1292; Ada Cheung and others "The Impact of Gender-Affirming Hormone Therapy on Physical Performance" (2024) 109 J Clin Endocrinol Metab e455; and Blair Hamilton and others "Strength, power and aerobic capacity of transgender athletes: a cross-sectional study" (2024) 58 Br J Sports Med 586.

⁴⁹ World Rugby *Summary of Transgender Biology and Performance Research* (2020).

⁵⁰ Blair Hamilton and others "Strength, power and aerobic capacity of transgender athletes: a cross-sectional study" (2024) 58 Br J Sports Med 586 at 591.

⁵¹ At 588 and 591–592.

Impact of innate variations of sex characteristics on athletic performance

- 14.51 As we discussed in Chapter 2, there are many different innate variations of sex characteristics. Some of these would not have any impact on athlete performance while some might have characteristics that could inhibit athletic performance such as a heart defect or short stature.
- 14.52 Most of the research of which we are aware that considers whether athletes with an innate variation of sex characteristics could have a performance advantage over other athletes has focused on women with hyperandrogenism. This is where the body produces high levels of androgens (including testosterone).⁵² Hyperandrogenism can be caused by some innate variations of sex characteristics but can also have other causes.⁵³
- 14.53 One study found that high free testosterone levels in female athletes were associated with higher athletic performance than female athletes with low free testosterone levels in certain athletics events.⁵⁴ Another study found that hyperandrogenic female athletes had more lean body mass and higher maximum oxygen consumption levels (VO₂ max) than non-hyperandrogenic women athletes.⁵⁵

SHOULD THE EXCEPTION BE AMENDED?

- 14.54 We want to understand whether section 49(1) should be amended to reflect any new grounds we propose. We have identified a wide spectrum of options below to encourage a full range of feedback. It is possible there might need to be a mix of options. For example, the same legislative response might not be appropriate for each of the three groups with which this review is concerned.
- 14.55 For all these options, we have assumed, in line with section 49(2) of the Act, that no exception would apply to competitive sports for children under 12 years or to coaches, umpires, referees or administrators.

Option 1: leave section 49 unchanged

- 14.56 One option is to retain the current wording of section 49(1). Sports organisations could continue to rely on the exception to exclude persons of one sex from competitive sporting events where the strength, stamina or physique of competitors is relevant.
- 14.57 Since section 49(1) has never been litigated, there is some uncertainty about what the “strength, stamina and physique” requirement involves. Exceptions that use similar wording in Australia have been interpreted as requiring the sport to demonstrate that competition would be uneven because of differences in the strength, stamina or physique

⁵² See Cleveland Clinic “Hyperandrogenism” <www.clevelandclinic.org>.

⁵³ See Robert L Rosenfield, Randall B Barnes and David A Ehrmann “Hyperandrogenism, Hirsutism, and Polycystic Ovary Syndrome” in J Larry Jameson and others (eds) *Endocrinology: Adult and Pediatric* (7th ed, Elsevier Saunders, Philadelphia, 2016) vol 2 at 2280–2281.

⁵⁴ Stéphane Berman and Pierre-Yves Garnier “Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes” (2017) 51 Br J Sports Med 1309 at 1309, 1312 and 1314 and “Correction: Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes” (2021) 55 Br J Sports Med e7.

⁵⁵ Anette Rickenlund and others “Hyperandrogenicity is an alternative mechanism underlying oligomenorrhea or amenorrhea in female athletes and may improve physical performance” (2003) 79 Fertil Steril 947 at 947 and 952–954.

of male and female competitors.⁵⁶ It is possible that a New Zealand court or tribunal might also take that approach.

- 14.58 A disadvantage of option 1 is it would likely cause uncertainty as to how the exception applies to people who are transgender or non-binary or who have an innate variation of sex characteristics. This is because of the different interpretations that can be taken of “sex” as we discussed in Chapters 7 and 8. If sex is not defined in the Act, sports organisations may be unsure who they are legally allowed to exclude under section 49(1). This option might result in litigation causing significant uncertainty and cost for organisations as well as participants.
- 14.59 It is unlikely that a cisgender athlete with an innate variation of sex characteristics could be excluded under this option. It would therefore maximise participation for those athletes. It would not address any concerns people might have about elevated testosterone associated with some variations.

Option 2: do not apply the exception to new grounds of discrimination

- 14.60 Another option is to clarify that section 49(1) does not allow an organisation to exclude people from competitive sporting activities for men or for women on the basis they are transgender or non-binary or they have an innate variation of sex characteristics. For example, language along the following lines might be inserted into section 49:

Nothing in section 49(1) shall enable a person to be excluded from the category that aligns with their gender identity.

Nothing in section 49(1) shall enable a person to be excluded from a competitive sporting activity on the basis they have an innate variation of sex characteristics.

- 14.61 It might also be desirable to spell out the implications for people who identify outside the gender binary. For example, the provision might specify that a person who is non-binary may not be excluded from the category that best aligns with their gender identity.
- 14.62 This approach would create a bright line that would provide sporting organisations with clarity about their obligations.
- 14.63 Under this approach, athletes who are transgender or non-binary or who have an innate variation of sex characteristics may feel more confident to play competitive sports without fear of being challenged, asked intrusive questions, made to take tests or excluded from the team that aligns with their gender identity. This approach would also align with the community sport guidelines developed by Sport New Zealand, which provide that transgender people should be able to take part in sports in line with their gender identity.⁵⁷
- 14.64 This approach would not address any safety concerns that could arise from allowing transgender women to compete against cisgender women without restriction, for example, in contact sports such as boxing, wrestling, judo and rugby. In some cases, there

⁵⁶ For example, *Robertson v Australian Ice Hockey Federation* [1998] VADT 112 (Anti-Discrimination Tribunal) at 10.

⁵⁷ Ihi Aotearoa | Sport New Zealand *Guiding Principles for the Inclusion of Transgender People in Community Sport* (December 2022) at 10.

may be other measures that sports could take to address safety concerns such as using weight categories.⁵⁸

- 14.65 This approach would not address any competitive advantage transgender women athletes might have over cisgender women athletes in the particular sport. Similarly, this approach would not allow a sport to place any restrictions on participation of an athlete with an innate variation of sex characteristics even if there was evidence that a variation provided a competitive advantage.
- 14.66 This approach may make it difficult for sporting organisations to comply with rules set by their international governing bodies that apply to domestic qualifying events. Most of the international policies we have seen have some restrictions on participation of transgender women in women's sport. This approach also involves a single approach for all competitive sports despite these being very different in terms of the primary muscles used, the strength and stamina required and the degree of contact between participants.

Option 3: apply section 49(1) to new grounds of discrimination

- 14.67 This option would involve amending section 49(1) so that the exception (as currently worded) also applies to any new grounds of discrimination. An example of this approach is the exception in Australian Commonwealth legislation which provides:⁵⁹

Nothing in Division 1 or 2 renders it unlawful to discriminate on the ground of sex, gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

- 14.68 Under this option, sporting organisations that want to rely on the exception would need to be able to demonstrate that the strength, stamina or physique of competitors is relevant to that code. That is already the position for sex-separated sporting activities.
- 14.69 This option does not expressly account for differences such as whether a person has gone through puberty, the duration of any hormone replacement therapy or the type of innate variation of sex characteristics a person has. However, this could be relevant to whether there are differences in relative strength or physique.
- 14.70 If this option were to be adopted, it might be advisable to limit its application to competitive sporting events that are restricted to people of one sex.

Option 4: a separate and unqualified exception for new grounds of discrimination

- 14.71 This option would involve a separate exception that applies to new grounds and that is not qualified by reference to the strength, stamina and physique of competitors. This is the approach taken in New South Wales (in relation to transgender competitors). Its anti-discrimination legislation provides:⁶⁰

Nothing in this Part renders unlawful the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies.

⁵⁸ See Ihi Aotearoa | Sport New Zealand *Guiding Principles for the Inclusion of Transgender People in Community Sport* (December 2022) at 13.

⁵⁹ Sex Discrimination Act 1984 (Cth), s 42(1). See also s 42(2), which is in similar terms to s 49(2) Human Rights Act 1993.

⁶⁰ Anti-Discrimination Act 1977 (NSW), s 38P(1).

- 14.72 This option would enable sporting organisations to decide for themselves whether people who are transgender or non-binary or who have an innate variation of sex characteristics can participate in men's or women's competitive sporting activities and on what terms.
- 14.73 We think it is appropriate to consult on this option given there is an Australasian precedent. However, we think there would need to be a very clear evidence-based justification to apply a more restrictive approach to participation of athletes who are transgender or non-binary or who have an innate variation of sex characteristics than to cisgender participation in a sporting event for the opposite sex. In the absence of clear justification, we think this approach would undermine the values of equality and dignity that underlie the Human Rights Act. It is also relevant to note there is currently a member's Bill that proposes to replace the New South Wales exception with a more limited exception.⁶¹

Option 5: apply section 49(1) to women's sport only

- 14.74 This option would involve reforming section 49(1) so that it would only allow sex-separated competitive sporting activities for women and would allow men or anyone assigned male at birth to be excluded from those events. For example, the exception might read:
- ... nothing in section 44 shall prevent the exclusion of men or persons assigned male at birth from participation in any competitive sporting activity for women in which the strength, stamina or physique of competitors is relevant.
- 14.75 Under this option, there would be no exception allowing a separate men's competitive sport category. Effectively, this would mean that sports could have a women's category and an open category. The open category would be available to anyone regardless of their sex, gender identity or sex characteristics.
- 14.76 This option would allow transgender men to compete with cisgender men without restriction, although we understand most sports already allow this. All non-binary athletes could compete in the open category, and non-binary athletes assigned female at birth could choose to participate in the women's category. This option would allow sports to exclude transgender women from participating in women's sport in which the strength, stamina or physique of competitors is relevant, regardless of whether they have undergone male puberty or taken hormone therapy. Option 5 would not have any specific restrictions on athletes with an innate variation of sex characteristics.
- 14.77 Despite the name of the open category, in practice, this category would likely predominantly consist of cisgender men.

Option 6: an exception for new grounds that only applies where required to advance underlying policy rationales

- 14.78 This would involve an exception that allows a person to be excluded from a competitive sporting activity that aligns with their gender identity (or to be required to comply with a condition to compete such as undergoing hormone therapy) where this is required to advance underlying policy objectives. For example, the exception might specify that, to

⁶¹ Equality Legislation Amendment (LGBTIQ+) Bill 2023 (NSW), sch 1, cl 12.

rely on the exception, a sporting body would need to establish that the exclusion or condition is reasonably required to:

- (a) secure fair competition between participants having regard to the level of the competition and the public interest in broad community participation in sporting activities;
- (b) ensure the physical safety of all participants; or
- (c) comply with international rules that apply to that sport.

- 14.79 There are some overseas precedents that are somewhat similar. For example, in Western Australia, a “gender reassigned person” can be excluded from a competitive sporting activity for the sex with which they identify if they would have a significant performance advantage as a result of their medical history.⁶² The sport exception in the United Kingdom allows a “transsexual person” to be excluded from a “gender-affected activity” if this is necessary to secure fair competition or the safety of competitors.⁶³ The member’s Bill currently before the New South Wales Parliament proposes an exception that would only apply if strength, stamina and physique is relevant and if exclusion is reasonable and proportionate in all the circumstances.⁶⁴
- 14.80 The wording we have suggested for this option is designed to achieve a proportionate balance between the rationale of fair competition and the public interest in securing broad community participation in sporting activities. We think this will allow for different rules to develop depending on the level of competition. What is reasonably required to achieve fair competition seems to us to be different depending on whether the sporting activity is at the grassroots or elite level.
- 14.81 An alternative would be to define “competitive sporting activity” as only including elite sport and not community sport. However, we understand this is a grey line that differs between sporting codes and so could result in the exception applying very differently between sports. Further, safety considerations may arise at any level. For those reasons, in option 6, we treat the level of the competitive sporting activity as a factor relevant to whether the exception is reasonably required for fair competition rather than as a threshold matter.
- 14.82 In addition to the fair competition rationale, this option would allow a sporting organisation to rely on the alternative rationales of ensuring physical safety or complying with international rules. When relying on either of these rationales, an organisation would not need to consider the level of the sport or the desirability of broad community participation. We imagine that, in practice, international rules would primarily apply to elite-level events.
- 14.83 This option involves a narrower and more sport-specific exception than other options we have set out and would require reliance on the exception to be grounded in evidence. An organisation would only be able to exclude an athlete from a competitive sporting activity if it could establish it was reasonably required for fair competition, safety or to comply with international rules. This option would therefore allow regard to be given to emerging

⁶² Equal Opportunity Act 1984 (WA), s 35AP(2).

⁶³ Equality Act 2010, s 195.

