

Pūrongo | Report 150

Ia Tangata

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

Executive summary



Executive summary

1. Te Aka Matua o te Ture | Law Commission has reviewed the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people who have innate variations of sex characteristics.¹ This is our final report. It contains 27 recommendations to the Government on how the Human Rights Act should be reformed.
2. The Human Rights Act is an anti-discrimination law. It explains the circumstances in which it is unlawful in Aotearoa New Zealand to treat a person differently and worse than others based on a ‘prohibited ground of discrimination’.
3. The central recommendation we make in this review is that section 21 of the Human Rights Act should be

¹ Briefly:

- A person who is transgender is someone whose gender identity is different to the sex they were assigned at birth.
- A person who is non-binary is someone whose gender identity does not fit exclusively into the binary of male or female.
- A person with an innate variation of sex characteristics is someone who was born with 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). Some people with an innate variation of sex characteristics refer to themselves as intersex.

amended to clarify that the Act covers discrimination that is due to a person being transgender or non-binary or having an innate variation of sex characteristics. We recommend there should be two new prohibited grounds of discrimination:

- (a) ‘gender identity or its equivalents in the cultures of the person’;² and
 - (b) ‘having an innate variation of sex characteristics’.
4. We consider adding these new grounds to section 21 will provide comprehensive protection from discrimination to people who are transgender or non-binary or who have an innate variation of sex characteristics.
 5. Adding these two grounds to section 21 will have implications for other provisions in the Human Rights Act that set out the circumstances in which differences in treatment based on a prohibited ground of discrimination are unlawful. We assess those implications throughout the report. They include implications for the public sector (which is governed by Part 1A of the Human Rights Act) and implications for the private sector (which is governed by Part 2 of the Act).
 6. We conclude that amendments to section 21 need to be accompanied by reforms to other provisions in the Human Rights Act to clarify the implications of reform

² We recommend the Human Rights Act should define gender identity to include both a person’s gender expression and the relationship between their gender identity and their sex assigned at birth.

and ensure that rights and interests are fairly balanced. Our recommendations are intended to operate together as a coherent package of reform so that the costs of legislating do not outweigh the benefits.

7. A particular focus of this report is 19 exceptions in Part 2 of the Human Rights Act that outline circumstances in which it is lawful to treat a person differently based on the prohibited ground of 'sex'. How the sex exceptions should apply to people who are transgender or non-binary or who have an innate variation of sex characteristics needs to be addressed on a case-by-case basis, taking into account the rationales that underlie each of these exceptions as well as other key reform considerations. We make recommendations for reform of each of these 19 exceptions to specify how each one should apply to the new prohibited grounds of discrimination.
8. Our recommendations provide a comprehensive response to the issues raised by our terms of reference and can be implemented as stand-alone reforms to the Human Rights Act. However, there are several limitations on the scope of our review that mean we cannot address all issues and concerns raised by submitters. In particular:
 - (a) we were only asked to review the Human Rights Act, not any other legislation;
 - (b) our review is about anti-discrimination law and not human rights law more generally;

- (c) we have not been asked to conduct a general review of the Human Rights Act; and
 - (d) we have only been asked to consider Human Rights Act protections for people who are transgender or non-binary or who have an innate variation of sex characteristics, not any other groups.
9. As well, three provisions in the Human Rights Act fall outside our terms of reference. These are two provisions relating to the incitement of racial disharmony and one relating to conversion practices.
 10. The recommendations we make in this report follow a detailed process of research, analysis and public consultation. In June 2024, we published an Issues Paper that sought feedback on a broad range of questions. We received a total of 737 submissions in response to the Issues Paper, including 74 from organisations. We also received a spreadsheet from Kia Rangona te Kōrero | Free Speech Union that contained 6,013 discrete pieces of feedback.³ During our consultation period, we also held or attended consultation hui in conjunction with various community groups with an interest in our review. We have carefully considered all the feedback we received.
 11. This executive summary provides an overview of our recommendations and what we discuss in each chapter.

³ The total of 6,013 was reached after a process of deduplication.

A full list of our recommendations follows immediately after.

ABOUT THIS REVIEW: CHAPTERS 1 AND 2

12. In Chapter 1, we outline some introductory matters related to our review. We explain the background to the review, the scope of the review, the process we have followed and the key issues we address in the report. We also provide a brief introduction to the Human Rights Act.
13. In Chapter 2, we:
 - (a) provide a brief introduction to the three groups mentioned in our terms of reference: people who are transgender, people who are non-binary and people who have an innate variation of sex characteristics;
 - (b) explain what we have learned since we published the Issues Paper about the experiences, perspectives and concerns of people in these groups who are Māori;
 - (c) explain what we have learned since we published the Issues Paper about the experiences, perspectives and concerns of people from New Zealand's ethnic minority communities; and
 - (d) explain what we have learned about experiences of disability for people in these groups.
14. Throughout Chapter 2, we explain terms that people use to describe themselves and the terminology that we have chosen to use in this report.

KEY CONSIDERATIONS UNDERLYING THIS REVIEW: CHAPTER 3

15. In Chapter 3, we explain the key reform considerations that guided our policy analysis and recommendations for reform. These fall into the following six categories:
 - (a) The coherence of the Human Rights Act.
 - (b) Core values that underlie the Human Rights Act. We identified four pairs of values that underlie the Act: equality/fair play; dignity/self-worth; autonomy/privacy; and limits/ proportionality.
 - (c) Constitutional fundamentals. We identified as relevant to this review: tikanga; te Tiriti o Waitangi | Treaty of Waitangi; and human rights obligations in domestic and international law.
 - (d) The needs, perspectives and concerns of New Zealanders.
 - (e) Evidence-led law reform.
 - (f) Other principles of good law making, including the need for laws to be accessible, to achieve an appropriate balance between certainty and flexibility and to be fit for purpose.
16. We also discuss in this chapter two issues that some submitters told us should be foundational to our review. First, some submitters felt that the review could not proceed without a clear statement of the meaning of sex and wanted this to guide our analysis and recommendations. In Chapter 3, we explain that sex is a functional term that is used in different ways depending

on the context. There is no single definition of sex in New Zealand law, and it is used in different ways in different legal contexts.

17. We did not consider that fixing a meaning of sex at the outset was a helpful starting point for this review. Our task in this review was to advise on how anti-discrimination law should protect people who are transgender or non-binary or who have an innate variation of sex characteristics. That is a policy question which we analyse throughout the report by reference to relevant legal, social and practical considerations. Defining 'sex' at the outset of our review would not have assisted with that exercise.
18. A second issue that some submitters considered to be foundational for the review was the validity of transgender identities and of concepts such as gender identity. Some submitters urged on us particular approaches to this issue, and some said we needed to state more clearly our underlying assumptions.
19. We explain in Chapter 3 that our review proceeds on the assumption that gender identity is not simply a belief or ideology and that some people have a deeply felt, internal and individual experience of gender that does not correspond with the sex they were assigned at birth. We heard from many people in consultation who are transgender or non-binary and whose individual experience of gender is deeply held. We do not think their experiences can simply be dismissed as a matter of ideology or belief. Recognition that it is legitimate for a person's gender identity to differ from

their sex assigned at birth is deeply embedded in New Zealand law as well as in the laws of other countries with which we share a close legal heritage.

THE CORE CASE FOR REFORM: CHAPTER 4

20. In Chapter 4, we explain the key recommendation we make in this report: that section 21 of the Human Rights Act should be amended to clarify that the Act covers discrimination that is due to a person being transgender or non-binary or having an innate variation of sex characteristics.
21. Although Chapter 4 presents the key reasons we recommend reform, there are many other implications of reform that we address in later chapters. Ultimately, our decision to recommend reform of section 21 is based on the analysis we present throughout the report.

Section 21

22. Section 21 of the Human Rights Act sets out 13 ‘prohibited grounds of discrimination’, including sex, race, religious belief, disability and sexual orientation. While section 21 is not the only element that must be established to prove discrimination under the Human Rights Act, it is a key gateway to protection. Unless discrimination was “by reason of” one of the prohibited grounds in section 21, a claim of discrimination under the Human Rights Act will fail.
23. None of the prohibited grounds in section 21 refer explicitly to a person’s gender identity or sex

characteristics, or to being transgender or non-binary or having an innate variation of sex characteristics.

Six rationales that underlie existing protections

24. We have identified six rationales that have been used in the past both in Aotearoa New Zealand and overseas to justify bringing new groups within the protection of anti-discrimination laws. These are that:

- (a) people in a particular group have experienced a history of discrimination, disadvantage, prejudice, stigma or stereotyping;
- (b) the characteristic that is being singled out for protection is either immutable or so closely tied to a person's sense of identity that the person should not be expected to hide or change the characteristic to avoid discrimination;
- (c) discriminating against someone on that basis is particularly harmful to human dignity;
- (d) protecting people from discrimination on that basis is consistent with developments in international law;
- (e) protecting people from discrimination on that basis is consistent with the approach in other liberal democratic nations with which we share a common legal heritage; and
- (f) protecting people from discrimination on that basis is consistent with changing social norms (although there is a need for some caution in relation to this last rationale given the purpose of anti-

discrimination laws is to protect people from societal prejudice).

