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**Te Whanganui-a-Tara, Aotearoa**

**Wellington, New Zealand**

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



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

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

***Kia whanake ngā ture o Aotearoa mā te arotake motuhake***

***Better law for Aotearoa New Zealand through independent review***

**The Commissioners are:**

Amokura Kawharu — Tumu Whakarae | President

Claudia Geiringer — Kaikōmihana | Commissioner

Geof Shirtcliffe — Kaikōmihana | Commissioner

The title of this report was developed for Te Aka Matua o te Ture | Law Commission by the translation team at Aatea Solutions Limited and was finalised in conjunction with the Law Commission’s Māori Liaison Committee.

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| Hon Paul Goldsmith  Minister Responsible for the Law Commission  Parliament Buildings  WELLINGTON |
| 11 August 2025 |
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| Tēnā koe Minister |
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**NZLC R150 — 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**

I am pleased to submit to you the above report under section 16 of the Law Commission Act 1985.

Nāku noa, nā



**Amokura Kawharu**

Tumu Whakarae | President



He mihi

E te tai whakarunga, e te tai whakararo

E karekare mai nei ki uta, e riporipo atu rā ki tai

E ngā wai tuku kiri o nunui mā

E ngā toka tū moana

Tēnā koutou, tēnā tātou katoa.

Tēnei mātou o Te Aka Matua o te Ture e tangi nei ki a rātou kua rūpeke atu. Heoti anō e mihi ana ki a koutou, ki a tātou ngā waihotanga e rapu nei i ngā ara kia marewa ai tātou ki te Hawaiki e ingoingo ana ko tēnā, ko tēnā, ko ia tangata e.

E mihi ana ki ia tangata e kawea ana e ngā au o mua rā, o nāianei rangi, o haere ake. Kia toka tū te mana o te tangata, o ia tangata. Waihoki e mihi ana ki te hunga i tāpaetia ngā kōrero, ngā whakaaro, ngā manako hoki mō tēnei kaupapa. Ko tā mātou he āta whakaaroaro, he tuitui, ā, hei te mutunga iho, he whakaū hoki i te hirahira o ngā take e tautetia nei i roto i tēnei pūrongo ki te iwi whānui.

Nō reira, ka herea ake tēnei ki te kōrero e kīia ana he tapu te tangata, he mana tangata. Mauri ora.

Foreword

The name of this report — Ia Tangata — has several meanings and connotations. First and foremost, it means ‘each and every person’. This reflects the human rights subject matter of this review. In human rights law, an important starting point is the dignity and self-worth of every person. This meaning of Ia Tangata has been a continuing reminder to us that many people in Aotearoa New Zealand have an interest in the issues we canvas in this report and that we have a responsibility to consider the different perspectives that are shared with us.

Another meaning of Ia Tangata is ‘the flow of personhood’. Additionally, ‘Ia’ itself is the gender-neutral third person pronoun — the only third person pronoun in te reo Māori. That meaning of “Ia” is relevant to this review because it reflects the fact that gender is viewed in different ways within the diverse communities that make up Aotearoa New Zealand.

In this report, we recommend a package of reforms to the Human Rights Act 1993 to provide better protection from discrimination to people who are transgender or non-binary or who have an innate variation of sex characteristics. We also make recommendations to address some implications of reform for other relevant rights and interests. For the most part, these reforms will result in quite minor changes to current practice. They will, however, provide much needed clarification of the rights of some of New Zealand’s most vulnerable communities, resolve significant areas of uncertainty and better enable people and organisations to understand their obligations under the Human Rights Act.

The review has been undertaken during a time of significant change in how issues of gender are viewed in law, policy and wider society — both in Aotearoa New Zealand and overseas. While it has been important for us to understand this wider context, our review has a narrow focus on the Human Rights Act, which is a law about discrimination.

The Human Rights Act sets general rules about when people and organisations can treat other people differently based on a personal characteristic. It is not the role of Te Aka Matua o te Ture | Law Commission to settle societal debates about the meaning of sex and gender, to answer complex questions of medical ethics or to resolve all policy issues that affect people who are transgender or non-binary or who have innate variations of sex characteristics.

This report does not, for example, suggest an answer to issues such as when young people should have access to puberty blockers, when transgender women should be housed in women’s prisons or the appropriate content of relationships and sexuality education in schools. Reform of the Human Rights Act would simply clarify that policy settings on these and other issues should be consistent with anti-discrimination norms.

I acknowledge with gratitude the many people and groups who gave the Law Commission feedback as part of this review. I appreciate the importance of these issues to many people who engaged with us, and I am grateful for the efforts people made to share their perspectives. We have listened to all of them.

A blue text on a black background

AI-generated content may be incorrect.

**Amokura Kawharu**

Tumu Whakarae | President

Acknowledgements

Te Aka Matua o te Ture | Law Commission gratefully acknowledges all those who helped us or engaged with us in this review.

We thank the many people and groups who met with us, made submissions, or gave us other feedback. We acknowledge that some people shared information that is sensitive or deeply personal, and that many people shared perspectives on issues that were of deep concern to them. The feedback we received during the course of this review has greatly enriched our analysis and the quality of our recommendations.

We acknowledge with gratitude the contribution of our Expert Advisory Group: Ahi Wi-Hongi; Professor Claire Charters; Frances Joychild KC; Jack Byrne; Jelly O’Shea; Mani Bruce Mitchell MNZM; Professor Paul Rishworth MBE KC; Phylesha Brown-Acton MNZM; and Susan Hornsby-Geluk.

We express again our gratitude to the pūkenga who attended and contributed to a wānanga we held to discuss Māori perspective on issues in this review (and who we named in the Issues Paper). We are also grateful for the support and guidance of the Law Commission’s Māori Liaison Committee.

We emphasise that the views we express in this report are those of the Commission and not necessarily those of the people who have assisted our work.

The Commissioner responsible for this project is Professor Claudia Geiringer FRSNZ.

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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]](#footnote-2) 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 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:
   * + 1. ‘gender identity or its equivalents in the cultures of the person’;[[2]](#footnote-3) and
       2. ‘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 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:
   * + 1. we were only asked to review the Human Rights Act, not any other legislation;
       2. our review is about anti-discrimination law and not human rights law more generally;
       3. we have not been asked to conduct a general review of the Human Rights Act; and
       4. 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]](#footnote-4) 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. A full list of our recommendations follows immediately after.