⁶⁴ Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW), sch 1, cl 12.

evidence and sport-specific considerations. For example, when considering the issue of fair competition, a sporting body could consider relevant evidence on whether transgender competitors could have a performance advantage over other competitors in that sport. A practical issue with option 6 is that, for some sports, there may be very little relevant evidence available.

- 14.84 Because this option does not involve a bright-line test, sports organisations might be uncertain whether they can rely on the exception. It might lead to increased litigation. If this option is adopted, it may be useful for an organisation such as Te Kāhui Tika Tangata | Human Rights Commission or Sport New Zealand to develop guidelines to assist sporting bodies.

QUESTION

Q64

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?

CHAPTER 15

Other issues in Part 2

INTRODUCTION

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

OTHER FORMS OF DISCRIMINATION

- 15.2 The subpart called “Other forms of discrimination” identifies some specific types of conduct as unlawful discrimination. As we explained in Chapter 8, three of these are enlarging provisions that expand the scope of all the protections in Part 2 (for example, by clarifying that people are liable in certain circumstances for the actions of their agents and employees).¹ We do not think these three provisions raise issues that warrant consideration in this review (other than one instance of binary language that we discuss along with others in Chapter 17).²
- 15.3 The other sections in this subpart specify that several discrete types of conduct are unlawful discrimination. These are provisions that do not fit into the main body of Part 2 because they follow a different logic. For example, some of them:
- (a) only apply to some prohibited grounds of discrimination rather than all prohibited grounds;³
 - (b) extend protection on a different logic altogether than the prohibited grounds;⁴
 - (c) apply to conduct in all the areas of life regulated by Part 2;⁵
 - (d) regulate an entirely different area of life to those identified in Part 2;⁶ or

¹ Human Rights Act 1993, s 68. See, also, Human Rights Act 1993, ss 65 (indirect discrimination) and 67 (advertisements).

² Human Rights Act 1993, s 68(3) (“he and she”).

³ For example, Human Rights Act 1993, s 63 (concerning racial harassment).

⁴ For example, Human Rights Act 1993, s 62 (concerning sexual harassment).

⁵ For example, Human Rights Act 1993, s 62 (concerning sexual harassment).

⁶ For example, Human Rights Act 1993, s 63A (concerning conversion practices).

- (e) regulate a type of adverse treatment that, although harmful to equality, is not exactly about treating one group of people differently from others in comparable circumstances (which is the focus of most Part 2 protections).⁷
- 15.4 Of these ‘other forms of discrimination’, two fall outside the scope of this review for reasons explained in Chapter 1.⁸ Three others concern subject matter that is not connected to this review.⁹ That leaves one remaining provision (concerning sexual harassment), which we discuss below.
- 15.5 We also seek feedback on whether any additional ‘other forms of discrimination’ should be added to this subpart to address issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. Specifically, we ask whether there should be a provision addressing harassment of people who fall into these groups, and whether there should be a provision clarifying the circumstances in which medical interventions on children and young people with an innate variation of sex characteristic are permissible.

Sexual harassment

- 15.6 Section 62 of the Human Rights Act is about sexual harassment.¹⁰ Sexual harassment involves behaviour of a sexual nature rather than behaviour driven by hostility to someone based on their sex (although that can sometimes be a reason for the behaviour). Anyone can take a claim of sexual harassment regardless of their sex, gender identity or sex characteristics. Section 62 covers two kinds of sexual harassment:
 - (a) asking a person for sexual contact where there is an (implied or overt) promise of preferential treatment or threat of detrimental treatment; and
 - (b) subjecting a person to language, visual material or physical behaviour of a sexual nature that is “unwelcome or offensive” and is either repeated or so significant that it has a detrimental effect on them in the area of life in which it occurs.
- 15.7 Sexual harassment is unlawful in all the areas of life regulated by Part 2 as well as when participating “in fora for the exchange of ideas and information”.¹¹
- 15.8 We do not have New Zealand data on the rates of sexual harassment for people who are transgender or non-binary or who have an innate variation of sex characteristics. As we explained in Chapter 3, we do know that people in Aotearoa New Zealand who are transgender or non-binary experience much higher rates of sexual violence than the general population. There is also Australian data suggesting that people who are non-

⁷ For example, Human Rights Act 1993, s 63A (concerning conversion practices).

⁸ Human Rights Act 1993, ss 61 (racial disharmony) and 63A (conversion practices). A third provision (not in Part 2) is also out of scope: Human Rights Act 1993, s 131 (also concerning incitement of racial disharmony).

⁹ Human Rights Act 1993, ss 62A (adverse treatment in employment of people affected by family violence), 63 (racial harassment) and 66 (victimisation of whistleblowers or complainants).

¹⁰ There is a corresponding provision in the Employment Relations Act 2000, s 108.

¹¹ Human Rights Act 1993, s 62(3). Unlike many provisions in Part 2, the prohibition on sexual harassment applies to government agencies as well as private individuals and organisations: Human Rights Act 1993, ss 20J(2) and 21A.

binary and people with an innate variation of sex characteristics can experience higher rates of sexual harassment than others in workplaces.¹²

- 15.9 We are interested to receive feedback on whether there are any issues with the wording of section 62 that may be relevant to this review. For example, we have heard anecdotally that it is common for people who are transgender or who have an innate variation of sex characteristics to be asked intrusive questions about their genitalia. We think those kinds of questions would already be covered by section 62 because they would amount to unwelcome or offensive language of a sexual nature. However, we are interested to understand this better.

QUESTION

Q65

Do you have any feedback on the implications of this review for section 62?

Should Part 2 identify additional “Other forms of discrimination”?

- 15.10 In recent years, two new prohibitions have been added to the “Other forms of discrimination” subpart to address the needs of vulnerable groups. In 2019, the subpart was updated to prohibit adverse treatment in employment of people affected by family violence, and in 2022, it was updated to prohibit conversion practices.
- 15.11 We want to understand whether there should be new provisions added to this subpart to address issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. We discuss two possibilities below.

Harassment based on gender identity or sex characteristics

- 15.12 We want to understand whether the Human Rights Act should prohibit harassment of people because they are transgender or non-binary or they have an innate variation of sex characteristics.
- 15.13 The only provision in the Human Rights Act that targets harassment of people based on group characteristics protected by section 21 is the section 63 prohibition of “racial harassment”.¹³ Section 63 singles out for protection three of the section 21 grounds — colour, race and “ethnic or national origins”.¹⁴ Under section 63, it is unlawful to use language, visual material or physical behaviour that:
- (a) “expresses hostility against, or brings into contempt or ridicule, any other person” based on these three prohibited grounds;
 - (b) is hurtful or offensive to the person; and

¹² Australian Human Rights Commission *Time for respect: Fifth national survey on sexual harassment in Australian workplaces* (November 2022) at 48 and 53. The sample sizes are small so the results should be approached with caution. However, in the most recent survey, 67 per cent of non-binary respondents and 70 per cent of participants with an intersex variation (the term used in the survey) reported being sexually harassed at work in the last five years. This compared to 41 per cent of all women, 26 per cent of all men and 33 per cent of all respondents who did not have an intersex variation.

¹³ There is a corresponding provision in the Employment Relations Act 2000, s 109.

¹⁴ Like sexual harassment, racial harassment applies to government agencies as well as private individuals and organisations: Human Rights Act 1993, ss 20J(2) and 21A.

- (c) is either repeated or so significant that it has a detrimental effect on them in the area of life in which it occurs.¹⁵
- 15.14 The Human Rights Act does not protect people directly from harassment that is motivated by hostility to them based on any of the other group characteristics listed in section 21. For example, it does not make unlawful harassment that is motivated by a person's sex, religion, political opinion, disability or sexual orientation.
- 15.15 The legislative history does not identify why other groups were not given express protection from harassment. In many jurisdictions, harassment provisions apply to most or all of the prohibited grounds of discrimination.¹⁶ Often, this includes protection from harassment because a person is transgender or non-binary.¹⁷ In the Northern Territory in Australia, harassment on the basis of both gender identity and sex characteristics is prohibited.¹⁸ The United Nations committee that monitors the International Covenant on Economic, Social and Cultural Rights has recommended that workers should be protected from harassment on broad grounds, including sex, disability, race, sexual orientation, gender identity and intersex status.¹⁹
- 15.16 As we discussed in Chapter 3, there is Australian research indicating that harassment is a serious issue for people who are transgender or non-binary.²⁰ According to the *Counting Ourselves* survey in Aotearoa New Zealand, people who are transgender or non-binary experience verbal harassment in public places. The survey found it was most common for this to have occurred when using public bathrooms, public transport, gyms or pools or in retail stores.²¹ We do not have specific New Zealand data about harassment in other areas of life protected by Part 2 such as employment and education.
- 15.17 We have heard in preliminary engagement that some people with an innate variation of sex characteristics also experience harassment and that sometimes it is because people assume they are transgender. We understand people may be less likely to be harassed if it is not noticeable to an onlooker that they are transgender or non-binary or they have an innate variation of sex characteristics.²²

¹⁵ Like sexual harassment, racial harassment is unlawful in all the areas of life regulated by Part 2 as well as when participating "in fora for the exchange of ideas and information": Human Rights Act 1993, s 62(3).

¹⁶ This is the case in the United Kingdom, Ireland, eight of Canada's 13 provinces and territories and Canada's federal Canadian Human Rights Act RSC 1985 c H-6.

¹⁷ For example, eight Canadian jurisdictions prohibit harassment on the basis of gender identity, and seven of those prohibit harassment on the basis of gender expression. The United Kingdom protects against harassment on the ground of "gender reassignment".

¹⁸ Anti-Discrimination Act 1992 (NT), s 19(1).

¹⁹ United Nations Committee on Economic, Social and Cultural Rights *General Comment No 36: on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (27 April 2016) at [48].

²⁰ Adam O Hill and others *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia* (Australian Research Centre in Sex, Health & Society, La Trobe University, 2020) at 41.

²¹ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 71 and 74.

²² For example, a transgender man in the *Counting Ourselves* survey explained he was grateful that, with hormone treatment, he now 'passed' as a man and did not risk being abused or harassed because of his gender: Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 75.

- 15.18 We are interested to understand whether there are sufficient legal remedies available to protect people who are transgender or non-binary or who have an innate variation of sex characteristics from harassment. When harassment occurs in the areas of life protected by Part 2 of the Human Rights Act, it will already be unlawful if it meets the tests for discrimination found in those provisions. For example, repeat harassment of a transgender employee in the workplace would likely amount to a “detriment” and therefore be employment discrimination.²³ An employee might also be able to pursue a personal grievance for bullying under the Employment Relations Act 2000.²⁴
- 15.19 Other laws also prohibit harassment in some situations. For example, the Harassment Act 1997 protects members of the public from certain types of harassment and provides both criminal penalties and restraining orders. Other legislation deals with harassment-like activities, for example, the Sexual Violence Act 2019 (in the context of family relationships) and the Harmful Digital Communications Act 2015.
- 15.20 If current laws are insufficient, we are interested to understand whether it would be desirable to insert a new provision into Part 2 aimed at protecting people from harassment because they are transgender or non-binary or they have an innate variation of sex characteristics. A new provision could be modelled on the racial harassment provision in section 63 and could apply to some or all of the new grounds.
- 15.21 The benefit of a new provision is that people who are transgender or non-binary or who have an innate variation of sex characteristics would be protected from repeated or significant harassment when it has a detrimental effect on them in respect of the 11 areas of public life to which the harassment provisions apply. However, some of the forms of harassment that transgender and non-binary people most commonly report (such as in public bathrooms and when using public transport or public facilities) would not necessarily fall within section 63 if new grounds were included. This is because, to qualify, behaviour must either be repeated or so significant that it has a detrimental effect on the person in the area of life in which it occurs. This means behaviour is more likely to qualify in the context of ongoing relationships.²⁵
- 15.22 One difficulty with adding a new provision is that it may raise consistency issues given how few of the groups protected by section 21 currently receive protection from harassment. We do not think it is available to us within the scope of this review to propose a new provision that protects against harassment on all the prohibited grounds in section 21.

QUESTION

Q66

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?

²³ Human Rights Act 1993, s 22(1)(c).

²⁴ See Chapter 9 for discussion.

²⁵ Human Rights Act 1993, s 63(1)(c).

QUESTION

Q67

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?