25. Taken together, these six rationales strongly support the conclusion that New Zealand law should protect people from discrimination that is due to being transgender or non-binary or having an innate variation of sex characteristics:

- (a) People in these groups have been subject to long histories of violence, stigmatisation, marginalisation and discrimination, and continue to experience high levels of discrimination in many areas of life.
- (b) A person's gender identity or the fact they have an innate variation of sex characteristics is something deeply personal that they should not be expected to hide or change to avoid discrimination.
- (c) It is harmful to human dignity to be denied opportunities to participate in society because of something as deeply personal as one's gender identity or sex characteristics.
- (d) There is a large and growing body of international authority that interprets the 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.
- (e) The jurisdictions with legal systems closest to our own (including the United Kingdom, the Commonwealth of Australia, the eight Australian states and territories, Canada and the 13 Canadian

provinces and territories) have all enacted anti-discrimination protections for gender identity or an equivalent. Most Australian anti-discrimination statutes also include a ground aimed specifically at protecting people with innate variations of sex characteristics.

- (f) The limited data that is available about social attitudes in Aotearoa New Zealand to people who are transgender or non-binary suggest high levels of agreement that people in these groups should be protected from discrimination.

Reasons why current law does not provide sufficient protection

- 26. We also examine in Chapter 4 whether people who are transgender or non-binary or who have an innate variation of sex characteristics may already receive adequate protection from discrimination under New Zealand law. Based on an opinion from Te Tari Ture o te Karauna | Crown Law Office, the New Zealand government already acts on the basis that people are protected from discrimination that is based on their gender identity or sex characteristics under the prohibited ground of 'sex'. Te Kāhui Tika Tangata | Human Rights Commission and some other public sector agencies also take this view. No court or tribunal has, however, confirmed this approach.
- 27. We do not consider that the state of the law on this issue is satisfactory. In the absence of any case law on the point, it remains unclear whether protection from

discrimination is available to people in these groups and, if so, what the scope of that protection might be. It is also unclear how the exceptions in the Human Rights Act that allow in certain circumstances for people to be treated differently on the basis of their sex apply to people who are transgender or non-binary.

28. The current law is also inaccessible. People should not have to rely on statements from the Crown Law Office or Human Rights Commission, or advice from lawyers or community organisations, to understand their rights and obligations.
29. Uncertainty and inaccessibility in the current law does not just affect those who need protection from discrimination. It also affects people and organisations with obligations under the Human Rights Act, such as landlords, business owners and employers.
30. Although it is a secondary consideration, we consider that having clearer protection from discrimination would also serve an important symbolic and expressive function.

TE AO MĀORI: CHAPTER 5

31. In Chapter 5, we consider the implications of the Treaty of Waitangi and tikanga for the reforms we propose to section 21 of the Human Rights Act.
32. We consider whether adding the new prohibited grounds of discrimination to section 21 is needed to uphold the Crown's obligations under the Treaty of Waitangi. Our conclusion is that reform of section 21 is

broadly consistent with the protection ethos that underlies the Treaty of Waitangi and is reflected in its preamble. However, we cannot say on the evidence currently available to us that reform is required to comply with the Crown's Treaty obligations.

33. In Chapter 5, we also address the possibility that the reforms we propose to section 21 could interfere with the ability of Māori to live in accordance with tikanga (and therefore with the Crown's commitment in article 2 of the Treaty of Waitangi to protect the exercise of tino rangatiratanga by Māori collectives). We evaluate, in particular, the potential implications of reform of section 21 for tikanga activities that involve differentiated roles for wāhine and tāne.
34. Sex-differentiated tikanga activities such as karanga (a welcome call), whaikōrero (a formal speech), tā moko (traditional Māori tattooing) and kapa haka (a type of Māori performing arts) are common in Aotearoa New Zealand, although the circumstances in which a person's sex is relevant to the roles they perform differ between hapū and iwi. An issue with which some Māori groups are currently grappling is what roles Māori who are transgender or non-binary or who have an innate variation of sex characteristics can fulfil in these activities. We understand that different positions are being reached on these issues by different hapū, marae and whānau.
35. A 2008 decision of Te Taraipiunara Mana Tangata | Human Rights Review Tribunal exposed the potential for Human Rights Act protections against discrimination

based on sex to conflict with sex-differentiated tikanga activities.⁴ We examine carefully in Chapter 5 whether the reforms we propose could enlarge this existing tension between tikanga and the Human Rights Act. For the reasons we set out there, we conclude that adding new prohibited grounds to section 21 is unlikely to increase the potential for state law to interfere with tikanga. We acknowledge, however, that the relationship between the Human Rights Act and tikanga deserves attention on any general review of the Act.

RIGHTS AND FREEDOMS: CHAPTER 6

36. In Chapter 6, we consider the implications for our proposed reforms of section 21 of certain rights found in the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) and at international law. These rights are: freedom of thought, conscience, religion and belief; freedom of expression; freedom of association; and the freedom to manifest one's religion or belief in worship, observance, practice or teaching.
37. Many submitters were concerned that, if a ground of gender identity is added to the Human Rights Act, their ability to express themselves freely on issues related to gender, or to manifest their beliefs, would be unfairly limited. Many other submitters were concerned about the harms caused to people who are transgender or non-binary by abusive speech.

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

38. We explore at length in Chapter 6 the circumstances in which, as a result of our review, a person might be in breach of the Human Rights Act for expressing their views about gender or because of how they speak to a person who is transgender or non-binary. We analyse whether this could result in a breach of the NZ Bill of Rights.
39. With some limited exceptions, the rights in the NZ Bill of Rights are not absolute. Section 5 of the NZ Bill of Rights states that the rights in it can be subject to “reasonable limits” that are “demonstrably justified in a free and democratic society”.
40. Protecting the right to freedom from discrimination may entail limits on other rights in certain circumstances. For example, things people say may sometimes form part of a course of conduct that amounts to discrimination. If an employee is repeatedly subject to verbal abuse in their workplace, for example, this might well constitute a “detriment” (one of the relevant tests for discrimination in the Human Rights Act).
41. It is, however, a legal requirement that the discrimination protections in the Human Rights Act be interpreted and applied in a manner that achieves consistency with the NZ Bill of Rights. There can be no finding of discrimination under the Human Rights Act if that finding would amount, in all the circumstances, to an unjustified limit on a right protected by the NZ Bill of Rights.
42. This means that the circumstances in which a discrimination complaint under the Human Rights Act

arising from something a person said would succeed are likely to be somewhat limited. For example, overseas cases in which misgendering (referring to a person by the incorrect gender) has been held to constitute discrimination have almost always arisen in workplace settings. These cases have generally involved persistent and intentional conduct, comprising other words and actions meant to belittle and harass a transgender person, and failures by management to foster a safe working environment.

43. We are satisfied that the reforms we propose of section 21 of the Human Rights Act would ensure the law fairly balances rights related to the freedom to express oneself and manifest one's beliefs with the right of people who are transgender or non-binary to be free from discrimination. We also consider that the reforms we propose will not significantly expand the circumstances in which forms of speech that cause harm are already unlawful. Speech-related harms (including to people who are transgender or non-binary) can already attract legal or employment consequences under other laws and regulations.
44. We make no specific recommendations for reform of the Human Rights Act in relation to free speech issues.
45. Contrary to a misunderstanding expressed by many people who gave feedback on this review, the reforms we propose to section 21 of the Human Rights Act will not result in the criminalisation of misgendering or deadnaming, or of any other forms of speech or expression.

46. In Chapter 6, we also consider some concerns submitters raised with us about:
- (a) the need to protect acts of conscience, including by healthcare providers; and
 - (b) the ability of cisgender women to determine who can participate in women-only networks and associations, or to run events restricted to women assigned female at birth.
47. We make no recommendations for reform on these issues either.

WORDING OF NEW GROUNDS: CHAPTER 7

48. In Chapter 7, we recommend that two new grounds be added to section 21 of the Human Rights Act.

Gender identity or its equivalents in the cultures of the person

49. We recommend that section 21 be amended to include a new ground of ‘gender identity or its equivalents in the cultures of the person’. The ground should be defined to include:
- (a) gender expression; and
 - (b) the relationship between a person’s gender identity and their sex assigned at birth.
50. We consider this ground will provide broad and comprehensive protection for people who are transgender or non-binary, while recognising that different cultures have their own ways of conceptualising gender diversity.

51. We considered but rejected the alternative possibility of a combined ground of ‘sex or gender’. While that approach might better reflect the complex relationship between sex and gender, it would create significant drafting challenges. This is because there is a need to differentiate certain aspects of sex, gender and sex characteristics for the purposes of some Part 2 exceptions.