## About this review: Chapters 1 and 2

1. 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.
2. In Chapter 2, we:
   * + 1. 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;
       2. 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;
       3. 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
       4. explain what we have learned about experiences of disability for people in these groups.
3. 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

1. 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:
   * + 1. The coherence of the Human Rights Act.
       2. 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.
       3. 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.
       4. The needs, perspectives and concerns of New Zealanders.
       5. Evidence-led law reform.
       6. 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.
2. 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.
3. 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.
4. 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.
5. 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

1. 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.
2. 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

1. 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.
2. 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

1. 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:
   * + 1. people in a particular group have experienced a history of discrimination, disadvantage, prejudice, stigma or stereotyping;
       2. 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;
       3. discriminating against someone on that basis is particularly harmful to human dignity;
       4. protecting people from discrimination on that basis is consistent with developments in international law;
       5. 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
       6. 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).
2. 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:
   * + 1. 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.
       2. 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.
       3. 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.
       4. 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.
       5. 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.
       6. 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

1. 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.
2. 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.
3. 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.
4. 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.
5. 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

1. 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.
2. 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.
3. 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.
4. 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.
5. 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]](#footnote-5) 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

1. 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.
2. 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.
3. 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.
4. 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”.
5. 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).
6. 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.
7. 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.
8. 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.
9. We make no specific recommendations for reform of the Human Rights Act in relation to free speech issues.
10. 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.
11. In Chapter 6, we also consider some concerns submitters raised with us about:
    * + 1. the need to protect acts of conscience, including by healthcare providers; and
        2. 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.
12. We make no recommendations for reform on these issues either.

## Wording of new grounds: Chapter 7

1. 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

1. 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:
   * + 1. gender expression; and
       2. the relationship between a person’s gender identity and their sex assigned at birth.
2. 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.
3. 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

1. 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.
2. 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

1. 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.
2. 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.
3. 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

1. 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.
2. 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.
3. Some key issues we address in Chapter 8 are as follows.

### How Part 2 works

1. Chapter 8 begins with an explanation of how Part 2 of the Human Rights Act operates. In brief:
   * + 1. 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.
       2. 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.
       3. 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).
       4. 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.
       5. 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

1. 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.
2. 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.
3. 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

1. 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.
2. 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.
3. 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.
4. Some key points we discuss in Chapter 8 are as follows.

#### Rationales underlying the sex exceptions

1. 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:
   * + 1. to advance a substantive view of equality by permitting sex-separated facilities and services that may be needed for women to flourish;
       2. to protect competing rights and interests that Parliament considered more important than equal treatment of women in the particular circumstances;
       3. to advance safety; and
       4. to ensure that activities in people’s homes are not regulated by anti-discrimination law.

#### Bodily privacy

1. 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.
2. 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]](#footnote-6) 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.
3. 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.
4. Where privacy issues of this kind have arisen in this review, we have weighed them carefully when evaluating potential reform options, alongside all other considerations that we have identified as relevant to the specific issue.

#### Case-by-case approach

1. 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.
2. 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.
3. The recommendations we make in relation to the sex exceptions in later chapters can be grouped into three categories:
   * + 1. 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.
       2. 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.
       3. 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

1. We explain in Chapter 8 our general approach to identifying options for reform of the Part 2 sex exceptions. For example, we explain that:
   * + 1. 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]](#footnote-7)
       2. 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

1. 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

1. 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 important to take into account if our recommendations are implemented.

## The ‘area of life’ subparts: Chapters 9 to 12

1. In Chapters 9 to 12, we review the Part 2 areas of life that are most affected by this review.
   * + 1. In Chapter 9, we consider a subpart that relates to employment matters.
       2. In Chapter 10, we consider two subparts relating to: access to places, vehicles and facilities; and provision of goods and services.
       3. In Chapter 11, we consider a subpart that relates to land, housing and accommodation.
       4. In Chapter 12, we consider a subpart that relates to educational establishments.

### Review of discrimination protections in each area of life

1. At the start of each of these chapters, we consider the discrimination protections that relate to the relevant subpart.
2. 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.
3. 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.
4. 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

1. 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]](#footnote-8)

#### Exception for work performed outside New Zealand — section 26

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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)

1. 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).
2. 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.
3. 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.
4. 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)

1. 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.
2. We recommend that this section be amended to allow for differences of treatment by reason of both the new prohibited grounds we propose.
3. 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.
4. 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)

1. 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.
2. 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.
3. 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.
4. 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]](#footnote-9)
5. 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)

1. 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.
2. 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”.
3. We recommend that both these exceptions be amended to allow for differences of treatment based on both proposed new grounds.
4. 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.
5. 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.
6. 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

1. 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]](#footnote-10)

#### Skill exception — section 47

1. 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.
2. 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.
3. 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:
   * + 1. the nature of a skill varies according to whether the customer or client has particular physical characteristics; and
       2. the person exercises the skill in relation to particular physical characteristics in accordance with their normal practice.
4. We consider that, properly interpreted, section 47 already only applies if the nature of a skilldiffers 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.
5. 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.
6. 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

1. 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.
2. 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.
3. 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.
4. 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)

1. 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.
2. 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.
3. 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.
4. 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.
5. 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

1. 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]](#footnote-11)

#### Shared accommodation exception — section 55

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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)

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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

1. 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]](#footnote-12)

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

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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

1. 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

1. 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.
2. We recommend that section 27(4) be amended to allow differences of treatment based on the new prohibited ground of gender identity.
3. 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.
4. 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.
5. 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

1. 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.
2. 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.
3. 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.
4. 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.
5. 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

1. 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.
2. 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

1. 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.
2. 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.
3. 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

1. 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

1. 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.
2. 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.
3. 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.
4. 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’.
5. 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.
6. 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.
7. 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.
8. 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]](#footnote-13) Research also suggests that people who are transgender and non-binary experience sexual violence at very high rates.
9. 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 apply to issues of gender identity is in a state of transition.
10. 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.
11. 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.
12. 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

1. 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.
2. 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

1. 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

1. 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.
2. 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:
   * + 1. secure fair competition between participants, having regard to the level of competition and the public interest in broad community participation in sporting activities;
       2. ensure the physical safety of all participants; or
       3. comply with an international rule that imposes a requirement in relation to the particular competitive sporting activity.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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]](#footnote-14) 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.

## Other forms of discrimination: Chapter 16

1. 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.
2. In Chapter 16, we address two issues relating to this subpart.

### Sexual harassment

1. 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.
2. 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

1. 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.
2. 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.
3. 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.
4. 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.
5. 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

1. 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.
2. 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.
3. 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.
4. 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.
5. 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).
6. 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.
7. 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.
8. Fourth, assisting parties to resolve complaints about medical practices likely falls outside the Human Rights Commission’s current expertise.
9. 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.
10. 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

1. 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.
2. 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.
3. 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

1. 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.
2. 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

1. 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.
2. 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

1. 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.
2. 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

1. 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.
2. 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

1. In Chapter 20, we discuss some other matters on which we sought or received feedback:
   * + 1. 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;
       2. whether public education is needed alongside Human Rights Act reform;
       3. the use of gendered pronouns in the Human Rights Act; and
       4. the wording of a provision relating to pregnancy and childbirth.
2. 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

1. 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.
2. 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

1. 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.
2. 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.
3. 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.
4. 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.

Recommendations

## Chapter 4: The core case for reform

1. Section 21 of the Human Rights Act 1993 should be amended to clarify that the Human Rights Act covers discrimination that is due to being transgender or non-binary or having an innate variation of sex characteristics.