Medical interventions relating to innate variations of sex characteristics

- 15.23 Another issue we have considered is whether there should be an ‘other form of discrimination’ in Part 2 clarifying the circumstances in which medical interventions on children and young people with an innate variation of sex characteristics are allowed. An example is surgery on children with genitalia that does not conform to norms for male or female bodies. We know this is a matter of deep concern to many people with innate variations of sex characteristics.
- 15.24 As we discussed in Chapter 3, there is a long history of surgical ‘correction’ being the dominant medical approach to infants born with an innate variation of sex characteristics. While there have been changes in medical practice over time, some community experts and researchers believe these surgeries still happen far too often and in cases that cannot be described as medically necessary.²⁶
- 15.25 Intersex advocates have raised the issue of unnecessary medical interventions on children and young people with innate variations of sex characteristics as a policy issue requiring reform in many different fora. This has included in select committee submissions on Bills that deal with similar issues²⁷ and submissions to international treaty bodies.²⁸
- 15.26 We have therefore considered carefully whether it would be desirable to include a provision regulating this issue in Part 2 of the Human Rights Act. As we explained earlier in this chapter, the discrete protections in the subpart on “Other forms of discrimination” all follow a different logic from those in the main body of Part 2. For example, some relate to experiences that are distinctive to only some of the groups protected by section 21 or to a different group altogether. Some also regulate types of adverse treatment that, although harmful to equality, are not really about treating one group differently from others in comparable circumstances (which is the focus of most of Part 2).²⁹
- 15.27 The closest precedent in this subpart for a protection relating to medical interventions associated with innate variations of sex characteristics is section 62A, which bans conversion practices.³⁰ When the Bill on conversion practices was being considered by the select committee, several submitters proposed that practices intended to change or

²⁶ For example, Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 The International Journal of Children’s Rights 533.

²⁷ For example, in submissions on the Crimes (Definition of Female Genital Mutilation) Amendment Bill 2019 (194-1) and the Conversion Practices Prohibition Legislation Bill 2021 (56-1).

²⁸ For example, Intersex Aotearoa *Thematic Report to the United Nations Committee on the Rights of the Child* (August 2022).

²⁹ For example, Human Rights Act 1993, s 63A (concerning conversion practices).

³⁰ Human Rights Act 1993, s 63A.

suppress innate variations of sex characteristics should be covered by the definition of conversion practices. However, this was ultimately considered outside of the Bill's intent.³¹

- 15.28 There might be a case for inserting a provision about medical interventions associated with innate variations of sex into this subpart by analogy with section 62A. However, we can also see some real difficulties in using Part 2 of the Human Rights Act to regulate this issue. It would likely be much more involved than inserting a single provision in the Act (as is the case with conversion practices).³² Detailed provisions would be needed on which variations are covered by the provisions, the circumstances in which particular forms of medical intervention are prohibited or allowed and (potentially) processes for approving treatment. In the Australian Capital Territory, legislation addressing this issue involves 47 sections as well as associated regulations.³³ If it is desirable to address this issue through legislation, it may be more appropriate to do this through stand-alone legislation. We have been unable to find any other jurisdiction that addresses this issue through anti-discrimination legislation. Some of the submitters on the Bill addressing conversion practices who supported prohibiting unnecessary medical interventions on people with innate variations of sex characteristics thought this should be dealt with by a specific policy or piece of legislation.³⁴
- 15.29 Another difficulty with having a provision in the Human Rights Act is that it may complicate work that is being done in other policy areas. In 2022, the government announced funding to support a rights-based approach to health care for children and young people with innate variations of sex characteristics. The funding will enable several initiatives, including clinical guidelines, information resources and peer support services.³⁵
- 15.30 Our preliminary conclusion is that it would not be desirable for the Human Rights Act to contain a provision that clarifies the circumstances in which medical interventions on children and young people with an innate variation of sex characteristics are permitted. However, we welcome feedback on this issue.
- 15.31 Finally, it is possible that health care provided by public hospitals would fall under Part 1A of the Human Rights Act rather than Part 2. Therefore, if a provision were added to Part 2 regulating medical interventions on children and young people with an innate variation of sex characteristics, it might be necessary to add that new provision to sections 20J(2) and 21A(1) of the Act, which specify the Part 2 provisions that apply to government and bodies exercising government functions.

QUESTION

Q68

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?

³¹ Conversion Practices Prohibition Legislation Bill (56-2) (select committee report) at 6. See also Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Prohibiting Conversion Practices* (15 April 2021) at 4.

³² There is also a separate Act relating to conversion practices: Conversion Practices Prohibition Legislation Act 2022.

³³ Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023 (ACT).

³⁴ Conversion Practices Prohibition Legislation Bill (56-2) (select committee report) at 6.

³⁵ Hon Ayesha Verrall MP “Rainbow health gets funding boost” (press release, 5 June 2022) <www.beehive.govt.nz>.

QUESTION**Q69**

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 (and that are not captured by other provisions in the Human Rights Act 1993)?

SPECIAL PROVISIONS RELATING TO SUPERANNUATION SCHEMES

- 15.32 There is a separate subpart in Part 2 of the Human Rights Act that contains some provisions about superannuation schemes. Superannuation schemes provide members with benefits when they retire (or in other circumstances such as accident, disability or sickness).³⁶ An example is the Government Superannuation Fund, which provides retirement benefits to former state sector employees.³⁷ Superannuation schemes are different to retirement savings schemes such as KiwiSaver. We understand far fewer people have superannuation schemes than retirement savings schemes.
- 15.33 Only one of the provisions in this subpart about superannuation raises issues relevant to this review. That is section 70(2), which contains an exception making it lawful for superannuation schemes to treat people differently in certain circumstances by reason of their sex.
- 15.34 The exception in section 70(2) is not expressly tied to any particular area of life regulated by the Human Rights Act. However, other exceptions for superannuation schemes also found in this subpart are expressly tied to discrimination in employment (section 22) and discrimination in the provision of goods, services and facilities (section 44).³⁸ We think these are the contexts in which section 70(2) is most likely to be relevant.

Scope and rationale of the exception

- 15.35 Section 70(2) allows superannuation schemes to provide different benefits to members of each sex even if they have made the same contributions, or to provide the same benefits to members of each sex even if they have made different contributions. The different treatment must be reasonable based on actuarial or statistical data relating to life expectancy, accidents or sickness and any other relevant factors.
- 15.36 This provision is based on an exception in the Human Rights Commission Act 1977. Consideration was given to removing this exception in 1993 with views being divided on whether that should happen.³⁹ The rationale for including the provision appears to have

³⁶ See definition of superannuation scheme in Human Rights Act 1993, s 2(1).

³⁷ This scheme has been closed to new members since 1992.

³⁸ Human Rights Act 1993, s 70(1), (4) and (5), which relate to age and disability.

³⁹ See Department of Justice *Human Rights Bill: Clauses 62, 82–84 – Report of the Department of Justice* (1993) at 9–10; and (27 July 1993) 537 NZPD 16908–16909 (Hon Lianne Dalziel MP).

been retaining a consistent approach between the insurance exception (which we discussed in Chapter 10) and superannuation.⁴⁰

- 15.37 We do not know whether the exception in section 70(2) is currently being relied on in practice. From the information we have seen, pensions are more often calculated from a person's age at retirement, their length of contributory service and their average salary in the years prior to retirement.⁴¹ Two other reasons why section 70(2) may now have limited application are that few superannuation schemes still exist and that it is possible some may fall under Part 1A rather than Part 2 of the Human Rights Act.⁴²

Should the exception be amended to reflect any new grounds?

- 15.38 We want to understand whether this exception should be amended to reflect any new grounds we propose. Given that section 70(2) may now have limited relevance, we suspect it may be unnecessary to reform the exception. We suspect there may also be a lack of relevant actuarial or statistical data to support applying the exception to new grounds.

QUESTION

Q70

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?

OTHER MATTERS

- 15.39 A final subpart in Part 2 is headed “Other matters”. It contains two general exceptions that we discussed in Chapter 8 — section 73(1) (which concerns positive discrimination generally) and section 74 (which concerns measures related to pregnancy, childbirth and childcare responsibilities).
- 15.40 It is beyond the scope of this review to reconsider the language of section 73(1) of the Human Rights Act because that section applies generally to all the prohibited grounds of discrimination. This would need to await a general review of the Act.⁴³
- 15.41 On the other hand, we are interested in feedback on the wording of section 74. That section confirms “for the avoidance of doubt” that it is not a breach of Part 2 of the Human Rights Act to provide preferential treatment because of “a woman's pregnancy or childbirth” or “a person's responsibility for part-time or full-time care of children or

⁴⁰ See (27 July 1993) 537 NZPD 16905 (Rt Hon Douglas Graham MP).

⁴¹ See, for example, Government Superannuation Fund *Police Sub-Scheme* (February 2020) at 4.

⁴² For example, the Government Superannuation Fund is established by statute and the Authority that manages and administers the fund is a Crown entity: see Government Superannuation Fund Act 1956, s 15A.

⁴³ For example, it may be desirable in such a review to consider discrepancies between the wording of section 73(1) and the equivalent provision in the New Zealand Bill of Rights Act 1990, which applies to discrimination under Part 1A of the Human Rights Act.

dependants”.⁴⁴ The sort of preferential treatment contemplated by section 74 might include things like parental leave, breastfeeding rooms in workplaces or malls, or providing bassinet seats on aeroplanes.

- 15.42 We are interested in feedback on whether it would be desirable to reword section 74 to clarify that it applies to anybody who is pregnant or who is giving birth.⁴⁵ This might include people who are non-binary, transgender men and some people with an innate variation of sex characteristics who do not identify as women. As an example, the section might simply refer to “preferential treatment by reason of pregnancy or childbirth”.

QUESTION

Q71

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?

⁴⁴ For discussion of this provision in the draft bill, see Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 49.

⁴⁵ See George Parker and others *Warming the Whare for trans people and whānau in perinatal care* (Trans Pregnancy Care Project, Otago Polytechnic Press, 2023).

CHAPTER 16

Part 1A and the New Zealand Bill of Rights Act

INTRODUCTION

- 16.1 In this chapter, we discuss the implications of this review for Part 1A of the Human Rights Act 1993 and for the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).
- 16.2 As we have explained elsewhere, Part 1A sets out rules in the Human Rights Act that apply to government departments and to people and bodies exercising government functions. Part 1A essentially incorporates sections from the NZ Bill of Rights. It reflects a policy decision that the discrimination obligations imposed on government should be identical under both statutes.
- 16.3 This review may have direct implications for the NZ Bill of Rights because its protection from discrimination (section 19) provides a right to freedom from discrimination “on the grounds of discrimination in the Human Rights Act 1993”.
- 16.4 It is outside the scope of this review to recommend any reform of the NZ Bill of Rights. This means it would also be difficult for us to recommend reform of Part 1A. We nevertheless need to understand the potential implications for Part 1A and the NZ Bill of Rights of any amendments we propose to section 21 of the Human Rights Act.

THE RIGHT TO FREEDOM FROM DISCRIMINATION IN THE NZ BILL OF RIGHTS

- 16.5 The NZ Bill of Rights applies to acts and omissions of the government (which includes government departments) as well as to people or organisations that are performing government functions.¹

¹ New Zealand Bill of Rights Act 1990, s 3. This refers to acts done by the legislative, executive or judicial branches of government as well as by “any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law”. For simplicity and to avoid confusion with the public-facing activities that are regulated under Part 2, in this Issues Paper, we use the terms government and government functions.

- 16.6 Under section 19 of the NZ Bill of Rights, everyone has a right to freedom from discrimination “on the grounds of discrimination in the Human Rights Act”.² The courts have said there is discrimination under section 19 if:³
- (a) a person or group is treated differently from others (whether that is the intention or the result of the treatment);
 - (b) the difference in treatment is based on a prohibited ground of discrimination; and
 - (c) the treatment results in a “material disadvantage” to the person or group when viewed in context.
- 16.7 Generally speaking, to prove that a difference in treatment is based on a prohibited ground, you need to show that someone who does not have that characteristic but is otherwise in a similar situation has not been, or would not be, treated the same way. Discrimination has been described as “in essence, treating persons in comparable situations differently”.⁴
- 16.8 Even if a government act, policy or practice limits the right to freedom from discrimination, that does not necessarily mean it is unlawful. There will often be good reasons for the government to treat different groups of people differently. As we explained in Chapter 4, section 5 of the NZ Bill of Rights says that it is lawful to limit rights so long as the limit is authorised by law and can be “demonstrably justified in a free and democratic society”. This is said to embody a ‘proportionality’ test, which, in general terms, means that the limit on the right needs to create a benefit for society sufficient to warrant the harm.
- 16.9 There is no universal approach to deciding whether a limit on a right is proportionate but there are some common questions courts often address.⁵ They include:
- (a) whether the purpose of the rights-limiting measure is important enough to justify limiting rights and freedoms;
 - (b) whether the law that limits the right has been designed with care so that it achieves its aim and avoids limiting rights more than necessary; and
 - (c) whether the overall gain to society from the rights-limiting measure is sufficient to justify the particular intrusion on rights that has resulted from it.
- 16.10 If someone experiences unjustified discrimination in breach of the NZ Bill of Rights, they can go to Te Kōti Matua | High Court and seek a remedy (for example, damages or an order requiring the person or agency to stop the discrimination). However, if the unjustified discrimination is authorised by legislation, the only remedy available is a non-binding declaration that the legislation is inconsistent with the NZ Bill of Rights.⁶

² Section 19 also provides that measures taken in good faith to assist or advance people who are disadvantaged by discrimination do not amount to discrimination: New Zealand Bill of Rights Act 1990, s 19(2).