Having an innate variation of sex characteristics

52. We recommend that section 21 should be amended to include a new ground of ‘having an innate variation of sex characteristics’. We prefer this approach to broader language such as ‘sex characteristics’ because it reflects the distinct experiences and needs of people who have an innate variation of sex characteristics. This approach will also make it easier to differentiate this group for the purposes of some exceptions in Part 2 of the Act.
53. We recommend this language over ‘intersex status’ because it is a less divisive term, is less likely to cause definitional debates and is likely to be more future-proof.

No definition of sex

54. We also discuss in Chapter 7 whether the existing ground of sex in section 21(1)(a) of the Human Rights Act should be defined. As we explained earlier, our research suggests that sex is a functional term that serves different purposes depending on the context. Given those different purposes and evolving societal debate

about the meaning of the word sex, it would not be desirable or appropriate for us to recommend a statutory definition of sex unless that was needed to support clear legislative design and good policy outcomes.

55. A key reason why some submitters wanted a definition of sex in the Human Rights Act was to provide clarity as to how the sex exceptions in the Act should be applied. Specifically, they sought clarity as to the circumstances in which people who are transgender or non-binary should be able to access single-sex spaces and facilities.
56. Although we agree it is important to provide clarity on this point, we do not think a single definition of sex is the best way to advance the issue. As we explain further below, the implications of this review for each sex exception need to be addressed on a case-by-case basis, taking into account the specific rationales that underlie each exception as well as other key policy considerations. A single definition of sex does not advance this analysis.

INTRODUCTION TO PART 2 OF THE HUMAN RIGHTS ACT: CHAPTER 8

57. The rules in Part 2 of the Human Rights Act regulate the private sector. They apply to people or organisations that are not part of government and are not exercising public functions, powers or duties.
58. Chapter 8 provides an introduction to Part 2 to support the more detailed analysis of its provisions in Chapters

9 to 17 of the report. Chapter 8 provides important context for those chapters and is intended to be read alongside them.

59. Some key issues we address in Chapter 8 are as follows.

How Part 2 works

60. Chapter 8 begins with an explanation of how Part 2 of the Human Rights Act operates. In brief:

- (a) Part 2 places obligations on private sector people and organisations, but only when they engage in certain public-facing activities listed in the Act. These include being an employer, being a landlord, or supplying goods and services to the public.
- (b) Each of these regulated ‘areas of life’ has its own subpart in Part 2. Each subpart sets out specific acts that are unlawful in that area of life if done “by reason of” a prohibited ground of discrimination. For example, one act that is unlawful under the subpart regulating “employment matters” is to refuse to hire someone who is qualified for work of a particular description by reason of a prohibited ground.
- (c) Part 2 also states numerous exceptions — circumstances in which Parliament has said it is acceptable to treat people differently based on one or more of the prohibited grounds when engaging in an activity that is regulated by Part 2. Some of these exceptions are general (applying to all regulated areas of life). Some are specific (applying to one area of life).

- (d) Most of the exceptions specific to each area of life do not apply to all the prohibited grounds. They allow differences of treatment based on one or some grounds. For example, there is an exception that makes it lawful to discriminate in employment if the difference of treatment is based on the prohibited ground of ‘political opinion’ and the role is a political advisor or working for a political party.
- (e) Nineteen of the exceptions in the Human Rights Act that are specific to an area of life permit different treatment based on a person’s sex. These sex exceptions are a particular focus of this review.

General implications for Part 2 of adding new prohibited grounds

- 61. Chapter 8 explores some general implications for Part 2 of the Human Rights Act of adding the proposed new grounds of discrimination to section 21.
- 62. For example, we explain in Chapter 8 that any amendment to section 21 needs to be accompanied by additional reforms to the Part 2 sex exceptions. One reason is to ensure the Act strikes an appropriate balance between the rights, interests and concerns of people in Aotearoa New Zealand. Part 2 is a complex scheme of rules designed to protect anti-discrimination goals while also accommodating other rights, interests and concerns. The Part 2 exceptions (including the sex exceptions) are important components of how that balance is achieved.

63. Another reason why accompanying amendments will be needed to the Part 2 sex exceptions is to ensure clarity and coherence of the Human Rights Act. How the sex exceptions apply in cases involving discrimination based on someone's gender identity is already uncertain and adding new grounds to section 21 will not, on its own, resolve that uncertainty. Specifically, it will remain unclear whether any of the sex exceptions authorise differences of treatment based on a person's sex assigned at birth, therefore enabling people who are transgender to be excluded from single-sex spaces, services and facilities that accord with their gender identity.

Our approach to reviewing Part 2 and the sex exceptions

64. In Chapter 8, we explain our general approach to reviewing Part 2 of the Human Rights Act. In the course of this review, we have examined every provision in Part 2 to satisfy ourselves that the implications of the reforms we propose are appropriate. We discuss the implications of reform for many Part 2 provisions in later chapters.
65. However, not all the provisions in Part 2 lend themselves to amendment as part of this review. Many are of general application and have implications for all the groups of people protected by section 21.
66. A key focus of the review (and the focus of most of our proposed amendments) is the Part 2 sex exceptions as these are of more specific relevance to the subject

matter of this review. In Chapter 8, we explain where in the report we review each of these exceptions and we explain our general approach to reviewing these exceptions.

67. Some key points we discuss in Chapter 8 are as follows.

Rationales underlying the sex exceptions

68. A starting point for our consideration of each sex exception was the reason or reasons why Parliament chose to permit differences of treatment based on sex in the particular circumstances. These exceptions exist for a variety of different purposes, for example:

- (a) to advance a substantive view of equality by permitting sex-separated facilities and services that may be needed for women to flourish;
- (b) to protect competing rights and interests that Parliament considered more important than equal treatment of women in the particular circumstances;
- (c) to advance safety; and
- (d) to ensure that activities in people's homes are not regulated by anti-discrimination law.

Bodily privacy

69. Some sex exceptions protect privacy in intimate situations. These privacy-related exceptions are grounded in social and cultural assumptions about nudity and whether it is acceptable to expose your body to people of a different sex in public settings. As this privacy rationale arises in relation to several

relevant exceptions, we provide some preliminary analysis of it in Chapter 8.

70. Social and cultural norms about bodily privacy are evolving, and mixed-sex facilities are more common than they were in the 1970s, when exceptions relating to bodily privacy were enacted as part of New Zealand's first law about sex discrimination.⁵ Nevertheless, taboos about being seen naked by people of a different sex in public settings are still widely held and were reflected in many submissions we received.
71. Working out the significance of this privacy rationale for the new ground we propose of gender identity is not straightforward. The way social norms about nudity currently apply to matters of gender identity is unclear. In consultation, we heard from some people that these norms are about 'biological sex', from some people that they are about sex characteristics and from others that they are about gender identity. We suspect these norms are in a state of transition and that they mean different things to different people. We accept that, for some people, these social norms mean their privacy is best protected if people of a different sex assigned at birth do not see their naked body without their permission.
72. Where privacy issues of this kind have arisen in this review, we have weighed them carefully when

⁵ Human Rights Commission Act 1977.

evaluating potential reform options, alongside all other considerations that we have identified as relevant to the specific issue.

Case-by-case approach

73. We have taken a case-by-case approach to analysing whether and how each of the sex exceptions in Part 2 of the Human Rights Act should apply to the new grounds we propose. This follows from the conclusion (above) that the sex exceptions exist for different reasons. Other relevant policy considerations (such as the core values that underlie the Human Rights Act) also have different implications for each exception.
74. In some cases, our key reform considerations are best advanced by amending the relevant exception to permit differences of treatment based on one or both of the new grounds we propose. In other cases, our key reform considerations are best advanced by either not extending the relevant exception, or extending it in a limited way.
75. The recommendations we make in relation to the sex exceptions in later chapters can be grouped into three categories:
 - (a) We recommend amendments to some exceptions to allow for people to be treated differently based on one or both of the new grounds we propose (as long as other conditions of the relevant exception are met). These exceptions are often ones that apply in narrow circumstances and provide discretion for an employer or business to

consider how best to meet the needs of its clients and customers.

- (b) In some cases, we recommend new tests to define the circumstances in which people can be treated differently based on one or both of the proposed new grounds. This is in situations where we consider the threshold in an existing sex exception is not sufficient to achieve an appropriate balance between competing rights and interests. An example is a new exception we recommend in relation to competitive sports.
- (c) We recommend the Human Rights Act should clarify that some exceptions do not allow people to be excluded from single-sex spaces that align with their gender identity. We take this approach in relation to exceptions applying to single-sex schools and to public facilities such as bathrooms. Practicality and the importance of access to basic facilities were important considerations in relation to these exceptions alongside careful consideration of the rationales that underlie each exception.