## Chapter 7: Wording of new grounds

1. Section 21 of the Human Rights Act 1993 should be amended to add a new ground of ‘gender identity or its equivalents in the cultures of the person’. The ground should be defined to include:
   1. gender expression; and
   2. the relationship between a person’s gender identity and their sex assigned at birth.
2. Section 21 of the Human Rights Act 1993 should be amended to add a new ground of ‘having an innate variation of sex characteristics’.

## Chapter 9: Employment

1. Section 26 of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new ground of gender identity.
2. Section 27(1) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.
3. Section 27(2) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.
4. Section 27(3)(a) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new ground of gender identity.
5. Sections 28(1) and 39(1) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.

## Chapter 10: Goods, services, facilities, places and vehicles

1. Section 47 of the Human Rights Act 1993 should be redrafted to specify that a person does not commit a breach of section 44 by reason of the grounds of sex, gender identity or having an innate variation of sex characteristics if:
   1. the nature of a skill varies according to whether a customer or client has particular physical characteristics; and
   2. the person exercises the skill in relation to particular physical characteristics only in accordance with their normal practice.
2. Section 48(1) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.
3. Section 70(2) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.

## Chapter 11: Land, housing and accommodation

1. The Human Rights Act 1993 should be amended to specify that the sex exception in section 55 of the Human Rights Act does not permit the different treatment of a person whose gender identity aligns with the sex for which accommodation is being provided unless that is reasonably required to preserve the privacy or to protect the welfare of any occupant or potential occupant of the accommodation.
2. The Human Rights Act 1993 should be amended to specify that the exception in section 27(3)(b) of the Human Rights Act does not permit the different treatment of a person whose gender identity aligns with the sex for which accommodation is being provided unless that is reasonably required to preserve the privacy of any occupant or potential occupant of the accommodation.
3. Section 27(5) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new ground of gender identity.

## Chapter 12: Education

1. Section 58 of the Human Rights Act 1993 should be amended to specify that section 58(1) 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.

## Chapter 13: Courses and counselling

1. Section 27(4) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new ground of gender identity.
2. Section 45 of the Human Rights Act 1993 should be amended to allow the holding of courses or the provision of counselling to be restricted to persons of a particular gender identity where highly personal matters are involved and where it is reasonably required to achieve the purposes of the course or counselling.
3. Section 59 of the Human Rights Act 1993 should be amended to allow the holding of courses or the provision of counselling to be restricted to persons of a particular gender identity where highly personal matters are involved and where it is reasonably required to achieve the purposes of the course or counselling.

## Chapter 14: Single-sex facilities

1. Section 43 of the Human Rights Act 1993 should be amended to specify that section 43(1) cannot be relied on to refuse a person access to or use of a single-sex facility that aligns with their gender identity.
2. Section 46 of the Human Rights Act 1993 should be amended to specify that it cannot be relied on to refuse a person access to or use of a single-sex facility or service that aligns with their gender identity.
3. Recommendations 19 and 20 should not apply to circumstances covered by Recommendation 12 relating to shared accommodation.
4. There should be new exceptions to sections 42 and 44 of the Human Rights Act 1993 that operate in the same circumstances outlined in relation to Recommendation 12.

## Chapter 15: Competitive sports

1. The Human Rights Act 1993 should be amended to specify that sports organisations cannot rely on section 49(1) of the Human Rights Act 1993 to treat a person differently by reason of 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 except to the extent that is reasonably required to:
   1. secure fair competition between participants having regard to the level of the competition and the public interest in broad community participation in sporting activities; or
   2. ensure the physical safety of all participants; or
   3. comply with an international rule that imposes a requirement in relation to the particular competitive sporting activity.
2. This new provision should clarify that, except in these circumstances, section 49(1) does not permit a person to be excluded from a single-sex competitive sporting activity if the person’s gender identity aligns with that sex.

## Chapter 19: Implications for other laws

1. Section 105 of the Employment Relations Act 2000 should be amended to address the internal inconsistencies that result from adding new grounds to section 21 of the Human Rights Act 1993 (Recommendations 1 to 3).

## Chapter 20: Other matters

1. Male and female gendered pronouns “him or her”, “his or her” or “he or she” in the Human Rights Act 1993 should be replaced with gender-neutral language.
2. Section 74 of the Human Rights Act 1993 should be amended to clarify that it applies to anyone who is pregnant or who is giving birth.

CHAPTER 1

# Introduction

* 1. This is the final report in the review that Te Aka Matua o te Ture | Law Commission was asked to undertake of 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.[[14]](#footnote-15)
  2. We recommend amendments to the Human Rights Act to specify more clearly that people in Aotearoa New Zealand are protected from discrimination that is due to:
     + 1. their gender identity (or any equivalents to gender identity in the person’s culture);[[15]](#footnote-16) and
       2. the fact they have an innate variation of sex characteristics.
  3. We also recommend other reforms of the Human Rights Act to ensure clarity, certainty and coherence and to ensure the Act reflects a proper balance of rights and interests. Primarily, these involve amendments to exceptions in the Act that allow for different treatment based on a person’s sex in certain circumstances.
  4. The reforms we propose will result, for the most part, in quite minor changes to current practice. The New Zealand government already acts on the assumption that discrimination that is linked to a person’s gender identity or sex characteristics is unlawful because it amounts to sex discrimination.[[16]](#footnote-17) Te Kāhui Tika Tangata | Human Rights Commission accepts complaints on this basis and some other public sector agencies do likewise. In many cases, unfair behaviour that could give rise to a complaint of discrimination is also covered by other laws (such as those relating to workplace bullying).
  5. The limited survey evidence that is available suggests that most New Zealanders do not consider it appropriate to discriminate against people because of their gender identity.[[17]](#footnote-18) In consultation, we learned that many organisations are already doing their best to ensure fair treatment and fair access to services for all New Zealanders.
  6. The reforms we propose are therefore not radical. Nevertheless, we consider they are necessary and desirable. There is a long history of marginalisation of people who are gender diverse or who have an innate variation of sex characteristics. Survey evidence indicates that significant prejudice remains.[[18]](#footnote-19) Further, the extent of current legal protection from discrimination is, at best, unclear. It is uncertain exactly how the protections in the Human Rights Act apply to people who are transgender or non-binary or who have an innate variation of sex characteristics. It is also unclear how the exceptions in the Act that, in certain circumstances, allow for people to be treated differently on the basis of their sex might apply in these situations.
  7. This position is unsatisfactory. Discrimination that is linked to a person’s gender identity or to the fact they have an innate variation of sex characteristics is unacceptable in a modern democratic society such as Aotearoa New Zealand. The law should state this clearly and unambiguously — just as it does in relation to many other prohibited grounds of discrimination. The absence of clear protection inhibits access to justice for people who are transgender or non-binary or who have an innate variation of sex characteristics.
  8. Legal ambiguity does not just affect those who need protection from discrimination. It also affects people and organisations who have obligations under the Human Rights Act such as landlords, business owners and employers. The Act provides detailed rules to guide the private sector in these situations so that they can organise their affairs accordingly.[[19]](#footnote-20) However, the way those detailed rules apply to differences in treatment linked to a person’s gender identity or sex characteristics is currently uncertain.
  9. Although we conclude in this report that amendments to section 21 of the Human Rights Act are necessary and desirable, we stress that the recommendations we present in this report are intended as a coherent package of reform. Amendments to section 21 need to be accompanied by other reforms, both to clarify the implications of adding new grounds for the Act as a whole and to ensure that rights and interests are fairly balanced. If that does not happen, the costs of legislating may outweigh the benefits.