³ For example, *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] NZLR 456 at [55] and [109]; and *Child Poverty Action Group v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [43].

⁴ *Ngaronoa v Attorney-General of New Zealand* [2017] NZCA 351, [2017] NZLR 643 at [121]. See also *Child Poverty Action Group v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [51].

⁵ See, for example, *R v Oakes* [1986] 1 SCR 103 at [69]–[70]; and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J.

⁶ See *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

PART 1A OF THE HUMAN RIGHTS ACT

- 16.11 Part 1A was inserted into the Human Rights Act in 2001 to ensure that the tests that apply to government are the same under the Human Rights Act and under the NZ Bill of Rights.
- 16.12 As we explained in earlier chapters, discriminatory treatment by government or people or organisations that are performing government functions will generally fall under Part 1A rather than Part 2.⁷ Under Part 1A, the tests for whether unjustified discrimination has occurred are identical to those in the NZ Bill of Rights (set out above).⁸ However, if a person pursues their claim under the Human Rights Act rather than directly under the NZ Bill of Rights, they can bring their complaint to Te Kāhui Tika Tangata | Human Rights Commission (which will attempt to help resolve the dispute). If the dispute cannot be resolved, a person may bring a claim in Te Taraipiunara Mana Tangata | Human Rights Review Tribunal.
- 16.13 The Human Rights Review Tribunal is a less costly and more informal body than the courts and can grant a range of statutory remedies. These include declarations, restraining orders and damages.⁹ As is the case under the NZ Bill of Rights, if the discriminatory conduct is authorised by legislation, the only remedy is a non-binding declaration that the legislation is unjustified discrimination in breach of the NZ Bill of Rights.¹⁰
- 16.14 As we discussed in Chapter 8, the line between what falls under Part 1A and Part 2 of the Human Rights Act is grey. This is due to uncertainty as to whether particular acts or omissions involve a government function. There is limited case law about what a government function involves, and commentators do not always agree on the correct position.
- 16.15 In many areas of life regulated by the Human Rights Act, some conduct will fall under Part 1A and some will fall under Part 2 (depending on the person or body that is responsible). For example:
- (a) As we explained in Chapters 8 and 12, when education is being provided by a state school, state-integrated school or tertiary institution, it will likely fall under Part 1A. Commentators disagree on whether private education providers such as early childhood centres and private schools are ever regulated by Part 1A.
 - (b) As we explained in Chapters 8 and 13, council-run bathrooms and changing rooms are likely covered by Part 1A. Bathrooms and changing rooms provided in places like gyms, shops and restaurants will fall under Part 2.
 - (c) Government policies about eligibility for health funding and resources would likely fall under Part 1A whereas the conduct of a private healthcare provider such as a general practitioner is likely to fall under Part 2.
- 16.16 Some areas are more exclusively regulated by Part 1A. These include primary legislation, the actions of government departments (such as Ara Poutama Aotearoa | Department of

⁷ Human Rights Act 1993, ss 20J and 21A. There are a handful of situations in which government and people exercising government functions fall under Part 2. These relate to employment discrimination, sexual harassment, racial harassment, racial disharmony and victimisation: Human Rights Act 1993, ss 20J(2) and 21A(1).

⁸ Human Rights Act 1993, s 20L.

⁹ Human Rights Act 1993, ss 92I–92Q.

¹⁰ Human Rights Act 1993, s 92J.

Corrections and Te Hiranga Tangata | Work and Income) and the conduct of agencies such Ngā Pirihimana o Aotearoa | New Zealand Police.

IMPLICATIONS OF THIS REVIEW FOR PART 1A AND THE NZ BILL OF RIGHTS

- 16.17 If section 21 of the Human Rights Act is amended to clarify that people are protected from discrimination that is linked to the fact (or discriminator's belief) they are transgender or non-binary or they have an innate variation of sex characteristics, this would clarify that protection is available for these groups under both Part 1A of the Human Rights Act and the NZ Bill of Rights. We are interested to understand the key implications of this for government and for people and bodies that exercise government functions.

Policy development

- 16.18 It is a general expectation of policy and legislative design in Aotearoa New Zealand that officials consider and advise on whether policy and legislative proposals are consistent with human rights obligations in the NZ Bill of Rights and the Human Rights Act and at international law.¹¹ As well, when a Bill is introduced to Parliament, the NZ Bill of Rights requires the Attorney-General to alert Parliament to any provision that appears to be inconsistent with the NZ Bill of Rights.¹² Officials at Te Tāhū o te Ture | Ministry of Justice and Te Tari Ture o te Karauna | Crown Law advise the Attorney-General on this.
- 16.19 We are interested to hear from submitters about the implications for policy development of amending the grounds of discrimination in section 21. It may be that the implications would be small because of what already happens in practice. There are examples of government officials already considering whether policy proposals might discriminate against people who are transgender or non-binary or who have an innate variation of sex characteristics in their human rights analysis.¹³ That reflects the government's longstanding view (explained in Chapter 6) that these groups are already protected by the Human Rights Act under the prohibited ground of sex.

Complaints against government

- 16.20 If new grounds are added to the Human Rights Act, it will be clearer to people that they can complain about discrimination by government (or organisations exercising government functions) that is based on their gender identity or sex characteristics. As we explained earlier in the chapter, people can make a complaint to the Human Rights Commission and, if that does not achieve an outcome with which they are satisfied, the Human Rights Review Tribunal. Alternatively, as we also discussed, they can apply to the High Court for a remedy under the NZ Bill of Rights.

¹¹ For example, Te Tari o te Pirimia me te Komiti Matua | Department of the Prime Minister and Cabinet "CabGuide: Human Rights implications in bills and Cabinet papers" (16 July 2019) <www.dpmc.govt.nz>; Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at Ch 6–7; and Cabinet Office *Cabinet Manual 2023* at [7.68]–[7.70].

¹² New Zealand Bill of Rights Act 1990, s 7.

¹³ See, for example, Te Tāhū o te Ture | Ministry of Justice *Legal Advice – Consistency with the New Zealand Bill of Rights Act 1990: Births, Deaths, Marriages, and Relationships Registration Bill* (26 July 2017) at [27]; and Te Tāhū o te Ture | Ministry of Justice *Legal Advice – Consistency with the New Zealand Bill of Rights Act 1990: Pae Ora (Healthy Futures) (Provision of Breast Cancer Screening Services) Amendment Bill* (14 August 2023) at [16].

- 16.21 We would like to understand the implications of adding new grounds for complaints to the Human Rights Commission, the Human Rights Review Tribunal and the courts. As we have explained in earlier chapters, the Human Rights Commission already interprets the ground of sex as including gender identity, gender expression and sex characteristics and will accept complaints about these forms of discrimination.¹⁴ Between 1 January 2008 and 31 December 2023, the Commission received 91 complaints about government activity from people who identified as transgender, gender diverse or intersex.¹⁵ This represented almost half of the 192 complaints the Commission received from people in these groups (under both Part 1A and Part 2) over that 16-year period. Complaints may have led to policy changes in some cases.¹⁶
- 16.22 As we explained in Chapter 6, we would expect an increased number of discrimination complaints to be made to the Human Rights Commission if there were new grounds of discrimination that expressly protect people who are transgender or non-binary or who have an innate variation of sex characteristics. That is because it will put it beyond doubt that these groups are covered by section 21 and increase awareness of these forms of discrimination.
- 16.23 New or amended grounds of discrimination may also make it more likely that complaints are pursued before the Human Rights Review Tribunal or in the High Court.

General features of litigation under Part 1A and the NZ Bill of Rights

- 16.24 As we explained earlier, it is possible under Part 1A to challenge any act or omission of a government department or of a person or body that is exercising a government function conferred on them by law. This means it is possible to challenge any “activity, condition, enactment, policy, practice, or requirement”.¹⁷ This would include decisions about, or acts towards, individuals as well as decisions or acts that apply more generally. It is also possible to challenge laws, although, where the challenge is to a statute, the only remedy is a non-binding declaration.
- 16.25 Judges are also covered by Part 1A and the NZ Bill of Rights but, for public policy reasons, there are significant limits on the ability to challenge their actions or decisions.¹⁸
- 16.26 Although we would like to better understand which kinds of claims might be brought if new grounds are added to section 21 of the Human Rights Act, it is not possible to identify all the issues that could give rise to a complaint nor to predict which claims will be successful. This is because of some general features of litigation under Part 1A and the NZ Bill of Rights that make it very different from Part 2.

¹⁴ Te Kāhui Tika Tangata | Human Rights Commission *PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOCIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 14.

¹⁵ Letter from Te Kāhui Tika Tangata | Human Rights Commission to Te Aka Matua o te Ture | Law Commission (1 March 2024).

¹⁶ For example, according to the Human Rights Commission, a complaint from a transgender person resulted in Manatū Hauora | Ministry of Health changing its guidelines on the availability of gender-affirmation surgery: Te Kāhui Tika Tangata | Human Rights Commission *Human Rights in New Zealand Today* | Ngā Tika Tangata O Te Motu (September 2004) at 360.

¹⁷ See Human Rights Act 1993, s 2(1) (definition of act).

¹⁸ For example, *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

- 16.27 As we discussed in Chapters 8 to 15, Part 2 of the Human Rights Act has detailed and specific provisions that explain when differences in treatment that relate to specific areas of life will be considered unlawful. By contrast, Part 1A and the NZ Bill of Rights take a more fluid and context-specific approach. In particular, as we explained earlier in this chapter, they allow for broad consideration of whether differences in treatment are reasonable and justified in a free and democratic society.
- 16.28 This recognises the reality that governments often need to draw distinctions between different groups to ensure that everyone's needs are met. It allows for the assessment of whether a particular act or omission involves unjustified discrimination to be made in context, based on evidence and in the light of any competing rights and interests (including other rights in the NZ Bill of Rights).
- 16.29 Clarifying the grounds of discrimination in section 21 of the Human Rights Act may well enable people who are transgender or non-binary or who have an innate variation of sex characteristics to bring novel legal claims challenging adverse treatment they may experience as result of government laws, policies and practices. However, the outcome of any case will be determined by a court or tribunal based on a broad and contextual assessment of all relevant rights and interests. We think it is worth highlighting some features of such litigation.

Plaintiffs have to prove their treatment was based on a prohibited ground

- 16.30 To succeed, a plaintiff will have to prove their treatment was discrimination. As we explained earlier, that generally means proving that someone who does not have the protected characteristic but is otherwise in a similar situation has not been, or would not be, treated the same way. This can be difficult to do when the issue that is being litigated is one that is unique to the particular group. For example, if the form of medical treatment that is at issue is only relevant to people with the particular characteristic, it can be difficult to show that decisions about access to that treatment are discriminatory. In challenges overseas about access to gender-affirming health care, the court's choice of comparator has often been determinative. For example:
- (a) In British Columbia, a transgender man whose phalloplasty surgery was only partially funded succeeded in his discrimination claim because a transgender woman who had been approved for a vaginoplasty would have had the procedure fully funded.¹⁹
 - (b) In the United States, healthcare plans have been held to be discriminatory where they covered treatments for certain diagnoses but refused cover for the same treatments to treat gender dysphoria. An example is a plan that covered breast-reduction surgery to treat excess breast tissue in cisgender men but not to treat gender dysphoria in transgender men.²⁰
 - (c) A challenge to the Ontario Government's failure to fund laser hair removal, voice therapy and breast augmentation surgery was unsuccessful because the

¹⁹ *Waters v British Columbia (Ministry of Health Services)* 2003 BCHRT 13, 46 CHRR 139 at [164]–[165] and [186]. The procedure was only partially funded because it had to be performed outside of the province (as no one in British Columbia was performing the procedure), but the government would only pay for doctors' fees at the rate that would have been paid if the procedure was performed in British Columbia.