Options for reform

76. We explain in Chapter 8 our general approach to identifying options for reform of the Part 2 sex exceptions. For example, we explain that:

- (a) Leaving an exception unamended would result in significant uncertainty as to whether the exception

entitles providers to exclude a transgender person from a space, service or facility that aligns with their gender identity. For that reason, we propose specific amendments to each sex exception to clarify how it should apply.⁶

- (b) It would be outside the scope of our review to recommend repeal of some or all the sex exceptions. We acknowledge in Chapter 8 that this means there are limitations on how we can address the issues and concerns of people who identify outside the gender binary in this review.

Some common issues about information privacy

- 77. Exceptions that enable different treatment based on a person's sex assigned at birth, the fact they are transgender or non-binary or their sex characteristics have implications for information privacy. In Chapter 8, we discuss some concerns we heard about the impact of reform on information privacy and refer to some important safeguards and constraints in the Privacy Act 2020.

Wording to give effect to our recommendations

- 78. We provide some specific guidance in Chapter 8 about some issues that we consider may arise with respect to the wording of new provisions. This guidance will be

⁶ The same uncertainty does not arise with respect to the ground of having an innate variation of sex characteristics. Therefore, we sometimes recommend no reform in relation to this ground.

important to take into account if our recommendations are implemented.

THE 'AREA OF LIFE' SUBPARTS: CHAPTERS 9 TO 12

79. In Chapters 9 to 12, we review the Part 2 areas of life that are most affected by this review.
- (a) In Chapter 9, we consider a subpart that relates to employment matters.
 - (b) In Chapter 10, we consider two subparts relating to: access to places, vehicles and facilities; and provision of goods and services.
 - (c) In Chapter 11, we consider a subpart that relates to land, housing and accommodation.
 - (d) In Chapter 12, we consider a subpart that relates to educational establishments.

Review of discrimination protections in each area of life

80. At the start of each of these chapters, we consider the discrimination protections that relate to the relevant subpart.
81. These discrimination protections apply uniformly to all prohibited grounds of discrimination. As we explained earlier, it would be difficult for us to propose amendments to general provisions of this kind as part of this review. We nevertheless examine these discrimination protections in each chapter to satisfy

ourselves that the implications of reform for these provisions are appropriate.

82. We conclude, in relation to each of these subparts that, if the new grounds we propose are added to section 21 of the Human Rights Act, the discrimination protections in each area of life will provide a reasonable basis for people who are transgender or non-binary or who have an innate variation of sex characteristics to complain about discrimination they experience.
83. We also discuss in each of these chapters some other possible implications of reform for these discrimination protections that were raised with us by submitters. We explain why we are satisfied that none of these issues make reform of section 21 undesirable or raise issues that cannot be addressed through the exceptions we discuss below.

Exceptions discussed in Chapter 9

84. In Chapter 9, as well as reviewing the discrimination protections that relate to employment, we also review five employment exceptions that allow for differences of treatment on the prohibited ground of sex, and one parallel exception that relates to qualifying bodies.⁷

⁷ There are also three employment exceptions that we discuss in other chapters: two exceptions relating to employer-provided accommodation in Chapter 11; and one exception relating to counsellors in Chapter 13.

Exception for work performed outside New Zealand — section 26

85. Section 26 is an exception for work performed outside New Zealand. It allows for different treatment based on sex, religious or ethical belief, or age if, because of the laws, customs or practices of the country in which the duties are to be performed, the duties are ordinarily carried out by a person who is of a particular sex, religious or ethical belief, or age.
86. The purpose of this exception is to ensure that New Zealand businesses operating overseas do not face contradictory legal and practical requirements. A New Zealand business that is operating overseas is required to comply with all the host state's laws and, as a matter of practicality, may also need to comply with some other local customs and practices. Section 26 ensures that businesses in this situation can recruit staff in Aotearoa New Zealand without breaching New Zealand laws.
87. We have not been able to identify significant evidence of a need for this exception and therefore we consider the arguments for and against extending the exception to be quite finely balanced. Ultimately, however, we recommend extending this exception to allow for differences of treatment by reason of the new prohibited ground of gender identity.
88. Extending the exception would be consistent with its underlying rationale. We have not identified any overseas laws, customs or practices that restrict jobs

based on gender identity or gender expression and that would have an impact on recruitment in Aotearoa New Zealand. However, many countries limit certain roles to persons of a particular sex. It is likely that, in practice, these would be limited in some jurisdictions to people of a certain sex assigned at birth.

89. We also know of overseas laws that criminalise gender identity or gender expression more generally. That suggests that, in some countries, there may be a potential risk to the safety of people who are transgender or non-binary if they are sent by their New Zealand employer to certain countries. Although employee safety is not the primary objective of the section 26 exception, we think it is a supporting reason to extend this exception.
90. Finally, the circumstances in which this exception applies are very narrow. We do not consider that extending this exception will have a significant impact in practice on the equality, dignity and autonomy of people who are transgender or non-binary.
91. We do not recommend that section 26 be extended to the new prohibited ground of having an innate variation of sex characteristics. We have not identified any laws, practices or customs overseas that could restrict the ability of a New Zealand business to recruit a person who has an innate variation of sex characteristics.

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

92. Section 27(1) is an exception for different treatment based on sex or age where, “for reasons of authenticity”, being of a particular sex or age is a “genuine occupational qualification” for the role. This exception is engaged when a person needs to look or sound a particular way for a role (for example, in acting or modelling).
93. We recommend that this section be amended to allow for differences of treatment based on both of the grounds we propose. A person’s physical characteristics may be relevant, in certain circumstances, to whether that person looks and sounds right for a particular role. These might include characteristics typically associated with male and female bodies such as body composition, facial structure and voice pitch.
94. The limiting language of section 27(1) — “authenticity” and “genuine occupational qualification” — mean the exception can only apply to the proposed new grounds if a person’s gender identity, gender expression or sex characteristics very substantially affect the person’s ability to fulfil the role in terms of the way they look and sound. Physical characteristics that are not visible when a person is performing the role would not be relevant. We imagine, for example, that a person’s genitalia would only rarely be relevant.

95. We also consider that the limiting language of section 27(1) will prevent the exception from being applied to restrict transgender actors to only playing transgender characters.

Exception for domestic employment in a private household – section 27(2)

96. Section 27(2) is an exception for domestic employment in a private household. It allows for different treatment based on a wide range of prohibited grounds: sex, religious or ethical belief, disability, age, political opinion and sexual orientation. This exception likely applies to roles such as nannies, cleaners, or caregivers for elderly or disabled persons.
97. We recommend that this section be amended to allow for differences of treatment by reason of both the new prohibited grounds we propose.
98. The rationale for this exception is to designate a private sphere in which the Human Rights Act does not apply. This reflects a more general principle underlying the Act that anti-discrimination laws should not, in general, regulate people's private lives. Significantly, for section 27(2) to be engaged, a trait does not need to be relevant to a person's ability to do the role. In the specific context in which this exception applies, the Human Rights Act prioritises the freedom of choice of householders over other concerns.
99. Extending the exception to the grounds of gender identity and having an innate variation of sex characteristics is consistent with this rationale. It will

allow private householders to continue to have autonomy over who to employ in their home.

Exception for reasonable standards of privacy — section 27(3)(a)

100. Section 27(3)(a) is an exception that allows for different treatment based on sex where a position “needs to be held by one sex to preserve reasonable standards of privacy”. This could cover roles where an employee interacts with someone who is partially clothed or would need to touch private areas of the body. Examples might include beauty therapy services such as intimate waxing, providing personal care such as assisting a client with showering and dressing, or fitting bras in a lingerie store.
101. We recommend that section 27(3)(a) be amended to allow for differences of treatment by reason of the proposed new ground of gender identity where a position needs to be held by a person of a particular gender identity to preserve reasonable standards of privacy.
102. Section 27(3)(a) is grounded in deeply ingrained social and cultural assumptions about nudity, and whether it is acceptable to expose your body to people who are of a different sex. Given the importance of bodily privacy and the range of views relating to how social taboos about being seen naked by people of a different sex apply to gender identity, we think it is appropriate to extend this exception. This will leave discretion to

employers, as experts in a particular field or industry, to manage any relevant privacy issues.

103. To rely on the exception, however, an employer would have to show the position needs to be held by a person of a particular gender identity to preserve reasonable standards of privacy. We doubt that a broad and unjustified assumption about client comfort would be sufficient. The employer would also need to consider if they could address the situation by reassigning duties to another employee.⁸
104. We do not recommend extending this exception to the proposed new ground of having an innate variation of sex characteristics. This would not be consistent with the underlying rationale of the exception. We have not heard anything to suggest that social norms about keeping men and women separate when unclothed in public settings are engaged differently when a person has an innate variation of sex characteristics.

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

105. Section 28(1) is an employment exception that relates to appointment to religious office. It allows for different treatment based on sex where a position is for the purposes of an organised religion and is limited to one sex to comply with doctrines, rules or established customs of that religion.