## Background to the review

* 1. The Human Rights Act states the circumstances in which it is unlawful to discriminate in Aotearoa New Zealand. Discrimination involves treating a person differently from, and worse than, others for a legally unacceptable reason. The Human Rights Act specifies the kinds of behaviour or activities that amount to unlawful discrimination and in what circumstances.
  2. One of the ways the Human Rights Act does this is by listing some “prohibited grounds of discrimination” in section 21. These are the personal traits, characteristics or beliefs that are protected under New Zealand’s anti-discrimination law.[[20]](#footnote-21) To succeed in a complaint of discrimination under the Human Rights Act, the difference in treatment must be due to one or more of these prohibited grounds.[[21]](#footnote-22)
  3. Some other statutes, including the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights), also draw on the prohibited grounds in section 21 of the Human Rights Act to establish the scope of specific protections from discrimination contained in those other Acts.[[22]](#footnote-23) The list of prohibited grounds in section 21 is therefore an important gateway to protection from discrimination under New Zealand law.
  4. The prohibited grounds of discrimination have evolved gradually. New Zealand’s first anti-discrimination statute, the Race Relations Act 1971, contained only three prohibited grounds: race; colour; and ethnic or national origin. Four further grounds received protection in the Human Rights Commission Act 1977.[[23]](#footnote-24) When the Human Rights Act was enacted, replacing both these earlier statutes, it contained a total of 13 grounds of discrimination.[[24]](#footnote-25) No grounds have been added since 1993.
  5. None of the prohibited grounds in section 21 explicitly prohibit discrimination that is due to a person being transgender or non-binary or having an innate variation of sex characteristics. These terms do not appear in section 21. Nor do related concepts such as gender, gender identity, gender expression, sex characteristics or intersex status.
  6. There have been several attempts dating back at least 35 years to amend New Zealand’s anti-discrimination legislation to protect people who are transgender (although attempts to protect people who have an innate variation of sex characteristics are more recent).[[25]](#footnote-26) One reason law reform may not have been prioritised is that, in 2006, Te Tari Ture o te Karauna | Crown Law issued an opinion saying that discrimination linked to a person’s gender identity is already covered by section 21 because it amounts to discrimination on the prohibited ground of sex.[[26]](#footnote-27) The New Zealand government has maintained this position since then. Some more recent government statements have suggested people with innate variations of sex characteristics are protected on the same logic.[[27]](#footnote-28) The Human Rights Commission receives and mediates complaints of discrimination on this basis (as do some other public agencies).
  7. Despite this, no New Zealand court or tribunal has yet confirmed that the Human Rights Act protects people from discrimination linked to their gender identity or to a variation in their sex characteristics. Many people continue to hold concern that protection from discrimination on these bases is not secure.[[28]](#footnote-29)
  8. In 2021, the Government published a consultation document that, among other things, proposed to amend section 21 to “clarify that trans, gender diverse, and intersex people are protected from discrimination”. Specifically, the Government proposed to define the prohibited ground of sex to include “sex characteristics or intersex status” and to add a new prohibited ground of “gender including gender expression and gender identity”.[[29]](#footnote-30)
  9. Following public consultation, this proposal did not proceed. Instead, in November 2022, the then Minister of Justice wrote to the Law Commission requesting we undertake this review.
  10. Subsequently, in August 2023, a member’s Bill (sponsored by Dr Elizabeth Kerekere MP) was drawn from the ballot.[[30]](#footnote-31) It seeks to amend section 21 to add two new prohibited grounds: “gender identity or expression” and “variations of sex characteristics”. Dr Kerekere left Parliament at the October 2023 general election. The Bill is now sponsored by Debbie Ngarewa-Packer MP. On 12 February 2025, the Business Committee agreed to postpone the first reading of the Bill until further notice.[[31]](#footnote-32)

## Scope of review and key issues

* 1. In accordance with our terms of reference, our task in this review is to advise the Government whether the current wording of the Human Rights Act adequately protects people who are transgender or non-binary or who have an innate variation of sex characteristics from discrimination and, if not, what amendments should be made.
  2. In this section, we explain briefly how the Human Rights Act works and the issues that we have considered in this review.

### Brief introduction to the Human Rights Act

* 1. As noted above, the Human Rights Act specifies the circumstances in which behaviour or activities amount to unlawful discrimination in Aotearoa New Zealand. It does this through two sets of rules — one regulating the public sector and one regulating the private sector.

#### Rules that apply to the public sector (Part 1A)

* 1. Part 1A of the Human Rights Act applies to government agencies and others carrying out public functions.[[32]](#footnote-33) The rules in Part 1A are drawn from and replicate rules in the NZ Bill of Rights. Section 19 of the NZ Bill of Rights states a right to “freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993”. Section 19 is qualified by section 5 of the NZ Bill of Rights, which states that it is permissible to place reasonable limits on rights in the NZ Bill of Rights as long as they are “prescribed by law” and “demonstrably justified in a free and democratic society”.
  2. Under Part 1A of the Human Rights Act, government acts, omissions, policies and practices that constitute unjustified discrimination under the NZ Bill of Rights are also in breach of the Human Rights Act.[[33]](#footnote-34) This ensures that Human Rights Act complaints mechanisms can be relied on in cases involving public sector discrimination.
  3. We explain how Part 1A works in more detail in Chapter 18.