²⁰ *Kadel v Folwell* 100 F 122 (4th Cir 2024) at 133–134, 149 and 152.

transgender plaintiffs failed to prove they were denied access to medically necessary treatments for which cisgender women could receive funding.²¹

- (d) In the United Kingdom, a claim about long waiting times for gender identity services failed because the plaintiffs could not establish differential treatment to others in comparable circumstances. The Court said the plaintiffs could not properly be compared to those referred for other services as it would not be comparing like for like. The long waiting time was due to a combination of factors that other services did not have, such as increased demand for gender identity services, recent clinical controversy about treatments and difficulty in recruiting and retaining specialists.²²

- 16.31 There are also examples of the appropriate comparator being central to discrimination claims by transgender prisoners. For example, in the United Kingdom, a transgender woman's claim about lack of access to wigs and tights while in a male prison failed because she was compared to cisgender male prisoners, who were also not entitled to these things.²³

Cases are determined based on the facts before the court and in the light of evidence

- 16.32 Cases are brought on the basis of particular facts rather than in the abstract. This means that the exact wording of a law or policy that is being challenged, or the precise circumstances of an individual claim, can be central to the outcome of the case. In overseas cases that have been brought based on gender identity, some have been successful and others have not based on differences in individual circumstances. For example, in an Ontario discrimination case about a government decision to discontinue funding for gender-affirming surgery, only the plaintiffs who had already begun gender-affirming treatment were successful.²⁴
- 16.33 The court or tribunal will decide the case on the evidence before it. Cases sometimes fail because the plaintiff has provided insufficient evidence on which to base a finding of discrimination. Evidence is particularly important to determining whether a limit on a right is demonstrably justified. Courts and tribunals generally expect the government to provide evidence of why it needed to limit a right.²⁵ For example, a Manitoba case where a person sought a birth certificate that recorded their gender as non-binary succeeded because the government had failed to provide sufficient evidence for its claim that accommodating the non-binary person would cause practical difficulties.²⁶
- 16.34 Although courts generally require the government to prove its need to discriminate, if evidence is disputed, unsettled or emerging, they tend to allow some leeway to the agency that made the decision that is being challenged. For example, in *New Health v South Taranaki District Council*, Te Kōti Mana Nui | Supreme Court had complex and

²¹ *Brodeur v Ontario (Health and Long-Term Care)* 2013 HRT0 1229 at [23], [28]–[32], [35] and [37]–[38].

²² *R (on the application of AA (A Child)) v National Health Service Commissioning Board (NHS England)* [2023] EWHC 43 (Admin) at [140] and [145]–[148]. An indirect discrimination claim also failed because the policies and practices that were being challenged only applied to patients with gender dysphoria: at [151].

²³ *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin) at [68]–[70].

²⁴ *Hogan v Ontario (Minister of Health & Long-Term Care)* 2006 HRT0 32, [2006] OHRTD No 34 at [118], [120], [128], [130] and [139]–[140].

²⁵ For example, *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [45].

²⁶ *Re TA and Manitoba* Manitoba Human Rights Adjudication Panel, 4 November 2019 at [63].

disputed scientific evidence before it about the health effects of fluoridation. The Judges noted that the Court was “not in a position to unpick these disputes nor is it able to determine whether particular scientific reports are scientifically robust”.²⁷ For that reason, the Supreme Court Judges thought that the decision being appealed was “right not to attempt a definitive ruling on the scientific and political issues”.²⁸ The Supreme Court Judges ultimately contented themselves with making a broad assessment of whether the agency that had made the original decision (a local council) had sufficient evidence before it to provide a “proper basis” for its conclusion.²⁹

The court or tribunal will have to balance all relevant rights and interests

- 16.35 Even if a plaintiff successfully establishes discrimination, the court or tribunal will need to balance the right to be free from discrimination against other relevant rights and interests.
- 16.36 There are examples of cases overseas where competing rights and interests have justified discrimination based on gender identity. For example, in an unsuccessful United Kingdom case about how the Department of Work and Pensions retained information about transgender customers, the competing interests were retaining information for calculating benefit entitlements, identifying and detecting fraud and protecting privacy.³⁰ Similarly, in a case about whether a gender recognition certificate had to record a claimant’s gender was non-binary, the High Court in England said it needed to balance the claimant’s interests against the need for legislative and administrative coherence and the administrative costs of change.³¹
- 16.37 In a Canadian case, a decision to place a transgender woman (who had not undergone gender-affirming surgery) in a men’s prison was held to be justified discrimination because of the unique prison setting and the vulnerabilities of the female inmate population.³² However, a United States court found that a ban on hormone therapy for transgender prisoners was not justified because there was no rational tie to prison safety and security.³³

QUESTION

Q72

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?

²⁷ *New Health v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [121].

²⁸ At [122].

²⁹ At [122].

³⁰ *R (on the application of C) v Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] WLR 4127 at [32]–[34], [37]–[38] and [44].

³¹ *R (on the application of Castellucci) v Gender Recognition Panel* [2024] EWHC 54 (Admin), [2024] WLR(D) 20 at [130].

³² *Kavanagh v Canada (Attorney General)* [2001] 41 CHRR D/119 (Canada Human Rights Tribunal) at [155]–[160], confirmed in *Canada (Attorney General) v Canada (Human Rights Commission)* 2003 FCT 89, 228 FTR 231. The claimant also brought claims relating to access to gender-affirming care and treatment in prison, which were successful.

³³ *Fields v Smith* 712 F Supp 2d 830 (ED Wis 2010) at 868.

CHAPTER 17

Cross-cutting issues

INTRODUCTION

17.1 In this chapter, we discuss three cross-cutting issues that have implications for both Parts 1A and 2 of the Human Rights Act 1993. These are:

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

POTENTIAL FOR INTERFERENCE WITH TIKANGA

17.2 We need to consider and address the potential impacts of any reform we propose on the ability of Māori to live in accordance with tikanga. This issue arises because, in *Bullock v Department of Corrections*, Te Taraipiunara Mana Tangata | Human Rights Review Tribunal held that requiring a (Pākehā) employee to participate in a role that aligned with her sex in a poroporoaki (leaving ceremony) at which tikanga was being observed breached the Human Rights Act.¹ Specifically, the Tribunal found that the applicant had been subject to a “detriment” by reason of her sex in breach of the Act’s employment protections.²

17.3 If new grounds of discrimination were added to section 21 of the Human Rights Act along the lines we have been exploring in this Issues Paper, it is possible to imagine the logic of *Bullock* being applied to those grounds. For example, a transgender man might argue that asking him to sit with women at a pōwhiri (welcome ceremony) is discrimination based on his gender identity.

17.4 We want to understand whether there is a real prospect of a complaint of this kind succeeding. If so, we want to understand whether it would amount to a widening of the circumstances in which state law institutions can interfere with the ability of Māori to live in accordance with tikanga (and, if so, what should be done about it).

¹ *Bullock v Department of Corrections* [2008] NZHRRT 4. The poroporoaki was the graduation ceremony for a course for Māori offenders.

² Human Rights Act 1993, s 22(1)(c). For discussion of this provision, see Chapter 9.

Relevant reform considerations

- 17.5 As we explained in Chapter 4, analysis of the impact of policy proposals on tikanga is an established tenet of good law making in Aotearoa New Zealand. It is also required to discharge the Crown's obligations under te Tiriti o Waitangi | Treaty of Waitangi (the Treaty). Specifically, the Crown undertook in article 2 of the Treaty to protect the exercise by Māori of tino rangatiratanga over their lands, villages and all their treasures — “ko te Kuini o Ingarani ka wakarite ka wakaee ki nga Rangatira ki nga hapu — ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa”.³
- 17.6 Tino rangatiratanga has been explained as the unqualified exercise of the chieftainship or trusteeship of rangatira (chiefs) in accordance with their customs.⁴ However, rangatiratanga is not only about the authority and responsibilities of rangatira. It can also involve the authority and responsibilities of Māori collectives, including hapū, whānau and non-tribal/non-kin groups.⁵ According to Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, tino rangatiratanga requires the Crown “to allow Māori to manage their own affairs in a way that aligns with their customs and values”.⁶
- 17.7 In the context of this review, we think the primary relevance of article 2 is as a reminder that we should not propose amendments to the Human Rights Act that increase the potential for state law to interfere with tikanga.

Would amending section 21 increase the potential for state law to interfere with tikanga?

- 17.8 As we explained in Chapter 5, a range of approaches is emerging within te ao Māori (the Māori world) as to the roles that Māori who are transgender or non-binary or who have an innate variation of sex characteristics can fulfil in activities that are sex-differentiated according to the tikanga of a particular Māori group.⁷ The approach that is taken on any particular occasion can depend on factors such as the tikanga of the particular hapū or marae, the mana of the individual, the particular practice at issue and the reasons that underlie the tikanga.
- 17.9 For three reasons, we think amendments to section 21 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. We are interested to hear feedback on whether we have understood the situation correctly.

³ We rely on Sir Hugh Kawharu's English translation of the Treaty as set out in the Cabinet Manuel: Cabinet Office *Cabinet Manual 2023* at 158–159. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal has explained that taonga or treasures “encompasses all those things which Māori consider important to their way of life”: *Te Whanau o Waipareira Report* (Wai 414, 1998) at 26.

⁴ IH Kawharu “Translation of Maori text” in IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319 at 319.

⁵ See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 26.

⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 28.

⁷ We gave examples of some common sex-differentiated tikanga activities in Chapter 5. This section should be read alongside that chapter.

Many tikanga activities fall outside the scope of the Human Rights Act

- 17.10 First, it is important to stress that many tikanga activities occur in situations that are beyond the reach of the Human Rights Act. As we have explained elsewhere in this Issues Paper, the Human Rights Act only regulates government functions (Part 1A) and certain specified areas of life such as employment, education, provision of housing and access to goods, services and facilities (Part 2). Many sex-differentiated tikanga activities fall outside of those categories.
- 17.11 Based on our preliminary engagement, it also seems unlikely that Māori themselves would use the Human Rights Act to challenge tikanga activities. As we explained in Chapter 5, we held a wānanga to better understand Māori perspectives relevant to this review. At that wānanga, we were told that Māori who are transgender or non-binary or who have an innate variation of sex characteristics have no interest in state law institutions inserting themselves into the conversations that are occurring in te ao Māori about how to accommodate gender diversity or variations of sex characteristics within tikanga activities.
- 17.12 That said, we recognise this might not represent the views of all Māori individuals or community groups. Further, some sex-differentiated tikanga activities may occur in situations that are regulated by the Human Rights Act and that could involve Māori and non-Māori (such as in *Bullock*). This would include when Māori-led organisations or businesses engage in activities regulated by Part 2 (such as providing education or offering goods, services and facilities to the public). It would also include when organisations that are not kaupapa Māori organisations adopt or apply tikanga (such as the government department in *Bullock*).
- 17.13 It is even possible some activities that occur on a marae might fall within the jurisdiction of the Human Rights Act (at least on the face of it). Some marae-based activities might be categorised as public functions to which Part 1A applies. For example, marae are sometimes used as Rangatahi Courts or COVID-19 vaccination centres. Other activities might be captured by Part 2 such as where a marae is being hired out as a venue for a meeting, event or conference.

Complaints can already be taken on the prohibited ground of sex

- 17.14 In this review we cannot address the existing relationship between tikanga and the Human Rights Act. Our focus is on the impact of any reforms we propose. Our preliminary assessment is that this impact might be quite small. This is because, on the logic of *Bullock*, a person who is transgender could already challenge a sex-differentiated tikanga activity as discrimination on the existing ground of sex. Adding new grounds of discrimination would make little or no difference to the availability of such a challenge.
- 17.15 Take the example of a transgender man who argues that asking him to sit with women at a pōwhiri (welcome ceremony) is discriminatory. Amendments to the Human Rights Act along the lines we are considering in this review might clarify that (assuming *Bullock* is correct) the transgender man could take a discrimination claim based on his gender identity. However, the transgender man would already be able to argue (again, assuming *Bullock* is correct) that he had experienced discrimination based on his sex assigned at birth. Whereas a person assigned male at birth was permitted to sit in the front row, the transgender man (assigned female at birth) was not. That claim is available regardless of

whether the opinion from Te Tari Ture o te Karauna | Crown Law that we discussed in Chapter 6 (that sex includes gender identity) is correct.

- 17.16 If we have understood this correctly, as a matter of law, the amendments to section 21 that we are considering would not widen the circumstances in which state law can interfere with tikanga. To the extent that potential exists, it is there already.
- 17.17 As a practical matter, however, someone in the transgender man's position may be more inclined to complain of discrimination if they can rely on their gender identity. A claim based on sex would require them to rely on their sex assigned at birth (female) when they might regard their sex as male. So we accept that the addition of new grounds to section 21 might have the potential to encourage more claims. Whether they would succeed is another matter, as we discuss below.