⁸ See Human Rights Act 1993, s 35.

106. Section 39(1) is a related exception that applies to qualifying bodies. It allows for differences of treatment in relation to authorisations or qualifications that facilitate engagement in a profession or calling for the purposes of an organised religion. Section 39(1) applies if the profession or calling is “limited to one sex or to persons of that religious belief so as to comply with doctrines or rules or established customs of that religion”.
107. We recommend that both these exceptions be amended to allow for differences of treatment based on both proposed new grounds.
108. Sections 28(1) and 39(1) protect freedom of religion — an important right that sits at the heart of our multicultural society. The institutional autonomy of organised religions to choose their own ministers and leaders is a core aspect of the right to freedom of religion and any interference with it would be difficult to justify.
109. Based on the limited feedback we received on this issue supplemented by our own research, we understand there may be organised religions that restrict religious office based on a person’s ‘biological sex’ or their sex characteristics.
110. These two exceptions only apply in narrow circumstances. They only allow different treatment when the position is for the purposes of an organised religion, and when the different treatment is required to comply with the doctrines, rules or established customs of the religion.

Exceptions discussed in Chapter 10

111. In Chapter 10, as well as reviewing the discrimination protections that relate to access to places, vehicles and associated facilities, and to the provision of goods, facilities or services, we also review three relevant exceptions.⁹

Skill exception – section 47

112. Section 47 is an exception to the discrimination provisions in the Human Rights Act relating to the provision of goods, facilities or services. It applies “where the nature of a skill varies according to whether it is exercised in relation to men or women”. Section 47 states that, in those circumstances, a person does not breach the discrimination protections relating to the provision of goods, facilities or services by exercising the skill in relation to one sex only, in accordance with the person’s normal practice.

113. This exception might apply, for example, to a beauty salon that specialises in intimate waxing for women but not men, or a tailor who specialises in men’s suits.

114. We recommend that section 47 should be reworded to provide an exception (applying to the prohibited grounds of sex, gender identity, and having an innate variation of sex characteristics) for when:

⁹ We discuss in other chapters some other exceptions that relate to these subparts: an exception for counselling in Chapter 13; two exceptions for single-sex facilities in Chapter 14; and an exception for competitive sports in Chapter 15.

- (a) the nature of a skill varies according to whether the customer or client has particular physical characteristics; and
 - (b) the person exercises the skill in relation to particular physical characteristics in accordance with their normal practice.
115. We consider that, properly interpreted, section 47 already only applies if the nature of a skill differs depending on a person's physical characteristics. We can think of no other circumstances in which the nature of a skill would differ depending on whether it is exercised in relation to men or women.
116. The redrafted exception would, however, make it clearer that section 47 does not give effect to outmoded historical assumptions that certain services can be limited, by custom or convention, to men or to women. The redrafted language will also clarify the application of the exception to people who are transgender or non-binary or who have an innate variation of sex characteristics.
117. As under the current exception, the redrafted wording will continue to allow service providers to develop expertise in particular kinds of services where the skill varies depending on a person's physical characteristics. The exception would not, however, allow service providers to refuse services because of assumptions about a customer's physical characteristics based on their sex, gender identity or gender expression.

Insurance exception — section 48

118. Section 48 is an exception to the discrimination provisions in the Human Rights Act relating to the provision of goods, facilities or services. It permits insurers to offer or provide annuities and insurance policies on different terms or conditions for each sex, or for people with a disability or for people of different ages. It is subject to strict threshold requirements relating to the need for any difference in treatment to be adequately supported by actuarial or statistical data.
119. The rationale for this exception is to facilitate fair pricing by limiting the extent to which those who pose a lower risk of insurance claims are subsidising those who pose a higher risk. Insurers do this by classifying people into groups with similar characteristics, of which sex is one.
120. We recommend amending section 48 to allow insurers to offer different terms and conditions based on both the proposed new grounds. Based on our research and what we have heard in feedback, the reason sex is a relevant factor in assessing insurance risk sometimes relates to factors associated with a person's sex assigned at birth, sometimes to their sex characteristics and sometimes to aspects of social conditioning that are connected to a person's gender identity. As these can be difficult to disentangle, not extending the exception to the new grounds we propose might create incoherence and confusion.
121. We consider that it is consistent with the underlying rationale of the exception to enable insurers to take a

similar range of matters into account in relation to people who are transgender or non-binary or who have an innate variation of sex characteristics — assuming there is statistical or actuarial data to support any difference in treatment.

Superannuation exception — section 70(2)

122. Section 70(2) of the Human Rights Act sits in a subpart entitled “Special provisions relating to superannuation schemes” and does not state the areas of life to which it relates. In practice, it operates as an exception to the discrimination provisions relating to employment, and to the provision of goods, facilities or services.
123. Section 70(2) permits superannuation schemes to provide different benefits for members of each sex on the basis of the same contributions, or the same benefits on the basis of different contributions. As with the insurance exception, section 70(2) is subject to strict threshold requirements relating to the need for any difference in treatment to be adequately supported by actuarial or statistical data.
124. The rationale for this exception is likely similar to that of the insurance exception. It is based on an assumption that, due to different health outcomes and life expectancies for men and women, superannuation funds may be required to balance contributions and payouts differently for men and women.
125. In practice, section 70 has very limited application as very few superannuation schemes of the kind covered by this exception now exist, and most of those that do

are closed to new members. Therefore, little turns on whether this exception is extended to new grounds.

126. We nevertheless recommend extending section 70(2) to both the proposed new grounds primarily for consistency with the insurance exception. As with the insurance exception, we think that sex, gender identity and sex characteristics are difficult to disentangle for the purposes of this exception.

Exceptions discussed in Chapter 11

127. In Chapter 11, as well as reviewing the discrimination protections that relate to land, housing and accommodation, we also review three exceptions that allow distinctions to be drawn based on a person's sex in relation to the provision of accommodation.¹⁰

Shared accommodation exception – section 55

128. Section 55 is an exception to the discrimination protections in the Human Rights Act relating to accommodation. It allows establishments such as hostels, hospitals, schools, universities, women's refuges and retirement villages to provide accommodation that is for people of one sex. It also allows for accommodation to be restricted to people of a certain marital status, religious or ethical belief, disability or age.

¹⁰ Only one of these is an exception to the discrimination provisions specifically relating to provision of land, housing and accommodation. The other two are employment exceptions that apply in relation to employer-provided accommodation.

129. We recommend that, where section 55 is being relied on to provide accommodation for people of one sex, a person whose gender identity aligns with that sex cannot be treated differently in relation to that accommodation unless that is reasonably required for one of two purposes. These are either to preserve the privacy, or to protect the welfare, of occupants or potential occupants of the accommodation.
130. We consider this recommendation reflects a fair balance of the different rights and interests involved. Section 55 is a broad exception that contains no threshold requirement to limit its application by reference to its underlying aims. It also applies to a broad range of accommodation types. Simply extending the existing exception so that a person can always be excluded from single-sex accommodation based on their sex assigned at birth would have an unjustified impact on the equality and dignity of people who are transgender or non-binary.
131. On the other hand, it would be inconsistent with the rationales underlying section 55, and too restrictive for accommodation providers, to preclude completely the possibility of people being treated differently based on their gender identity in relation to single-sex accommodation. Like some other exceptions we discuss, section 55 is based in part on social and cultural norms about bodily privacy. These norms are evolving, as we have already explained. While mixed-sex accommodation is far more common than it once was, social norms about keeping men and women separate

when sharing communal accommodation are still important to some people. These norms are also still evolving in their application to gender identity and there is no one settled view.

132. We also consider that privacy interests may be particularly strong in relation to the place where a person sleeps, and that people can be vulnerable when sleeping.
133. The reason we recommend listing the welfare of occupants, alongside privacy, as a legitimate matter for accommodation providers to consider is to acknowledge that this exception might apply to women's refuges. Most of the feedback we received about this exception related to its potential application in this setting.
134. We did not find any evidence to support concerns that were raised with us by some submitters that transgender women pose a safety risk to cisgender women in women's refuges. Further, we understand that most refuges in Aotearoa New Zealand already accommodate transgender women. Nevertheless, all users of women's refuges (including users who are transgender) are vulnerable, and many have experienced gender-related violence. We therefore consider it appropriate to leave some flexibility to refuges, as experts in the field, to manage issues that arise based on the need to protect the welfare of all occupants or potential occupants.
135. We do not recommend extending this exception to allow for differences of treatment by reason of the

proposed new ground of having an innate variation of sex characteristics. We heard nothing to suggest that the norms underlying single-sex accommodation are engaged differently when a person has an innate variation of sex characteristics.