#### Rules that apply to the private sector (Part 2)

* 1. A second set of rules in the Human Rights Act applies to people and organisations that are not part of government and are not exercising public functions.[[34]](#footnote-35) These are in Part 2.
  2. The obligations stated in Part 2 of the Human Rights Act are far more confined than those placed on the public sector. Unless they are exercising public functions (bringing them within Part 1A), private individuals and organisations generally only have obligations under the Human Rights Act when they participate in certain public-facing activities that are set out in Part 2.[[35]](#footnote-36) Some examples are employing staff, selling or renting out a house, or supplying goods, services or facilities to the public. This limited focus means substantial aspects of people’s private lives are beyond the reach of the Human Rights Act. For example, the Act does not seek to regulate who people live with or socialise with.[[36]](#footnote-37)
  3. Even in these public-facing areas of life, Part 2 does not state a general right to freedom from discrimination. Instead, it specifies the acts and omissions that are unlawful if they are done “by reason of” one of the prohibited grounds of discrimination. For example, section 22(1)(a) of the Human Rights Act states that, if a job applicant is qualified for work of any description, it is unlawful for an employer to refuse or omit to employ them by reason of a prohibited ground.
  4. Part 2 of the Human Rights Act also outlines exceptions — specific situations in which acts or omissions that fall within one of these protections from discrimination are nevertheless lawful. These exceptions often only apply to one prohibited ground of discrimination or to a small handful. For example, an exception in the Act that allows insurers to offer differential terms or conditions in certain circumstances only applies to the prohibited grounds of sex, age and disability.[[37]](#footnote-38)
  5. The exceptions in Part 2 of the Human Rights Act are key mechanisms by which the Act distinguishes between fair and unfair differences in treatment and takes into account competing rights and interests.

#### Provisions that establish complaints mechanisms (Part 3)

* 1. The Human Rights Act also establishes mechanisms for people to complain about discrimination.[[38]](#footnote-39) If someone believes their rights under Part 1A or Part 2 have been violated, they can complain to the Human Rights Commission. Its functions include assisting parties to resolve disputes in “the most efficient, informal, and cost-effective manner possible”.[[39]](#footnote-40) For example, the Human Rights Commission might provide the parties with information, offer expert problem-solving support or convene a mediation.[[40]](#footnote-41)
  2. In its submission to us, the Human Rights Commission said its role is to be an impartial mediator, providing a forum for parties to resolve disputes. It said its dispute resolution processes are voluntary and any outcomes are reliant on the parties mutually agreeing.[[41]](#footnote-42) Examples of outcomes that parties have agreed on at dispute resolution meetings include an apology, a financial payment, improved organisational policies, an agreement to improve access to goods, services or facilities, and an agreement to provide staff training.[[42]](#footnote-43)
  3. If a complainant is not satisfied with the outcome of dispute resolution through the Human Rights Commission, they can take a case to Te Taraipiunara Mana Tangata | Human Rights Review Tribunal. Statutory tribunals such as this one exist to provide a forum for resolution of disputes that is cheaper, less formal and more accessible than a court.[[43]](#footnote-44) The Tribunal can determine whether discrimination has occurred and can award remedies such as a declaration, restraining order or monetary damages.[[44]](#footnote-45)

#### Other technical provisions (Parts 1 and 4)

* 1. The Human Rights Act also contains provisions relating to more technical matters. For example, it sets out the membership, functions and powers of the Human Rights Commission and the Human Rights Review Tribunal and the process for resolving complaints to either body.[[45]](#footnote-46) We explore the limited implications of this review for these other provisions in Chapter 20.

### Key issues in the review

* 1. The key question in this review is whether section 21 of the Human Rights Act (the list of prohibited grounds of discrimination) should be amended to clarify that the Act applies to discrimination that is due to a person being transgender or non-binary or having an innate variation of sex characteristics. We conclude in this report that such amendments are necessary and desirable. We also make recommendations on how section 21 could be amended to achieve this.
  2. When forming these recommendations, we considered the implications of reform from as many perspectives as possible. For example, we considered the implications for te ao Māori, for the rights and freedoms of other people in Aotearoa New Zealand (including those rights and freedoms protected by the NZ Bill of Rights) and for individuals and organisations in both the public and the private sector. We address the relevant implications of reform throughout the report.
  3. As we explain in more detail in later chapters, many sections in the Human Rights Act state rights and obligations that apply to all the prohibited grounds of discrimination. For example, sections 22 and 23 of the Human Rights Act set out actions that are unlawful for employers if done by reason of any prohibited ground of discrimination.
  4. Although we have considered the implications of reform of section 21 for general provisions of this kind, we have not ultimately recommended amendments to any of them. Amending general provisions of this kind would have implications well beyond the scope of the review and would require a much broader consultation exercise.
  5. On the other hand, some provisions in the Human Rights Act focus on specific grounds of discrimination. These are the Part 2 exceptions that, as explained earlier, specify circumstances in which it is lawful for a private person or organisation to treat someone differently based on a prohibited ground when engaging in an activity otherwise regulated by Part 2.
  6. A principal focus of this report is those Part 2 exceptions that allow different treatment based on a person’s sex.[[46]](#footnote-47) How these exceptions apply when a person’s gender identity is different from the sex they were assigned at birth is currently unclear. Because each of these exceptions has a different rationale and engages different policy considerations, it is important to address that question on an exception-by-exception basis. We do not think applying a single rule to these exceptions would lead to a fair result that appropriately balances the rights and interests of all New Zealanders.
  7. We have therefore reviewed each of the Part 2 sex exceptions to consider whether and how it should apply to the new grounds we propose. We recommend amendments to the Act to promote clarity and coherence in the application of these exceptions and to ensure the Act reflects an appropriate balance of relevant rights and interests.

## Limitations on the scope of the review

* 1. The recommendations we make in this report provide a comprehensive response to the issues raised by our terms of reference and can be implemented as stand-alone reforms of the Human Rights Act. There are, however, several limitations on the scope of our review that have meant we could not address all issues and concerns raised by submitters.

### We were only asked to review the Human Rights Act

* 1. We were only asked to examine the adequacy of protections in the Human Rights Act, not in any other legislation or in other policy contexts.
  2. We need to be satisfied that the implications of reform for other laws do not make reform undesirable. However, we only recommend amendments to other legislation as part of this review if we considered it was necessary to address significant incoherence or ambiguity that would otherwise result from our proposed reforms.
  3. In Chapter 19, we identify one provision in the Employment Relations Act 2000 that we consider meets that threshold. Otherwise, we do not recommend amendments to other legislation as part of this review.
  4. This review has unfolded against the background of wide-ranging and often polarised public debate on a range of issues relating to sex and gender identity. Submitters raised many concerns with us relevant to that wider debate. For example:
     + 1. Some submitters suggested the provisions in the Births, Deaths, Marriages, and Relationships Registration Act 2021 that enable people to obtain a birth certificate that aligns with their gender identity should be repealed. Others expressed concern that some people born overseas cannot currently obtain New Zealand identity documents that align with their gender identity.
       2. Many submitters raised concerns with us about access to gender-affirming health care. Some submitters expressed concern that such health care is too readily available, particularly in relation to children and young people. Other submitters were concerned that gender-affirming health care is too hard to access.
       3. Some submitters raised issues about the content of relationships and sexuality education in schools.
  5. It is outside the scope of our review to make specific recommendations on any of these issues. If laws and policies governing these issues are discriminatory, a complaint under Part 1A of the Human Rights Act would be possible (as we explain further in Chapter 18).[[47]](#footnote-48)

### The focus is anti-discrimination law, not human rights law generally

* 1. In Aotearoa New Zealand, human rights are protected under many different laws. For example, the NZ Bill of Rights protects a range of rights from interference by the government. These include the right to life, the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment, fair trial rights and the freedoms of opinion and belief, expression, religion and association. Aotearoa New Zealand is also a party to some international treaties that protect human rights. For example, there is a specific international convention protecting the rights of children.
  2. By contrast, the Human Rights Act is mainly about freedom from discrimination. Where protections from discrimination have implications for other rights and freedoms, we consider them in this review.[[48]](#footnote-49) However, it is outside the scope of the review to consider independently whether other rights are adequately protected by New Zealand law. For example, we cannot recommend reform of the NZ Bill of Rights as part of this review.