Bullock may no longer reflect how cases would be decided

- 17.18 A third reason why the amendments we are considering may make little difference in practice to the ability of state law to interfere with tikanga is that it is by no means clear that a case like *Bullock* would be decided the same way if it came again before the Human Rights Review Tribunal. *Bullock* is a decision of a first-instance tribunal that has never been confirmed by a court. It is 16 years old. Since it was determined, Te Kōti Mana Nui | Supreme Court has affirmed on several occasions that tikanga values are part of the common law of Aotearoa New Zealand.⁸ In the light of that development, we think it is questionable whether it remains good law.
- 17.19 Specifically, we question whether the Human Rights Review Tribunal would still conclude that asking the complainant to participate in the poroporoaki in a role that accorded with the tikanga of the event constituted a “detriment” in breach of employment protections in the Human Rights Act.⁹ We appreciate this might depend on the facts and evidence. However, in applying an evaluative standard such as “detriment”, we think the Tribunal (or courts on appeal) would likely take into account the fact tikanga values are part of the common law and weigh the benefits of enabling people (such as the Māori offenders in *Bullock*) to participate in tikanga activities against the somewhat minor inconvenience to the complainant.
- 17.20 There is evaluative language elsewhere in the Human Rights Act that would similarly allow an assessment of this kind. For example, there are other Part 2 protections that use the language of “detriment” or (to similar effect) being treated “less favourably”.¹⁰ In some areas of life regulated by Part 2, the Tribunal can declare that something is not unlawful because there is “a genuine justification”.¹¹ Under Part 1A (regulating government functions), a difference in treatment will not constitute unlawful discrimination unless it results in “material disadvantage” when viewed in context and is not “demonstrably justified in a free and democratic society”.¹² A complaint that a sex-differentiated activity

⁸ For example, *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; and *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

⁹ We discuss the idea of “detriment” more fully later in the chapter.

¹⁰ Human Rights Act 1993, ss 57(1)(d) (relating to education) and 44(1)(b) (relating to provision of goods and services).

¹¹ Human Rights Act 1993, s 97(2)(b).

¹² We explored these tests in Chapter 16.

is unlawful under the Human Rights Act might well fail at one or more of these gateways if it is in accordance with applicable tikanga.

- 17.21 On a general review of the Human Rights Act, it may still be desirable to address more carefully the relationship between tikanga and anti-discrimination law. For example, a general review might address whether it is undesirable for a state law institution such as the Human Rights Review Tribunal to determine whether a tikanga activity is a “genuine justification” or is “demonstrably justified in a free and democratic society”.
- 17.22 For the purposes of our more limited review, the key point is that amending section 21 along the lines we are exploring may not make any appreciable difference to the ability of Māori to live in accordance with tikanga. We are interested to hear feedback on this.

Reform options

- 17.23 If we are wrong (that is, if there is a real prospect that clarifying the grounds of discrimination in section 21 of the Human Rights Act might widen the circumstances in which state law can interfere with tikanga), we may need to propose reforms to the Human Rights Act to address that possibility. We think we should only do so if there is a real risk that needs to be addressed. That is because including in the Act an exception for tikanga activities would bring its own risks. For example, an exception might suggest the underlying position is that the Human Rights Act *does* apply to tikanga activities and, in that way, unintentionally invite state law in.
- 17.24 Nevertheless, we set out four possible reform options below. We are interested to understand their implications.
- 17.25 The first three options involve creating an exception to limit the circumstances in which sex-differentiated tikanga activities could be found to breach the Human Rights Act. Each of these three exceptions could be drafted restrictively (so that it only applies in cases involving the new prohibited grounds being explored in this review) or more expansively (so that it also applies to the ground of sex, or even to all prohibited grounds in the Human Rights Act). We can see some problems with either approach.
- 17.26 An exception for tikanga activities that only applies to any new prohibited grounds we propose might be considered arbitrary. For example, it would preclude a transgender man from challenging a sex-differentiated practice based on his gender identity when exactly the same challenge would be available to a cisgender woman based on her sex. We also think it might be ineffective. As we explained above, the transgender man would still be able to bring a discrimination claim. He would just have to frame it as sex discrimination.
- 17.27 On the other hand, an exception that is broader (also applying to the ground of sex, or even to all prohibited grounds) might be difficult for us to recommend in this review. As we explained in Chapter 4, we need to be cautious about proposing broad-based reform of the Human Rights Act that has implications well beyond the scope of our review. Our limited terms of reference hinder our ability to consult effectively with all the groups that might be affected and to fully analyse potential implications.
- 17.28 We are interested to understand these issues better and to receive feedback on how tikanga can best be protected from state interference within the scope of this review.

Exclusion of application of Human Rights Act for activities on a marae

- 17.29 One possibility is an exclusion in the Human Rights Act for activities that take place on a marae. This could be broad (excluding all challenges under the Human Rights Act) or more focused (for example, applying to particular areas of life in Part 2).
- 17.30 An exclusion for marae-based activities would recognise that, for Māori, marae are sites of tino rangatiratanga on which activities should be regulated by the relevant tikanga and kawa.¹³ It would also provide a bright line that state law institutions (such as tribunals and courts) could enforce. Deciding whether an activity has taken place on a marae would not require the court or tribunal to have any expertise on tikanga.
- 17.31 On the other hand, a marae-based exclusion might be both underinclusive and overinclusive. It would be underinclusive because not all sex-differentiated tikanga practices happen on marae. It would be overinclusive because it would exempt activities that are not required by the tikanga of the particular marae to be sex-differentiated (for example, when a marae is providing COVID-19 vaccinations).

An exception that lists specific activities

- 17.32 Alternatively, an exception could exempt specific activities from Human Rights Act scrutiny. For example, the exception might list pōwhiri (welcoming ceremony), poroporoaki, kawanga whare (ceremony to open a new building), kapa haka and poi (forms of Māori performance arts) and tā moko (traditional Māori tattooing). Such an exception might apply only on marae or also in community settings.
- 17.33 This approach would not have the problems of overinclusion and under inclusion that we identified with respect to a marae-based exclusion. On the other hand, there would be some significant definitional challenges outlining which activities should be exempted (especially given practices vary between Māori groups). This approach may also be inconsistent with the nature of tikanga as a coherent integrated system of norms rather than a “grab bag” of discrete customary practices.¹⁴

An exception for all sex-differentiated tikanga activities

- 17.34 An exception could be framed more broadly to exempt differences in treatment that are required by tikanga. Again, this could apply to all challenges available under the Human Rights Act or only in particular areas of life.
- 17.35 This option would avoid the definitional issues associated with the previous option but would potentially enmesh the Human Rights Review Tribunal in arguments about whether a particular difference in treatment was required by tikanga. It would call into question the expertise and authority of the Tribunal to be adjudicating on such issues.

Amendments to ensure the Human Rights Review Tribunal has appropriate expertise

- 17.36 As we explained above, there are already several provisions in the Human Rights Act that can potentially be interpreted to ensure the Act does not restrict sex-differentiated

¹³ Kawa refers to the application of tikanga on marae. It has been defined as “practice wrapped up in tapu”: Wiremu Doherty, Hirini Moko Mead and Pou Temara “Appendix 1: Tikanga” in *Te Aka Matua o te Ture | Law Commission He Poutama* (NZLC SP24, 2023) at [2.34].

¹⁴ See *Te Aka Matua o te Ture | Law Commission He Poutama* (NZLC SP24, 2023) at [3.1].

tikanga activities. These include Part 2 protections that are framed in evaluative terms (such as detriment), the Tribunal's power under section 97 to declare something a genuine justification and the Part 1A tests of material disadvantage and demonstrable justification.

- 17.37 One option might be to make amendments to the composition and process of the Human Rights Review Tribunal to ensure that, if a matter involving tikanga comes before it, it has appropriate expertise. For example, the provisions that determine the membership of the Tribunal could be amended to ensure that, when it is considering a matter involving tikanga, at least one member has expertise on tikanga.¹⁵
- 17.38 This option would not address the undesirability of state law institutions such as the Human Rights Review Tribunal becoming enmeshed in assessments of whether a tikanga activity is, in the circumstances, a genuine justification or demonstrably justified.
- 17.39 On the other hand, having one or more members with tikanga expertise would at least assist the Human Rights Review Tribunal to engage with tikanga in an appropriate manner. A Tribunal member with tikanga expertise might be more readily able to recognise when evidence is required from a pūkenga (expert) about the tikanga of a particular hapū or iwi. They might also be able to advise other Tribunal members on an appropriate process to follow in determining the complaint.¹⁶

QUESTIONS

Q73

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?

Q74

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?

MISGENDERING AND DEADNAMING

- 17.40 We are interested to understand the extent to which the Human Rights Act regulates or ought to regulate misgendering and deadnaming. Misgendering involves referring to a person who is transgender or non-binary by the wrong gender (for example, using pronouns for them that correspond with their sex assigned at birth). Deadnaming is

¹⁵ Human Rights Act 1993, ss 98 (specifying the membership of the Tribunal when hearing particular complaints) and 101(2) (specifying the qualities to which the Minister must have regard when appointing a panel from which membership of the Tribunal is to be drawn).

¹⁶ See Human Rights Act 1993, s 104(5) (specifying that a Tribunal may regulate its procedure as it sees fit, subject to the Act, any regulations made under the Act and any practice notes issued by the Tribunal Chairperson).

referring to a person who is transgender or non-binary by a name they no longer use and that draws attention to their sex assigned at birth.

- 17.41 We understand from our preliminary research and engagement that misgendering and deadnaming are issues of concern to many people who are transgender or non-binary and that they occur in several areas of life regulated by Part 2 of the Human Rights Act. They also occur in contexts regulated by Part 1A such as at public schools, prisons and police stations.¹⁷
- 17.42 The regulation of misgendering and deadnaming requires care because it engages the right to freedom of expression in the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). The right to freedom of expression has been said to be “as wide as human thought and imagination”.¹⁸ It is engaged by anything one person says to another.
- 17.43 It is possible that, in certain circumstances, the regulation of deadnaming or misgendering may also engage other rights, including the right to manifest one’s religion and the right to be free from discrimination based on one’s political opinion.¹⁹ However, the scope of these rights (as it relates to misgendering and deadnaming) is less clear.
- 17.44 The rights in the NZ Bill of Rights are not absolute. As we explained in Chapter 16, there can be limits so long as they are authorised by law and “demonstrably justified in a free and democratic society”.²⁰ For example, there are many laws in Aotearoa New Zealand that limit speech. These include laws about defamation, privacy, censorship of objectionable publications and incitement to commit an offence. We need to ensure that any reforms we propose do not place an unjustified limit on the right to freedom of expression (or on any other rights).

How would misgendering or deadnaming be regulated under Part 1A?

- 17.45 We are not aware of any cases from New Zealand courts or tribunals that have considered whether misgendering or deadnaming is in breach of Part 1A of the Human Rights Act. However, we are aware of successful overseas cases involving misgendering or deadnaming of prisoners or a person in police custody.²¹
- 17.46 As we explained in Chapter 16, the test in Part 1A for establishing unjustified discrimination involves several steps. People complaining of discrimination must prove they were treated differently from others, that the treatment was based on a prohibited ground and that the treatment resulted in a material disadvantage to them. If those tests are met, discrimination has occurred. However, the court or tribunal still needs to determine whether the discrimination was demonstrably justified. It will consider this in context, based on evidence and its assessment of competing rights and interests.

¹⁷ See, for example, *Complaints Assessment Committee v Respondent* [2023] NZTDT 24; Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 79; and Tari o te Kaitiaki Mana Tangata | Office of the Ombudsman *OPCAT Report: Report on an announced follow up inspection of Whanganui Prison under the Crimes of Torture Act 1989* (June 2021) at 16.

¹⁸ *Mooney v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].

¹⁹ New Zealand Bill of Rights Act 1990, ss 15 and 19; and Human Rights Act 1993, s 21(1)(j).

²⁰ New Zealand Bill of Rights Act 1990, s 5.

²¹ *September v Subramoney* Equality Court of South Africa EC10/2016, 23 September 2019; *Tay v Dennison* 457 F Supp 3d 657 (SD Ill 2020); and *Dawson v Vancouver Police Board* 2015 BCHRT 54.

- 17.47 We think a New Zealand court or tribunal could hold that persistent misgendering and deadnaming was in breach of Part 1A. However, a court or tribunal could only reach this conclusion if penalising the behaviour was, in all the circumstances, a reasonably justified limit on freedom of expression (or on any other rights the court considered relevant).
- 17.48 Te Mana Whanonga Kaipāho | Broadcasting Standards Authority engaged in a balancing exercise of this kind in *Bell and Radio New Zealand* (albeit, not directly under the Human Rights Act). The Authority dismissed a complaint that the deadnaming and misgendering of an interviewee by a Radio New Zealand host breached the fairness standard in the Code of Broadcasting Standards. The Authority thought the misgendering was largely unintentional and the interview “did not come across as malicious or nasty”.²² It held that, while some listeners may have found the comments offensive and the interviewee may have felt uncomfortable, the harm was not “at a level meriting restriction to the right to freedom of expression”.²³

How would misgendering or deadnaming be regulated under Part 2?