Employer-provided accommodation exceptions — sections 27(3)(b) and 27(5)

136. Section 27(3)(b) is an exception to the employment discrimination protections in the Human Rights Act that applies where an employee needs to live on site, the premises do not include separate accommodation for each sex, and it is not reasonable for the employer to provide this. It might apply in settings such as seasonal work or work on cruise ships. The reasons for the exception are privacy and practicality.
137. This exception has little current application. As far as we can ascertain, employer-provided accommodation is no longer a major feature of New Zealand's job market and, where it is provided, is unlikely to be limited to people of one sex.
138. Nevertheless, we recommend that, where single-sex accommodation is being provided in reliance on section 27(3)(b), a person whose gender identity aligns with the designated sex of that accommodation can be treated differently in respect of that accommodation, but only if that is reasonably required to preserve the privacy of people with whom the accommodation is shared. This is largely for the same reasons we gave in relation to section 55.

139. Section 27(5) is an exception to the employment discrimination protections in the Human Rights Act that allows an employer to omit to apply a term or condition that would otherwise allow or require an employee to live on site if that is not reasonably practicable based on their sex or marital status.
140. We recommend this exception should be extended to the ground of gender identity. This may provide a benefit to people who are transgender or non-binary as it may enable an employer to exempt them from a requirement that would apply to other employees if it is not reasonably practicable for them to live on site.
141. As this exception is already limited to situations where accommodating the person on site is “not reasonably practicable”, there is no reason to introduce a “reasonably required” threshold for this exception.
142. We do not recommend extending either of the employer-provided accommodation exceptions to allow for differences of treatment on the basis of an innate variation of sex characteristics.

Exception discussed in Chapter 12

143. In Chapter 12, as well as reviewing the discrimination protections that relate to educational establishments, we also review one exception that allows for differences of treatment on the ground of sex.¹¹

¹¹ We discuss another education exception relating to provision of courses and group counselling in Chapter 13.

Exception for single-sex schools — section 58(1)

144. Section 58(1) allows educational establishments that are “maintained wholly or principally” for students of one sex to refuse to admit students of a different sex. The exception also applies to race, religious belief, disability and age.
145. This exception reflects a longstanding tradition in Aotearoa New Zealand of schools set up for students of a particular sex, race or religion, or for students with disabilities. It also accommodates the specific educational needs and preferences of students and their parents.
146. We recommend that section 58(1) be amended to clarify that it does not entitle an educational establishment maintained wholly or principally for students of one sex to refuse to admit a student whose gender identity aligns with that sex.
147. The practical impact of this reform is likely to be small. Section 58(1) only applies to educational establishments that are regulated by Part 2 of the Human Rights Act and only applies to decisions about admission. The exception likely only applies to 21 private single-sex schools currently in operation in Aotearoa New Zealand.
148. Nevertheless, we consider that transgender children and young people are a particularly vulnerable group whose rights to equality, dignity and autonomy should not be limited without good reason in relation to something as important as education. We consider the

law should maximise the choice of schools available for transgender students.

149. While some submitters were concerned to ensure girls can access single-sex education that responds to their different needs and experiences, we are not convinced that admitting a small number of transgender students to a single-sex school would interfere with its general character. The law already contemplates (with respect to state schools) that single-sex schools might have students of a different sex attending.
150. Our recommendation will not result in an unjustified limit (or, possibly, any limit) on the right in section 15 of the NZ Bill of Rights for people to manifest their religion or belief in community with others. Relevantly, religious faiths will continue to be entitled to maintain schools only for students of that faith and to refuse to admit students of a different faith.
151. Section 58(1) does not currently allow for students to be excluded from a single-sex school on the basis of having an innate variation of sex characteristics, and would not do so under any of the options we considered. Express reform with respect to this ground is not required.

COURSES AND COUNSELLING: CHAPTER 13

152. In Chapter 13, we discuss three exceptions in the Human Rights Act that relate to courses and counselling on highly personal matters such as sexual matters or the prevention of violence. These exceptions relate to three

different areas of life: employment; goods and services; and education.

Employment exception — section 27(4) — application to gender identity ground

153. Section 27(4) is a narrow exception to the employment discrimination protections in section 22 of the Human Rights Act. It allows an employer to treat an employee or prospective employee differently based on sex if the position is that of a counsellor on highly personal matters such as sexual matters or the prevention of violence. The exception also applies to race, ethnic or national origins and sexual orientation.
154. We recommend that section 27(4) be amended to allow differences of treatment based on the new prohibited ground of gender identity.
155. This exception facilitates effective counselling services by recognising that clients may be more willing to undertake counselling on highly personal and sensitive matters (and may be more comfortable) if the counsellor shares in common with them certain personal characteristics or lived experience. Extending this exception to gender identity is consistent with this underlying rationale.
156. It was clear from the feedback we received on this exception that some people have strong preferences for counsellors of a particular gender identity. This includes some women, including some female sexual assault survivors, who would prefer a cisgender woman

counsellor, and some people who are transgender who would prefer a counsellor who is transgender.

157. The underlying rationale of ensuring access to effective counselling services is a legitimate one that serves the values of autonomy, dignity and equality that underlie the Human Rights Act. Facilitating counselling on highly personal matters such as violence prevention is not only important to the individual involved but is also in the public interest.

Goods and services exception — section 45 — application to gender identity ground

158. Section 45 is an exception to the discrimination protections in the Human Rights Act that relate to the provision of goods, facilities or services. It allows for courses and group counselling to be restricted to people of one sex when highly personal matters such as sexual matters or the prevention of violence are involved. The exception also applies to the grounds of race, ethnic or national origins and sexual orientation.
159. We recommend that section 45 should be amended to allow for courses and group counselling to be restricted to people of a particular gender identity but only if that is reasonably required to achieve the purpose of the course or counselling.
160. Similar to section 27(4), the rationale behind this exception is to enable participants to feel comfortable with each other, participate freely and secure the full therapeutic benefits of courses or group counselling on

highly personal matters. This can be important for the individuals involved and may also serve a public interest.

161. However, a blanket extension of this exception to permit restrictions based on gender identity could be too exclusionary — especially in smaller communities with limited services available. It could lead to courses and group counselling sessions on highly personal matters being routinely restricted to cisgender women or men. This could prevent people who are transgender or non-binary from accessing appropriate therapeutic services.
162. Therefore, we favour a more limited extension of this exception that constrains the ability to restrict services based on a person's gender identity to circumstances needed to advance the underlying aims of the course or counselling.

Education exception — section 59 — application to gender identity ground

163. Section 59 is an exception to the discrimination protections in the Human Rights Act that relate to education. It allows educational establishments to hold or provide courses or group counselling that are restricted to persons of a particular sex when highly personal matters such as sexual matters or the prevention of violence are involved. The exception also applies to the grounds of race, ethnic or national origins and sexual orientation.
164. Largely for the same reasons we discussed in relation to section 45, we consider this exception should be

amended to allow educational establishments to hold or provide courses or group counselling that are restricted to persons of a particular gender identity where highly personal matters are involved and where this is reasonably required to achieve the purpose of the course or counselling.

Application of counselling exceptions to innate variations of sex characteristics

165. We do not recommend any reform of any of the counselling exceptions in relation to the proposed new ground of having an innate variation of sex characteristics.
166. We cannot see any policy basis for restricting counselling positions or access to courses or group counselling to people who do not have an innate variation of sex characteristics.
167. No exception is needed to permit employers to prefer an employee or prospective employee who *has* an innate variation of sex characteristics for a counselling position. Nor is an exception needed to permit service providers or educational establishments to restrict a course or group counselling session to people who have an innate variation of sex characteristics. This is because, under the reforms we propose to section 21 of the Human Rights Act, the absence of an innate variation of sex characteristics would not be a protected characteristic.

SINGLE-SEX FACILITIES: CHAPTER 14

168. In Chapter 14, we consider two exceptions that relate to single-sex facilities such as bathrooms and changing rooms. We also discuss some related issues.

Reform of sections 43 and 46

169. Sections 43(1) and 46 of the Human Rights Act are exceptions to the discrimination protections in the Human Rights Act that relate to access to places, vehicles and associated facilities, and to the provision of goods, services and facilities, respectively. These two exceptions allow for the maintenance and provision of separate facilities for each sex for reasons of public decency or public safety. As they are in Part 2 of the Human Rights Act, these exceptions only apply to facilities provided by the private sector, such as those in cafes, restaurants and gyms. The type of facilities that these exceptions cover might include bathrooms, changing rooms and saunas.

170. This is an issue on which people have different views and a challenge for us in settling on the best policy approach was that all potential options involved, to some degree, trade-offs between the rights and interests of different groups. Our approach was to carefully evaluate the impact of each option, paying close attention to any evidence that was available about the nature and extent of potential harms. We also paid close attention to the workability of options, and how they would impact in practice on the daily lives of New Zealanders.