### This is not a general review of the Human Rights Act

* 1. We have not been asked to conduct a general review of the Human Rights Act. Rather, we have been asked to review whether the Act adequately protects people who are transgender or non-binary or who have an innate variation of sex characteristics.
  2. A broader review of the Human Rights Act may well be desirable. The Act is over 30 years old. Some parts of it (including those most relevant to this review) have not been systematically reviewed since enactment.[[49]](#footnote-50) Even when it was enacted, the Act drew heavily on earlier anti-discrimination laws from the 1970s. It continues to reflect attitudes and compromises made in the context of 1970s Aotearoa New Zealand. The drafting of some provisions could be improved to make their meaning clearer.
  3. Some submitters commented that particular provisions in the Human Rights Act are outdated or suggested matters that could be considered in a broader review. In some cases, submitters thought that sex exceptions should be removed from the Human Rights Act entirely because they saw them as outdated or as not recognising the situation of people who identify outside the gender binary.[[50]](#footnote-51)
  4. In this report, we sometimes identify broader issues raised with us by submitters that could be considered as part of a wider review of the Human Rights Act. We cannot, however, recommend wider reform of the Act as part of this review even when there is general agreement that such reform is desirable.

### We have been asked to consider human rights protections for certain groups

* 1. As mentioned above, 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. As part of that consideration, we have identified the implications of reform for a range of other groups in the community and satisfied ourselves that reform is appropriate taking into account those implications. We have not, however, reviewed the grounds of discrimination in section 21 more generally.
  2. During our consultation, we heard some suggestions of other amendments that could be made to section 21 such as adding grounds to protect other groups, modernising the definition of sexual orientation and clarifying that discrimination on the basis of multiple grounds is covered. These suggestions for reform fall outside the scope of our review.

### Three provisions in the Human Rights Act fall outside our terms of reference

* 1. As outlined in our terms of reference, three provisions in the Human Rights Act fall outside the scope of the review.
  2. Sections 61 and 131 of the Human Rights Act concern the incitement of racial disharmony (sometimes known as hate speech). We have not examined these provisions in this review as the Minister responsible for the Law Commission requested that the Law Commission withdraw issues relating to hate speech from its work programme.
  3. Section 63A of the Human Rights Act relates to conversion practices. As this provision was only enacted in 2022 (the same year the Government requested the Law Commission to review the Human Rights Act), we decided it was too soon to reconsider the policy on which it was based or to evaluate how it is working in practice.

## Our process

* 1. Following receipt of the Minister’s letter of referral in November 2022, we undertook preliminary research to understand the scope of the reference. We examined every provision in the Human Rights Act to establish which of them had implications for the review. We also conducted preliminary engagement with various experts, government agencies and community stakeholders. We published terms of reference in August 2023 that outlined the scope of the review and our intended approach.[[51]](#footnote-52)
  2. We then conducted in-depth research on the relevant legal and policy issues. This included reviewing New Zealand case law and commentary, legislative history, international human rights law and the laws in several other jurisdictions with a similar legal heritage to our own. We reviewed studies and other research to help us understand issues faced by people who are transgender or non-binary or who have an innate variation of sex characteristics, especially their experiences of discrimination. We learned about some Māori perspectives on the issues in this review, including by convening a wānanga (a gathering to discuss an issue) of Māori pūkenga (experts). We also learned about the perspectives of others in the community who have views about the legal regulation of gender, including those with concerns that it might affect other people’s rights and interests.
  3. In accordance with the usual practice for Law Commission reviews, we set up an Expert Advisory Group to help us test our thinking on key issues in the review. The role of this group was advisory. It did not have decision-making responsibilities. Experts were invited to join the group based on their substantial knowledge in relevant fields and did not represent the interests of any specific sector, stakeholder or special interest group. We met twice with the Expert Advisory Group over the course of the review (as well as a brief introductory meeting online). We also had discussions with the Law Commission’s Māori Liaison Committee over the course of the review.
  4. We published an Issues Paper in June 2024. It explained the background to the review, discussed the legal issues we had identified, presented a preliminary view on the key question of whether section 21 should be amended and sought feedback on a broad range of questions. References in this report to “the Issues Paper” refer to that document.[[52]](#footnote-53)
  5. Following publication of the Issues Paper, we entered a 10-week consultation period during which members of the public could make a submission through our website. We sent the Issues Paper to over 300 organisations and individuals we thought may be interested in making a submission.

### Submissions and other feedback we received

* 1. We received a total of 737 submissions on the review, including 74 from organisations.[[53]](#footnote-54) We also received a spreadsheet from Kia Rangona te Kōrero | Free Speech Union containing 6,013 discrete pieces of feedback on the review.[[54]](#footnote-55) This feedback was mainly based on form text supplied by the Free Speech Union on its website although most authors also provided brief individualised comments.
  2. On the final day of the submission period, we received 631 emails to a Law Commission email address for a different review. The emails contained feedback relevant to the Ia Tangata review based on form text supplied by Voices for Freedom.[[55]](#footnote-56) We directed these emailers to our online submissions process.
  3. During the consultation period, we also held or attended hui in conjunction with various community groups with an interest in the review. We recognised there may be challenges in obtaining the perspectives of people who have an innate variation of sex characteristics. We therefore commissioned a community organisation with intersex expertise, Te Ngākau Kahukura, to undertake confidential interviews with people in this group on our behalf to ascertain their views on topics in the Issues Paper.

### How we used the feedback we received

* 1. In submissions and during consultation, we heard many different perspectives on the issues in this review. We acknowledge that many people who engaged with us felt strongly about issues in this review and some people shared information that was personal or sensitive. We are grateful to everyone who took the time to share their views and perspectives with us as part of this review.
  2. We read all the submissions we received and used qualitative software to arrange them into themes to facilitate our analysis.[[56]](#footnote-57) We read all the feedback forwarded to us by the Free Speech Union and analysed the themes it contained.
  3. Throughout this report, we explain what we heard from submitters and others with whom we consulted on relevant issues. For reasons of length, we do not refer to every point that we heard in feedback.
  4. Due to the subject matter of this review, many submitters told us they did not want their names disclosed. As a result, we do not generally name individual submitters in the report. However, we make exceptions where confidentiality has not been requested and the identity of the submitter is relevant (for example, because they have relevant expertise on the matter being discussed). We are more specific about the content of the submissions we received from organisations. This is because the same issues of confidentiality and privacy do not arise, organisational submissions tended to reflect the perspectives held by submitters generally and they were often comprehensive.
  5. A list of organisations that submitted on our review is set out in Appendix 1. We will proactively release submissions from organisations on our website and make available a summary of other feedback we received.