- 17.49 As we explained in Chapter 8, Part 2 of the Human Rights Act does not expressly prohibit “discrimination”. Instead, it describes specific actions or outcomes that are unlawful within each of the areas of life regulated by Part 2 if they are done “by reason of” a prohibited ground of discrimination.
- 17.50 We would like to understand better whether any of the Part 2 protections could be violated by misgendering or deadnaming and, if so, in what circumstances. We think some Part 2 protections are likely broad enough to encompass abusive or belittling speech in an appropriate case. For example, in three areas of life regulated by Part 2 (employment, partnerships and education), it is unlawful to subject someone to a “detriment” by reason of a prohibited ground.²⁴ Detriment is not defined in the Human Rights Act but is defined in the equivalent provision in the Employment Relations Act 2000 as “anything that has a detrimental effect on the employee’s employment, job performance, or job satisfaction”.²⁵ As well, when supplying goods, services and facilities to the public, it is unlawful to treat someone “less favourably” in connection with the provision of those goods, service and facilities by reason of a prohibited ground.²⁶
- 17.51 We are not aware of any cases from New Zealand courts or tribunals that have decided whether misgendering or deadnaming amounts to a detriment or to less favourable treatment.²⁷ We are, however, aware of handful of tribunal-level decisions from Canada

²² *Bell and Radio New Zealand Ltd* BSA 2023-016, 30 May 2023 at [18].

²³ At [18]. Examples of laws, policies and practices to protect against deadnaming and misgendering being held incompatible with free speech in the United States include *Meriweather v Hartop* 992 F 3d 492 (6th Cir 2021); and *Taking Offense v State of California* 498 P 3d 90 (Cal 2021). We acknowledge United States courts take a more absolutist approach to free speech than is usual in Aotearoa New Zealand.

²⁴ Human Rights Act 1993, ss 22(1)(c), 36(2)(b) and 57(1)(d).

²⁵ Employment Relations Act 2000, s 104(2).

²⁶ Human Rights Act 1993, s 44(1)(b). There are other provisions in the Act about “less favourable” terms or conditions that we think are less relevant.

²⁷ We are aware of one decision from Te Ratonga Ahumana Taimahi | Employment Relations Authority that held that disparaging speech relating to sexual orientation amounted to a detriment: *Matthews v Newberrys Funeral Home Ltd* [2022] NZERA 345 at [77]. There are also Human Rights Review Tribunal decisions about racial harassment that find that racist slurs have had a “detrimental effect” on the respective complainants. We do not discuss these because racial harassment is a somewhat different legal concept.

and the United Kingdom holding that misgendering or deadnaming is discrimination or harassment in employment.²⁸ Similarly, in the United States, courts have said that persistent and intentional misgendering can support a claim of “hostile work environment” — a cause of action that we understand is a mix of discrimination and employment law.²⁹

- 17.52 If these precedents are followed in Aotearoa New Zealand, a court or tribunal might find (on suitable facts) that persistent and intentional misgendering and deadnaming is unlawful under Part 2 of the Human Rights Act. A New Zealand court or tribunal would only be entitled to reach that conclusion, however, if that outcome was a justified intrusion on freedom of expression.³⁰ As we explained earlier in this chapter when discussing tikanga, evaluative standards like ‘detriment’ are sufficiently malleable to enable courts and tribunals to take into account fundamental norms and values that underlie the legal system when applying them. More specifically, section 6 of the NZ Bill of Rights requires that, wherever possible, terms in legislation must be interpreted and applied in a manner that does not result in an unjustified limit on rights.

What factors have characterised successful cases?

- 17.53 In sum, we think that — whether under Part 1A or Part 2 — a New Zealand court or tribunal could hold that misgendering or deadnaming was in breach of the Human Rights Act but only if the behaviour and its consequences were sufficiently serious that penalising the behaviour was a justified limit on freedom of expression.
- 17.54 We are interested to understand better what factors might determine whether a misgendering or deadnaming case was successful. For reasons explained in Chapter 16, we doubt it is possible to answer that question definitively. Judicial assessments of what amounts to a reasonable limit on rights are based on evidence and are highly fact and context dependent. However, we think there are some helpful indications in the overseas cases of which kinds of claims are most likely to succeed.
- 17.55 First, the successful cases of which we are aware have involved persistent and intentional misgendering or deadnaming — often alongside other hostile or discriminatory treatment. None have involved one-off incidents, and none have involved conduct that was careless rather than intended to make a point. We are aware of cases that have been taken about one-off or unintentional misgendering or deadnaming but none that have succeeded.
- 17.56 For example, in one Irish case, a transgender woman said a doctor had deadnamed her and made disparaging comments about her such as referring to her genitals as “a bit vague”. This was a one-off incident for which the doctor apologised. Ireland’s Equality Tribunal held it did not amount to discrimination or harassment.³¹ In an Australian case, a

²⁸ *Nelson v Goodberry Restaurant Group Ltd* 2021 BCHRT 137; *EN v Gallagher’s Bar and Lounge* 2021 HRT0 240; *Bilac v Abbey* 2023 CHRT 43; *Miss AB v Royal Borough of Kingston upon Thames* UK Employment Tribunal 2303616/2021, 11 September 2023; and *Miss A de Souza E Souza v Primark Stores Ltd* UK Employment Tribunal 206063/2017, 22 December 2017.

²⁹ For example, *Doe v Triangle Doughnuts LLC* 472 F Supp 3d 115 (ED Pa 2020); *Eller v Prince George’s County Public Schools* 580 F Supp 3d 154 (D Md 2022); and *Doe v Progressive Casualty Insurance Company* United States District Court, ND Cal No 21-CV-02602-BLF, 18 September 2023 at 5.

³⁰ See *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471 in which Te Kōti Matua | High Court reached a similar conclusion about malleable language in section 61 of the Human Rights Act 1993, regulating incitement of racial disharmony.

³¹ *A Patient v A Hospital* Equality Tribunal (Ireland) DEC-S2014-020, 24 November 2014.

transgender woman was persistently deadnamed in automatic emails from her property manager despite having requested the manager use her current name. The claim failed because the Victorian Civil and Administrative Tribunal accepted the property manager's explanation that the automated email system was picking up on the name in the lease agreement.³²

- 17.57 Second, all the successful cases of which we are aware have arisen in institutional settings that involve a power imbalance and in which there are professional obligations to moderate one's conduct and language towards others. We doubt in these kinds of situations that anti-discrimination law would be the only avenue available to complain about persistent and intentional misgendering and deadnaming. For example, in an employment setting, a person might be able to take a personal grievance based on workplace bullying.
- 17.58 Although we are not aware of successful discrimination complaints having yet been taken about misgendering or deadnaming in schools, these issues have been pursued in Aotearoa New Zealand and overseas as complaints about professional misconduct. In 2023, the New Zealand Teachers Disciplinary Tribunal found a teacher who persistently misgendered and deadnamed a student (as well as advising them their transition was wrong) had committed serious misconduct.³³ There are similar cases in Canada and the United Kingdom.³⁴ We are also aware of a United Kingdom decision from the Employment Tribunal upholding the dismissal of a teacher for misconduct that included misgendering and deadnaming over a substantial period.³⁵
- 17.59 We therefore wonder if the potential for regulation of misgendering and deadnaming under the Human Rights Act does not add greatly to other applicable regulatory and ethical frameworks. However, we welcome feedback on this issue.

Reform options

- 17.60 We want to understand whether the Human Rights Act should respond expressly to the issue of misgendering and deadnaming and, if so, how. It would not be appropriate to specify how misgendering and deadnaming should be dealt with under Part 1A as it replicates protections from discrimination in the NZ Bill of Rights and reflects a policy decision that the anti-discrimination obligations that apply to government should be identical under both regimes.
- 17.61 Therefore, if the Human Rights Act were to have a specific provision about misgendering and deadnaming, it would most likely be in Part 2. As with other possible reforms to Part 2, we set out a broad spectrum of options here to elicit feedback.
- 17.62 First, the Act could stipulate that misgendering and deadnaming are forms of discrimination that are unlawful. A provision of this kind could either be specific to a

³² *VVR v Trustee for Ironfish Property Management Melbourne Unit Trust* 73299113275 [2024] VCAT 222.

³³ *Complaints Assessment Committee v Respondent* [2023] NZTDT 24.

³⁴ For example, *Ontario College of Teachers v Teal* 2022 ONOCT 33; and Teaching Regulation Agency *Mr Joshua Sutcliffe: Professional conduct panel outcome: Panel decision and reasons on behalf of the Secretary of State for Education* (0017091, 5 May 2023).

³⁵ *Lister v New College Swindon* UK Employment Tribunal 1404223/2022, 27 March 2024. See also *Mackereth v Department for Work and Pensions* [2022] EAT 99.

particular area of life regulated by Part 2 or could sit in the subpart on “Other forms of discrimination” and apply across all areas of life regulated by Part 2.

- 17.63 This approach would secure maximum protection from harmful speech for people who are transgender or non-binary. However, a blanket rule of this kind might well result in limits on the right to freedom of expression that could not be justified.
- 17.64 Second, the Act could provide that misgendering and deadnaming are never unlawful under Part 2. Again, a provision of this kind could either be specific to a particular area of life regulated by Part 2 or could apply across all areas of life regulated by Part 2.
- 17.65 This approach would secure maximum protection for freedom of expression. However, a blanket rule of this kind would be inconsistent with the way other speech issues are regulated by Part 2. We think belittling and abusive speech would quite often be part of a course of conduct giving rise to a complaint of discrimination as well as to other kinds of complaints such as a personal grievance on the basis of workplace bullying.³⁶
- 17.66 Third, the Act could try to specify the particular situations in which misgendering and deadnaming rise to the level of harm that would justify an intrusion on freedom of expression. We think it may be difficult to specify this in legislation given that the facts and context of a particular situation are often relevant to determining whether a limit on speech is justified.³⁷
- 17.67 Given the difficulties with each of these options, we think it may well be preferable to leave misgendering and deadnaming to be regulated under the existing provisions in Part 2 (such as provisions relating to detriment). That would mean that whether misgendering or deadnaming were in breach of the Act would have to be assessed in context based on all the relevant facts and in the light of other relevant rights and interests. We are interested in feedback on whether this is the best approach.

QUESTION

Q75

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?

BINARY LANGUAGE IN THE HUMAN RIGHTS ACT

- 17.68 In this section, we seek feedback on instances throughout the Act of the binary expressions “him or her”, “his or her” and “he or she”. This issue arises because some people prefer to use the pronouns ‘they or them’, including some people who have a non-binary gender identity.

³⁶ See, for example, *Goel v Barron* [2022] NZHRRT 28, in which belittling speech was relevant to establishing that the person had been refused employment based on discrimination.

³⁷ See *Mackereth v Department for Work and Pensions* [2022] EAT 99 at [116].

- 17.69 Twelve provisions in the Act refer to “him or her”,³⁸ 43 to “his or her”³⁹ and 30 to “he or she”.⁴⁰ Several are in sections about Part 2 discrimination or exceptions to Part 2 discrimination.⁴¹ Others refer to the complainant, respondent or other participant in a complaint to Te Kāhui Tika Tangata | Human Rights Commission or the Human Rights Review Tribunal.⁴² All the rest are references to the membership of the Human Rights Commission, the Human Rights Review Tribunal and other related agencies.
- 17.70 We want to understand if these instances of gendered language should be replaced. An example is section 37(1)(c) of the Human Rights Act, which states that it is unlawful for an industrial or professional organisation to “deprive a person of membership, or suspend *him or her*” in certain circumstances.⁴³ To render this gender-neutral, the italicised words could simply be replaced with “*them*”.
- 17.71 The Legislation Act 2019 (which provides principles and rules about interpreting legislation) confirms that “words denoting a gender include every other gender”.⁴⁴ This means that, as a matter of law, there is no need to replace these references with gender-neutral language.
- 17.72 The argument for making such a change would therefore be symbolic — to send a clear signal that the Human Rights Act applies to people of any gender and that membership of its enforcement bodies is open to people of all genders.
- 17.73 Using gender-neutral language is consistent with guidance published by Te Tari Tohutohu Pāremata | Parliamentary Counsel Office (albeit in the context of drafting secondary legislation).⁴⁵ We do not think it would cause ambiguity.

QUESTION

Q76

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?

³⁸ Human Rights Act 1993, ss 15(g), 16(1)(d), 18(2)(a), 18(3), 20(2), 37(1)(c), 57(1)(d), 91(1), 91(2)(b), 91(3), 100(3) and 140(1).