171. Our recommendation in Chapter 14 is that both exceptions should be amended to specify that they do not permit service providers to exclude a person from a single-sex facility that aligns with their gender identity.
172. An alternative option we considered (and do not recommend) is for the Human Rights Act to permit service providers to restrict access to single-sex facilities based on a person's sex assigned at birth. One concern we have about such a law is how it would be enforced. There is no current form of identification in Aotearoa New Zealand that reliably records a person's sex assigned at birth, and we do not consider New Zealanders would wish to present identification when accessing public facilities such as bathrooms. Therefore, a law of this kind would likely be policed informally based on people's assumptions about other people's sex characteristics and 'biological sex'.
173. These assumptions may often be incorrect. A transgender person's sex assigned at birth is not always evident from their gender presentation. For example, a transgender man with a masculine gender presentation may seem out of place to others in a women's changing room. We are also aware of reports of cisgender women with non-conforming gender presentation being harassed in women's bathrooms on the assumption their sex assigned at birth is male.
174. We anticipate that, under a law that permitted service providers to restrict access to single-sex facilities based on a person's sex assigned at birth, all people with non-

conforming gender presentation would find themselves confronted more often when using public facilities.

175. The primary concern raised with us by submitters who opposed a reform of this kind was that it would exacerbate safety risks for cisgender women and girls. Our research confirms that women are more likely to experience sexual violence than men, that sexual violence is usually perpetrated by men and that many women have significant fear of sexual violence. However, we have not found evidence to support the concern that clarifying the legal entitlement of people who are transgender to use a single-sex facility that aligns with their gender identity exacerbates safety risks for cisgender women and girls.
176. We are aware of a body of evidence confirming that people who are transgender or non-binary face safety risks when they use public facilities that do not align with their gender presentation.¹² Research also suggests that people who are transgender and non-binary experience sexual violence at very high rates.
177. Although most concerns we heard from submitters related to safety, we received some submissions raising concerns about public decency or related ideas such as privacy, comfort and modesty. As we explained earlier, social norms about keeping men and women separate when they are unclothed in public situations are strongly held by some people, and the way those norms

¹² We explore evidence on these issues more fully in Chapter 14.

apply to issues of gender identity is in a state of transition.

178. We acknowledge that a law that restricts access to single-sex facilities based on a person's sex assigned at birth would better address the concern raised by some submitters about the privacy, modesty and comfort of cisgender women and girls. Ultimately, however, we had to weigh those concerns against the other implications of reform, such as those relating to safety, proof, practicability and the ability of all members of the community to participate in society.
179. While we do not discount the validity of the privacy concerns we heard, we think they are outweighed by the harmful effects of exclusion. We are also mindful of the fact that, within single-sex facilities, people will often have options available to them to manage privacy concerns. For example, while there may be inconvenience involved, people can generally choose to get changed in an individual cubicle or a toilet stall.
180. Ultimately, we consider that a law clarifying that the exceptions for single-sex facilities do not permit service providers to exclude a person from a facility that aligns with their gender identity is the option that is best supported by the core values that underlie the Human Rights Act and by the rationales underlying the single-sex facilities exceptions. We anticipate that this reform would allow New Zealanders to go about their daily lives in much the same way as they do presently.

Overlap with shared accommodation exception

181. There are some situations covered by the two single-sex facilities exceptions in which the exception for shared accommodation (which we discussed above) could also apply. This is because a provider of shared accommodation (for example, a hostel that offers separate bunkrooms for men and women) might also be said to be maintaining or providing separate facilities for each sex on the ground of public decency or public safety.
182. We recommend reforms of the Human Rights Act to ensure that, in cases of overlap, the test we proposed in Chapter 11 in relation to shared accommodation would take precedence.

Other issues on which we consulted

183. In Chapter 14, we also discuss two related issues on which we had consulted: whether there should be new exceptions for single-sex facilities in educational establishments and workplaces; and whether the Human Rights Act should have a requirement relating to provision of unisex facilities. We make no recommendations for reform on either of these issues.

COMPETITIVE SPORTS: CHAPTER 15

184. In Chapter 15, we discuss the competitive sports exception in section 49(1) of the Human Rights Act, which is an exception from the discrimination protections related to goods, facilities or services. It 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.

185. We recommend that there should be a new exception that only allows sports organisations to treat a person differently by reason of their gender identity or having an innate variation of sex characteristics in relation to a single-sex competitive sporting activity that aligns with their gender identity if this is reasonably required to:
- (a) secure fair competition between participants, having regard to the level of competition and the public interest in broad community participation in sporting activities;
 - (b) ensure the physical safety of all participants; or
 - (c) comply with an international rule that imposes a requirement in relation to the particular competitive sporting activity.
186. The evidence that is currently available concerning the participation of people who are transgender, or who have an innate variation of sex characteristics, in competitive sporting activities is evolving and incomplete. We summarise some relevant evidence in Chapter 15, while acknowledging that the Law Commission does not have expertise in sport science or physiology.
187. At a population level, evidence shows that cisgender men have an advantage over cisgender women in many sports. It seems highly likely that some of this advantage is experienced by transgender women who have not

undergone gender-affirming hormone therapy (again, at a population level). The extent to which that advantage persists among transgender women who have undergone gender-affirming hormone therapy is, however, far less clear. Studies reach differing conclusions depending on factors such as the physical measure that is being assessed and the duration that participants have undertaken hormone therapy. Further, how these (often laboratory-based) measurements translate into competitive advantage is both difficult to determine and likely to differ from sport to sport.

188. There is extremely limited evidence yet available about safety issues that may arise if transgender athletes participate in line with their gender identity, and extremely limited evidence about whether female athletes with certain innate variations of sex characteristics could have a performance advantage.
189. Against that background, we consider that a reform of the Human Rights Act that requires total inclusion (allowing athletes to compete in line with their gender identity in all circumstances) is not supported by the evidence. On the other hand, a reform that would allow sports organisations to prohibit athletes from competing in line with their gender identity regardless of the circumstances is not supported either. Instead, the Human Rights Act should set out the underlying principles and leave it to sports organisations (at first instance) to determine how to apply those principles

within the context of their sport, based on the relevant evidence.

190. The criteria that we set out above for inclusion in the new exception reflect the main rationales underlying section 49(1), which are fair competition, safety and participation. A sporting body would need to establish that a restriction or exclusion is “reasonably required” on the basis of fair competition, safety or international rules. If the criteria could be met through a restriction, then excluding an athlete would not be reasonably required.
191. A challenge in designing an appropriate reform option in relation to this exception is that section 49(1) applies to competitive sporting activities at all levels, including community sports and elite sports.¹³ What amounts to fair competition may differ considerably depending on the nature and level of the competition. For example, what is required to secure fair competition in an Olympic qualifying event is not the same as for a fun run. For this reason, in order for a sports organisation to rely on the ‘fair competition’ limb of the exception, we propose they must consider both the level of the competition and the public interest in broad community participation in sport.

¹³ It does not, however, apply to sporting activities by children under the age of 12.

OTHER FORMS OF DISCRIMINATION: CHAPTER 16

192. A subpart in Part 2 of the Human Rights Act called “Other forms of discrimination” identifies some specific types of conduct as unlawful discrimination. It operates on a different logic from the ‘area of life’ subparts that we discuss in Chapters 9 to 15.
193. In Chapter 16, we address two issues relating to this subpart.

Sexual harassment

194. We consider the implications of our review for one current provision in the ‘Other forms of discrimination’ subpart: section 62, which relates to sexual harassment.
195. We do not recommend reform of section 62 as part of this review. We did not identify a clear need for reform based on feedback from submitters and, in any event, it would be difficult to achieve reform of section 62 within the limited scope of this review. While we are aware that sexual harassment can be a significant issue for people who are transgender or non-binary or who have an innate variation of sex characteristics, section 62 already covers sexual harassment that targets people in these groups.

Possibility of additional provisions

196. We also consider in Chapter 16 whether any new forms of discrimination should be added to the ‘Other forms of discrimination’ subpart. We focus primarily on one possibility on which we consulted: a provision to address harassment of people who are transgender or

non-binary or who have an innate variation of sex characteristics.

197. People who are transgender or non-binary or who have an innate variation of sex characteristics can face harassment in many areas of their daily life. Further, there are overseas precedents for a provision in anti-discrimination legislation prohibiting harassment based on these characteristics.
198. Ultimately, however, we do not recommend reform on this issue for two main reasons. The first is that, following our proposed reforms of section 21, existing laws will be able to respond to many situations in which people face harassment based on their gender identity or having an innate variation of sex characteristics. This will include the general discrimination provisions in the Human Rights Act.
199. The second is that it would be difficult to achieve a reform of this kind in a principled way within the limited scope of this review. Although the Human Rights Act already has a provision that makes harassment unlawful if it is on the ground of a person's colour, race or national or ethnic origins, there is no such provision relating to other prohibited grounds. For example, there is no harassment provision relating to sexual orientation. There is also limited research that compares rates of harassment among different groups in the community.
200. In the absence of consultation with other groups that may be affected by harassment, we do not consider we have a sufficient evidential basis to recommend that the grounds of gender identity and having an innate

variation of sex characteristics should be treated differently to other grounds. Whether the harassment provisions in the Human Rights Act should be expanded to cover a broader range of characteristics is something that could be considered on a general review of the Human Rights Act.