### How we analysed policy considerations and developed our recommendations

* 1. As we discuss in Chapter 3, we developed key reform considerations to guide our approach to reform in this review. We used these considerations to advance our policy analysis and to formulate recommendations for reform. We also analysed and considered the information and perspectives shared with us by submitters. Where needed, we also undertook further research or additional targeted consultation with experts or stakeholders.
  2. Although we used the key reform considerations to analyse each of the reform questions we discuss in this report, we do not set out that analysis in each chapter in a mechanical way. That would be unnecessarily lengthy and repetitive. Instead, we focus in each chapter on explaining the central considerations that underlie each of our recommendations.

## Structure of this report

* 1. We make 27 recommendations in this report, addressing a wide range of issues.
  2. Chapters 2 and 3 outline some introductory matters.
     + 1. In Chapter 2, we provide a brief introduction to the groups mentioned in the Minister’s letter of referral: people who are transgender, people who are non-binary and people with innate variations of sex characteristics. We explain what we have learned since we published the Issues Paper about people in these groups who are Māori, who come from New Zealand’s ethnic minority communities or who are disabled. We also explain some terms that people use to describe themselves and the terminology that we have chosen to use in this report.
       2. In Chapter 3, we explain the key reform considerations that have guided our policy analysis and recommendations for reform. We also address two issues that some submitters told us should be foundational to our review: the meaning of sex; and the validity of the concept of gender identity.
  3. In Chapters 4 to 6, we address the key question of whether 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.
     + 1. In Chapter 4, we explain our key reasons for recommending reform of section 21.
       2. In Chapter 5, we consider the implications of te Tiriti o Waitangi | Treaty of Waitangi and tikanga for reform of section 21.
       3. In Chapter 6, we consider the implications of the rights to freedom of thought, conscience, religion, belief, expression and association for reform of section 21.
  4. In Chapter 7, we explain our recommendations for the wording of two new prohibited grounds of discrimination to be added to section 21.
  5. In Chapters 8 to 17, we discuss the rules in the Human Rights Act that apply to the private sector. These are set out in Part 2 of the Human Rights Act.
     + 1. We discuss our approach to Part 2 and some overarching issues in Chapter 8.
       2. In Chapters 9 to 12, we discuss some areas of life regulated by Part 2. In each chapter, we discuss the protections from discrimination in that area of life, and some exceptions that allow different treatment based on a person’s sex.

We discuss employment in Chapter 9.

We discuss access to places, vehicles and associated facilities, and provision of goods, facilities or services in Chapter 10.

We discuss land, housing and accommodation in Chapter 11.

We discuss education in Chapter 12.

* + - 1. In Chapters 13 to 15, we discuss some further exceptions that allow different treatment based on sex. We discuss three exceptions that relate to counselling in Chapter 13, two exceptions for single-sex facilities in Chapter 14 and an exception for competitive sporting activities in Chapter 15.
      2. In Chapters 16 and 17, we discuss whether any new provisions should be added to a subpart in Part 2 of the Human Rights Act called “Other forms of discrimination”. In Chapter 16, we focus primarily on provisions relating to harassment. In Chapter 17, we consider the possibility of a new provision restricting medical interventions on infants and children with an innate variation of sex characteristics.
  1. In Chapters 18 and 19, we address some other implications of adding new grounds to section 21 of the Human Rights Act.
     + 1. In Chapter 18, we consider the implications of reform for the rules that apply to government and the public sector (which are in Part 1A of the Human Rights Act).
       2. In Chapter 19, we consider the implications of reform for other 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.
  2. In Chapter 20, we address several additional matters. We recommend removing gendered pronouns from the Human Rights Act and clarifying the application of a provision allowing preferential treatment by reason of pregnancy or childbirth. We also discuss the Human Rights Act’s oversight and dispute resolution mechanisms, and the need for education and guidance in respect of our reform recommendations.

CHAPTER 2

# The groups covered by our terms of reference

## Introduction

* 1. As we explained in Chapter 1, Te Aka Matua o te Ture | Law Commission was asked to review the protections in the Human Rights Act 1993 for people in three groups: people who are transgender, people who are non-binary and people who have an innate variation of sex characteristics.
  2. In this chapter, we provide a brief introduction to these three groups. This includes some discussion of the experiences, perspectives and concerns of people in these groups who are Māori or who come from New Zealand’s ethnic minority communities. We also briefly discuss what we have learned about disabled people in these groups.
  3. Where relevant, we refer to data released since our Issues Paper was published. This includes data from the most recent Counting Ourselves survey (conducted in 2022 but published in 2025) and data from the 2023 Census.[[57]](#footnote-58)
  4. Throughout this chapter, we discuss terminology and explain the terms that we plan to use in the remainder of the report. Selecting terminology to use in this review has not been straightforward. One reason is that people who are gender diverse or who have an innate variation of sex characteristics use many different terms to describe themselves. Another is that language is evolving, and some terms that relate to issues of sex, gender and gender identity are seen as contentious.
  5. Our primary consideration in selecting language to use in this report is that the terms we use must be capable of conveying with sufficient precision our analysis and recommendations for reform. Subject to that consideration, we have tried where possible to use terms that are in common usage. We have also tried to respect people’s preferences about the language that is used to describe them. However, given the extent of variance and disagreement, that has not always been possible.

## Being transgender or non-binary

* 1. A person who is transgender is someone whose gender identity — their deeply felt internal experience of gender — does not correspond with the sex they were assigned at birth.
  2. A person who is non-binary is someone whose gender identity does not fit exclusively into the binary of male or female. For example, a person who is non-binary might see themselves as neither male nor female or might identify with multiple genders.
  3. The terms ‘transgender’ and ‘non-binary’ are used in different ways by different people. For example, some people describe non-binary as their gender. Others see non-binary as an umbrella concept that is made up of discrete genders such as gender fluid or bi-gender.[[58]](#footnote-59) Some people who identity outside the binary of male or female may not relate to the term ‘non-binary’ at all.[[59]](#footnote-60)
  4. Some people who identify outside the gender binary consider themselves to be transgender or trans. However, other people may use the term ‘transgender’ to refer only to people with a binary gender identity (male or female).
  5. People who are transgender or non-binary use many other terms to describe themselves. The 2022 Counting Ourselves survey of people who are transgender or non-binary asked respondents what terms they used to describe their gender. The terms people used included non-binary, genderqueer, woman/girl, man/boy, trans man, trans woman, gender diverse, gender fluid, agender, bi-gender, cross-dresser and pangender.[[60]](#footnote-61) Some people also used culturally specific terms, which we discuss below.
  6. Terminology relating to gender is evolving. We understand that some terms that were commonly used in the past are now regarded as outdated and, in some cases, offensive. For example, the term ‘transsexual’ was commonly used in the past. Although some people still use it describe themselves (including some who submitted to the review), many people now consider this term to be offensive.[[61]](#footnote-62)
  7. The 2023 Census was the first New Zealand census to collect information about people’s gender identity. It found that, in 2023, there were 26,097 people who were transgender in Aotearoa New Zealand, making up 0.7 per cent of the population aged 15 years and over.[[62]](#footnote-63) This comprised 5,013 transgender men, 5,736 transgender women and 15,348 transgender people of “another gender”.[[63]](#footnote-64) According to Tatauranga Aotearoa | Stats NZ, people from the “another gender” group were, on average, younger than the general population.[[64]](#footnote-65)