³⁹ Human Rights Act 1993, ss 4(4)(b), 9(2)(b)(i), 9(3)(b), 16(2), 20(1), (2), (3) and (4), 20A(3)(a) and (b), 20B(1) and (2), 20C(1) and (2), 20F(c), 25(1)(a), 29(3)(a), 53(1) and (2), 77(2)(c)(i), 80(4)(c), 86(1)(b), 92N(2), 101(3)(d), 103(1) and (2), 108(3), 110(1)(a) and (b), 119(1)(b), 124(2), 126(6)(b), 130(2) and (2B), 140(4), 143(a) and (c), sch 1AA cls 1(3) and 1(4)(b), cl 2(1) and sch 1 cls 1(1)(a), (b) and (d).

⁴⁰ Human Rights Act 1993, ss 8(3), 9(2)(b)(ii), 9(3)(d), 20F(c), 20G(b) and (c), 36(3)(b), 39(2A)(a), 68(3), 80(1), 84(1), 92G(3), 92I(5), 95(1), 100(6), 102(1) and (2), 103(2), 103B(2), 108(1), 110(1)(a), 121A(1), 130(2), 148D, 148G(2), 148I(1), sch 1AA cl 1(3), sch 1 cl 1(1)(d) and sch 2 cls 2(1) and 5.

⁴¹ Human Rights Act 1993, ss 25(1)(a), 29(3)(a), 36(3)(b), 37(1)(c), 39(2A)(a), 53(1) and (2), 57(1)(d) and 68(3).

⁴² Human Rights Act 1993, ss 77(2)(c)(i), 80(1), 80(4)(c), 86(1)(b), 92I(5), 92N(2), 108(1) and (3), 110(1)(a) and (b) and 124(2).

⁴³ Emphasis added.

⁴⁴ Legislation Act 2019, s 16(1).

⁴⁵ Te Tari Tohutohu Pāremata | Parliamentary Counsel Office “Plain Language Standard: 8.2 Gender-neutral language” <www.pco.govt.nz>.

CHAPTER 18

Other matters

INTRODUCTION

- 18.1 In this chapter, we discuss parts of the Human Rights Act 1993 that we have not considered in earlier chapters. These are Part 1 (which states the membership, powers and functions of Te Kāhui Tika Tangata | Human Rights Commission) and Parts 3 and 4 (which deal with the resolution of disputes).
- 18.2 We also consider the consequential implications of this review for other laws (especially, laws that refer directly to the Human Rights Act).

PART 1 OF THE HUMAN RIGHTS ACT

- 18.3 Part 1 of the Human Rights Act states the membership, powers and functions of the Human Rights Commission (and of some associated officers).
- 18.4 As well as a disputes resolution function (discussed further below), the Human Rights Commission has broad powers to advocate for and promote human rights in Aotearoa New Zealand.¹ This includes things such as publishing guidelines and educational material, and instigating its own inquiries (which it did in 2006 when it commenced an inquiry into discrimination experienced by transgender people).² The Human Rights Commission has dedicated commissioners in some priority areas.³
- 18.5 In preliminary research and engagement, we have not heard of any specific issues raised by these provisions that warrant consideration in this review. However, we are interested to hear from submitters whether they have any concerns (and, specifically, whether the membership, powers and functions of the Human Rights Commission are sufficient to protect the rights of people who are transgender or non-binary or who have an innate variation of sex characteristics).

¹ Human Rights Act 1993, s 5.

² Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuitanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008).

³ Disability, equal employment opportunities and race relations: Human Rights Act 1993, s 8(1A).

QUESTION

Q77

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?

PARTS 3 AND 4: ACCESS TO JUSTICE AND DISPUTE RESOLUTION

- 18.6 Parts 3 and 4 of the Human Rights Act deal with the resolution of disputes. In broad terms, a person who believes their rights under Part 1A or Part 2 have been violated can complain to the Human Rights Commission, which is meant to facilitate the resolution of the dispute in “the most efficient, informal, and cost-effective manner possible”.⁴ It can offer a range of services to help resolve the dispute such as providing information, expert problem-solving support and mediation.⁵
- 18.7 If the parties are unable to resolve the dispute with the help of the Human Rights Commission, the complainant can lodge a claim with Te Taraipūnara Mana Tangata | Human Rights Review Tribunal.⁶ The Tribunal will adjudicate the dispute and, if the complainant is successful, grant a remedy. Decisions of the Human Rights Review Tribunal can be appealed to Te Kōti Matua | High Court.
- 18.8 In Chapter 17, we raised some issues concerning the membership and processes of the Human Rights Review Tribunal in cases involving tikanga. Other than that, we have not identified issues in Part 3 that obviously warrant consideration in this review. However, we are interested to hear from submitters whether they have any concerns.
- 18.9 As we mentioned in Chapter 6, we are struck by how few complaints are made to the Human Rights Commission by people who are transgender or non-binary or who have an innate variation of sex characteristics. The Commission typically receives around 1,000 complaints of unlawful discrimination each year.⁷ But, in the 16 years from 1 January 2008 to 31 December 2023, the Commission received just 192 complaints about discrimination from people who identified as transgender, gender diverse or intersex.⁸ As we explained in Chapter 6, this may be because of the absence of any express grounds of protection in section 21 of the Human Rights Act. However, we are interested to understand whether there are other barriers to access to justice experienced by these groups that we should address in this review.

⁴ Human Rights Act 1993, s 76(1)(b).

⁵ Human Rights Act 1993, ss 76(2)(c) and 77.

⁶ Assistance is sometimes available from the Director of Human Rights Proceedings.

⁷ See, for example, Te Kāhui Tika Tangata | Human Rights Commission *Pūrongo ā-tau | Annual Report: For the year ended 30 June 2023* (2023) at 29; and Te Kāhui Tika Tangata | Human Rights Commission *Pūrongo ā-tau | Annual Report: For the year ended 30 June 2021* (2021) at 19.

⁸ Letter from Te Kāhui Tika Tangata | Human Rights Commission to Te Aka Matua o te Ture | Law Commission (1 March 2024).

QUESTION**Q78**

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?

IMPLICATIONS OF THIS REVIEW FOR OTHER LAWS

- 18.10 There are references to the Human Rights Act in several other New Zealand statutes as well as in some secondary legislation. We want to understand the implications of this review for those other laws.
- 18.11 In earlier chapters we sought feedback on the implications of this review for four laws. We asked about the Employment Relations Act 2000 in Chapter 9, the Residential Tenancies Act 1986 in Chapter 11, the Education and Training Act 2020 in Chapter 12 and the New Zealand Bill of Rights Act 1990 in Chapter 16.
- 18.12 In this section, we seek feedback on the implications of this review for other laws that refer to the Human Rights Act.

Statutes that use the section 21 grounds in a legal test

- 18.13 If we amend the section 21 grounds of discrimination, that will have implications for other statutes that attach legal consequences to the Human Rights Act's prohibited grounds of discrimination. In addition to the statutes discussed in earlier chapters, we have identified three statutes that fall into this category (as well as one associated regulation).
- 18.14 First, the Films, Videos, and Publications Classification Act 1993 establishes a system for classifying publications as objectionable (in which case they are illegal), restricted or unrestricted. One matter to which particular weight must be given when making that decision is the extent and degree to which, and manner in which, the publication represents certain groups as inherently inferior by reason of "a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993".⁹ This consideration must also be taken into account in certain decisions about the labelling of films and commercial video on-demand content under the Act and corresponding regulations.¹⁰
- 18.15 Second, the Terrorism Suppression (Control Orders) Act 2019 requires a judge, when deciding whether to permit publication of the name of someone who is subject to a control order or an application for a control order, to consider whether an order permitting publication may lead to the publicising of views that would promote or encourage hostility towards a group on one or some of "the grounds specified in section 21 of the Human Rights Act".¹¹

⁹ Films, Videos, and Publications Classification Act 1993, s 3(3)(e).

¹⁰ Films, Videos, and Publications Classification Act 1993, s 46F(1)(d)(ii); Films, Videos, and Publications Classification Regulations 1994, reg 10(2)(d)(ii).

¹¹ Terrorism Suppression (Control Orders) Act 2019, s 33(5)(a).

- 18.16 Third, the Corrections Act 2004 permits a prison manager to withhold a prisoner’s mail if the manager believes on reasonable grounds that the mail may promote or encourage hostility to a group on one or some of “the grounds specified in section 21 of the Human Rights Act 1993”.¹²
- 18.17 Amending the section 21 grounds would clarify that discrimination against people who are transgender or non-binary or who have an innate variation of sex characteristics is relevant under these provisions. We are not aware of any particular implications that arise from this but are interested to hear feedback from submitters.

Codes and rules that prohibit unlawful discrimination

- 18.18 We are also aware of two pieces of secondary legislation that apply the obligation not to discriminate in certain professional contexts.
- 18.19 First, the Code of Health and Disability Services Consumers’ Rights states the right of health and disability consumers to be free from discrimination that is unlawful under Part 2 of the Human Rights Act.¹³ Amending the section 21 grounds would clarify that consumers have a right under the Code not to be discriminated against because they are transgender or non-binary or they have an innate variation of sex characteristics. They would have this right under Part 2 of the Human Rights Act in any event but the Code would open up different complaint mechanisms. In practice, we doubt this will make much difference as the Code already contains many other rights that require consumers to be treated with dignity and respect and in an ethical and professional manner.¹⁴
- 18.20 Second, the Lawyers’ Conduct and Client Care Rules specify that lawyers must not engage in discrimination that is unlawful under the Human Rights Act or any other enactment.¹⁵ Again, this simply restates obligations lawyers have under Part 2 of the Human Rights Act but makes it clear these obligations are part of the expectations of professional conduct for lawyers (therefore potentially opening up different complaint mechanisms). The Rules also create some related procedural obligations.¹⁶
- 18.21 Again, we doubt adding new grounds to section 21 will make much difference to lawyers’ obligations under the Rules. Lawyers are already prohibited from refusing instructions from someone based on their personal attributes, required to treat people with respect and courtesy and required to exercise their professional judgement solely for the benefit of their clients.¹⁷

¹² Corrections Act 2004, s 108(1)(d)(viii).

¹³ Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, sch 1 cls 2 (right 2) and 4 (definition of discrimination).

¹⁴ For example, Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, sch 1 cls 2 (rights 1, 2, 3 and 4(2)).

¹⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 1.2 (definition of discrimination), 3.1, 4.1.1 and 10.3. The Rules also convey an entitlement: to refuse to complete legal services for which a lawyer has been retained if they face discrimination from the client: r 4.2.1.

¹⁶ Lawyers who practise on their own account must have effective policies and practices to protect people in their workplaces from discrimination: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 11.2. The practice must notify the Law Society if disciplinary action is taken against an employee on grounds of discrimination: r 11.4.

¹⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 3.1, 4.1(a), 4.1.1(b), 5.2 and 10.3.

- 18.22 We are interested to hear feedback from submitters on whether we have understood correctly the implications of this review for these pieces of secondary legislation and whether there are other implications we need to understand.

Other statutes that refer to the Human Rights Act

- 18.23 There are other statutes that refer to the Human Rights Act in ways that we do not think will be affected by this review. For example, they require consultation with the Human Rights Commission, allow for complaints to the Human Rights Commission in respect of something other than discrimination or have specific exclusions that mean the Human Rights Act protections do not apply in specific statutory contexts.¹⁸ We are interested to hear feedback from submitters on any implications of the review for these statutes that we need to consider.

Statutes that protect people based on a list of group characteristics

- 18.24 Finally, there are several statutes that contain their own lists of group characteristics (similar to the one in section 21 of the Human Rights Act) without referring to the Human Rights Act.¹⁹ For example, one of the statutory functions of Te Mana Whanonga Kaipāho | Broadcasting Standards Authority is to encourage the development and observance of codes of broadcasting practice in relation to various matters, including “safeguards against the portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age, disability, or occupational status or as a consequence of legitimate expression of religious, cultural, or political beliefs”.²⁰
- 18.25 If new grounds are added to section 21 of the Human Rights Act, the agencies responsible for administering these statutes may wish to review them for consistency and currency.

QUESTIONS

Q79 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?

Q80 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?

¹⁸ Children’s Commissioner Act 2003, ss 19 and 23; Contraception, Sterilisation, and Abortion Act 1977, s 15; Defence Act 1990, s 33A; Financial Markets Conduct Act 2013, s 183; and Public and Community Housing Management Act 1992, ss 81, 95 and 129.

¹⁹ Those of which we are aware are Broadcasting Act 1989, s 21(e)(iv); Extradition Act 1999, s 7(c); Harmful Digital Communications Act 2015, s 6(1); Sentencing Act 2002, s 9(1)(h); Misuse of Drugs Act 1975, s 35DDE(2)(a); and Mutual Assistance in Criminal Matters Act 1992, s 27. We have not listed statutes that directly implement an international treaty and incorporate a list of grounds directly from that treaty.

²⁰ Broadcasting Act 1989, s 21(e)(iv).



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