INTERVENTIONS ON CHILDREN WITH INNATE VARIATIONS OF SEX CHARACTERISTICS:

CHAPTER 17

201. We consulted in the Issues Paper on another possible addition to the ‘Other forms of discrimination’ subpart: a provision to restrict medical interventions on infants and children with innate variations of sex characteristics. In Chapter 17, we address that possibility.
202. The history of unnecessary medical interventions on infants and children with innate variations of sex characteristics raises significant human rights issues. Further, the issue continues to be a matter of deep concern to some people. There is limited information available about the extent to which unnecessary medical interventions continue, in part, because of areas of disagreement about what conditions count as ‘intersex conditions’ and about when interventions are medically necessary. However, some community groups and experts remain concerned that medical interventions on infants and children with innate variations of sex characteristics (including surgeries)

occur in situations that are not strictly necessary for the health of the child.

203. Although we acknowledge the significant human rights issues at stake in relation to this issue, we have identified some difficulties with addressing this issue through new provisions in the Human Rights Act.

204. First, for reasons we discuss below, we cannot recommend reforms as part of this review to Part 1A of the Human Rights Act (which regulates the public sector). Therefore, a provision in the Human Rights Act regulating this issue would not apply to the provision of public health care.

205. Second, detailed and specific regulation of medical interventions of this kind (as has been enacted in some other jurisdictions) would be out of place in the 'Other forms of discrimination' subpart and would not be achievable as part of this review. Detailed regulation of this kind should be preceded by a dedicated policy process to consult with affected communities and medical experts, and to fully analyse technical issues (such as which variations to cover and which medical interventions to permit or restrict).

206. The alternative is a more general provision which does not list specific variations or procedures. While this might have symbolic value, it would do little to resolve current uncertainty about when medical interventions are appropriate.

207. Third, there are other laws that regulate the medical profession and the circumstances in which medical

treatment can be provided. It is unclear how a provision in the Human Rights Act would fit alongside these laws. None of the matters currently listed in the ‘Other forms of discrimination’ subpart are technical matters of this kind related to a highly regulated profession.

208. Fourth, assisting parties to resolve complaints about medical practices likely falls outside the Human Rights Commission’s current expertise.

209. Finally, we consider that a legislative reform on this issue at the present time would cut across work that is currently being undertaken in government to develop a rights-based approach to intersex health care.

210. Therefore, we consider that, if legislative reform on this issue is desirable, it should take place at a later point in time and outside of the Human Rights Act.

PART 1A OF THE HUMAN RIGHTS ACT: CHAPTER 18

211. Part 1A of the Human Rights Act sets out the anti-discrimination rules that apply to the government or those otherwise performing public functions. The rules in Part 1A are drawn from the NZ Bill of Rights. An act or omission will be in breach of Part 1A if it involves a limit on the right to freedom from discrimination in section 19 of the NZ Bill of Rights, and if that limit is not demonstrably justified under section 5 of the NZ Bill of Rights.

212. In Chapter 18, we consider the implications of our proposed reforms of section 21 for Part 1A and explain why we are satisfied those implications are appropriate.
213. We do not consider the possibility of reforms of Part 1A itself. The rules in Part 1A are designed to ensure that the anti-discrimination obligations that apply to the public sector are identical under the Human Rights Act and the NZ Bill of Rights. It would not be appropriate for us to revisit that policy within the narrow confines of this review.

Implications for policy development

214. The reforms we propose of section 21 will clarify that public sector bodies cannot discriminate on the basis of gender identity or having an innate variation of sex characteristics unless that discrimination can be justified under section 5 of the NZ Bill of Rights. Although this will have implications for policy development, it will not mean that policies can never draw distinctions based on these characteristics. Rather, it will require officials to be aware of potential discrimination and to consider whether there are less discriminatory alternatives that might achieve any legitimate government purpose.
215. We understand that officials are already considering these issues in their policy development as a result of the Crown Law opinion we discussed earlier. Amending section 21 may therefore make little difference in practice. We are satisfied, in any event, that it is appropriate for officials to be considering these matters in policy development. We have not identified a good

reason why discrimination based on a person's gender identity or having an innate variation of sex characteristics should be treated differently from other forms of discrimination in this regard.

Implications for complaints against government

216. The reforms we propose will also clarify that people can complain to the Human Rights Commission and the Human Rights Review Tribunal about public sector discrimination that is based on their gender identity or having an innate variation of sex characteristics. As the Human Rights Commission already accepts discrimination complaints on this basis, reform of section 21 may not represent a significant change in practice. However, it will put the legal position beyond doubt and may lead to more complaints being made.

217. We are satisfied it is appropriate for people who are transgender or non-binary or who have an innate variation of sex characteristics to have the same opportunity as other protected groups to question government conduct using the informal dispute resolution processes available through the Human Rights Act.

The rules in Part 1A

218. We are also satisfied that it is appropriate for the broad tests in Part 1A of the Human Rights Act to apply to any assessment of public sector discrimination based on the new grounds we propose. These are the tests that Parliament has decided should apply to public sector discrimination. The tests in Part 1A enable a fluid and

context-specific assessment of when differences in treatment by public sector agencies constitute unlawful discrimination.

219. In Chapter 18, we illustrate the way Part 1A operates by reference to two issues raised by submitters: placement of transgender prisoners and access to gender-affirming health care. We suggest that, in both these contexts, Part 1A will enable government agencies (and a court or tribunal if there is a legal challenge) to balance appropriately all relevant rights and interests, based on relevant evidence.

IMPLICATIONS FOR OTHER LAWS: CHAPTER 19

220. In Chapter 19, we consider the implications of our review for 10 New Zealand laws that rely on the prohibited grounds of discrimination in section 21 of the Human Rights Act to dictate the scope of certain rights or obligations. We explain why we are satisfied those implications are appropriate.
221. We also consider whether to recommend amendments to any of these laws as part of this review. We would only recommend amendments to other legislation if we considered that was needed to address significant incoherence or ambiguity that would otherwise result from our proposed reforms. In Chapter 19, we identify one issue that we consider meets this threshold. Section 105 of the Employment Relations Act 2000 refers to the prohibited grounds in section 21 of the Human Rights Act and then lists the current grounds. Therefore, if new grounds are added to section 21 of the Human Rights

Act, an amendment to section 105 will be required to avoid an internal inconsistency.

OTHER MATTERS: CHAPTER 20

222. In Chapter 20, we discuss some other matters on which we sought or received feedback:

- (a) whether reforms are needed of the provisions in the Human Rights Act that address the membership, powers and functions of the Human Rights Commission and dispute resolution under the Act;
- (b) whether public education is needed alongside Human Rights Act reform;
- (c) the use of gendered pronouns in the Human Rights Act; and
- (d) the wording of a provision relating to pregnancy and childbirth.

223. We make recommendations in relation to gendered pronouns and the wording of the provision about pregnancy and childbirth. We make no other recommendations.

Gendered pronouns in the Human Rights Act

224. Some provisions in the Human Rights Act use the male and female gendered pronouns “him” or “her”, “he” or “she” or “his and her”. We recommend these should be replaced with gender-neutral language. This is consistent with the overall objective of our review, which is to clarify protections in the Human Rights Act

for people who are transgender or non-binary or who have an innate variation of sex characteristics. It would be incongruent for an Act that extends anti-discrimination protection to people who identify outside the gender binary to use binary pronouns that do not include them.

225. Gender-neutral language is more inclusive and accessible and will communicate clearly that the Human Rights Act's protections apply to everyone. Contrary to the views of some submitters, it will not limit existing rights under the Human Rights Act in any way.

Matters relating to pregnancy and childbirth — section 74

226. Section 74 of the Human Rights Act provides that preferential treatment by reason of a woman's pregnancy or childbirth or a person's responsibility for the care of children or other dependants is not a breach of Part 2 of the Human Rights Act.
227. We recommend that this section should be amended to clarify that it applies to anyone who is pregnant or gives birth. This reform would be consistent with the rationale underlying section 74, which is to allow preferential treatment that is needed because a person is pregnant or giving birth. Although most people who become pregnant and give birth are women, not all are. Needs associated with pregnancy or childbirth exist regardless of whether the person who is pregnant identifies as a woman.

228. We acknowledge many women have a special connection with pregnancy as a matter of identity and because it has been the cause of longstanding historical and contemporary discrimination. We agree with those submitters who told us that it is important that the Human Rights Act continues to provide protection for women who are pregnant or give birth. Our proposed reform would not remove that protection for women. It would simply provide greater accessibility and certainty.

229. We understand that some people particularly dislike gender-neutral language that refers to body parts such as “people with uteruses” or “people with a cervix”. We explain in Chapter 20 that law reform on this issue can be achieved without using language of this kind.