### Gender dysphoria, incongruence, affirmation and detransition

* 1. People who are transgender or non-binary may experience gender dysphoria or gender incongruence, which are terms used by medical professionals to describe when a person has a marked and persistent incongruence between their experienced gender and their sex assigned at birth.[[65]](#footnote-66) We understand some people prefer the term ‘gender incongruence’ on the basis that it does not imply being transgender is a mental health condition.[[66]](#footnote-67) Both gender dysphoria and gender incongruence are diagnostic terms. A person does not need to be diagnosed with either to be transgender or non-binary.
  2. Gender affirmation refers to the steps that a person takes to affirm their gender identity and can also refer to ways that others respect and affirm a person’s gender identity. Common forms of gender affirmation include:[[67]](#footnote-68)
     + 1. expressive gender affirmation such as changes to hair, clothing or makeup;
       2. social gender affirmation such as ‘coming out’, using a different name or pronouns or using a bathroom that aligns with the person’s gender identity;
       3. legal gender affirmation, which involves changing official documents; and
       4. medical gender affirmation, including non-surgical options such as hormone treatment or hair removal or surgical procedures such as breast or genital surgery.
  3. Being transgender or non-binary is not contingent on any particular form of gender affirmation. People might choose to affirm their gender in a range of different ways and individual preferences will vary.
  4. A person’s relationship with their sex assigned at birth can also vary. For example, in their submissions, Qtopia and the Rainbow Support Collective told us that some people who are gender diverse may not feel adequately described by the traditional definition of having a gender that is different from their sex assigned at birth. This could be because they have a non-linear experience of transition (sometimes called ‘retransition’ or ‘detransition’) or were brought up in a gender-neutral manner.
  5. Retransitioning or detransitioning involves a person who has taken steps to affirm their gender going back to living as a gender consistent with their sex assigned at birth.[[68]](#footnote-69) Some submitters told us that people who detransition are a vulnerable group who need support and respect.[[69]](#footnote-70)

### Terms we use in this report

* 1. In this report, we use the composite term ‘transgender or non-binary’ to refer to people whose gender identity is different to their sex assigned at birth, including those whose gender identity is neither male nor female. This language is consistent with the letter of referral from the Minister who initiated this review.
  2. We sometimes use the looser term ‘gender diverse’ to describe people whose gender identity does not correspond in a clear-cut way with the sex they were assigned at birth. For example, we use this term below when talking about the experiences of Māori and people in ethnic minority communities. This is because, as we explain further below, some people in these groups do not feel that the words transgender or non-binary adequately describe their identities.
  3. We are more specific or use different language when the context requires. For example, in some contexts, different issues arise for people who identify outside the gender binary compared to those who do not. Where we need to make this distinction, we generally refer to people who identify outside the gender binaryrather than using specific labels.
  4. In some instances, we reflect the language used in source material on which we are relying, even when this is different or outdated.
  5. We sometimes use the term ‘rainbow’ as an umbrella term for gender and sexual minorities. For example, where submitter organisations have referred to themselves as ‘rainbow’, we use that language.
  6. Where the context requires it, we use the term ‘sex assigned at birth’ to refer to a person’s birth sex. Some people prefer different terms such as ‘sex observed at birth’ or ‘natal sex’. However, it was necessary for us to select one term for consistency and we understand the term ‘sex assigned at birth’ to be commonly used and understood.

## Innate variations of sex characteristics

* 1. The third group covered by our review is people with innate variations of sex characteristics. One way of describing an innate variation of sex characteristics is that it is a variation that:[[70]](#footnote-71)
* Shows up in a person’s chromosomes, genitals, gonads or other internal reproductive organs, or how their body produces or responds to hormones;
* Differs from what society or medicine considers to be “typical” or “standard” for the development, appearance, or function of female bodies or male bodies; and
* Is present from birth or develops spontaneously later in life.
  1. An innate variation of sex characteristics begins during the development of a foetus. It can be caused by chromosomal variances (such as an extra X or Y chromosome), by atypical levels of hormones, by reactions to hormones or by other aspects of foetal development.[[71]](#footnote-72) These influences can result in physical sex characteristics that do not correspond with medical norms for male and female bodies.
  2. Innate variation of sex characteristics is a broad umbrella term that covers as many as 40 different variations.[[72]](#footnote-73) The impact of the variation on sex characteristics depends on the specific variation. Some variations affect primary sex characteristics (such as the vulva, clitoris, vagina, fallopian tubes, testes, uterus, ovaries or penis), some affect secondary sex characteristics (such as facial hair, breast growth, depth of voice and fat distribution) and some affect both.[[73]](#footnote-74) In some cases, a person with an innate variation of sex characteristics will have external genitalia that are ambiguous or appear more typical of a person of the other sex.
  3. Some variations are detected at birth while others may be discovered later in life such as at puberty or when a person seeks to become pregnant. In some cases, a person might never know they have a variation of sex characteristics. Many variations are not noticeable to other people.
  4. Some innate variations affect other aspects of foetal development such as a person’s height, sense of smell, kidneys, spine or heart. Starship Child Health reports that, in approximately 25 per cent of cases where a newborn has a difference of sex development, this is part of a complex medical condition involving congenital, metabolic or endocrine issues.[[74]](#footnote-75)
  5. Innate variations of sex characteristics are sometimes known as ‘intersex variations’ (although we understand that there is a lack of consensus about which innate variations should be classified as intersex variations).[[75]](#footnote-76)
  6. In medical settings, innate variations are usually referred to as ‘differences of sex development’ (and, historically, ‘disorders of sex development’).[[76]](#footnote-77) However, we understand that the term ‘innate variations of sex characteristics’ encompasses a broader range of variations than those that would be medically termed differences of sex development.[[77]](#footnote-78)
  7. In the 2023 Census, 15,039 people stated they knew that they were born with a variation of sex characteristics, which equates to 0.4 per cent of the population 15 years and over.[[78]](#footnote-79)
  8. In the 2022 Counting Ourselves survey of people who are transgender or non-binary, 3 per cent of respondents said that they had an “intersex variation”, 11 per cent of respondents said they did not know and half of these thought they might have one. Other respondents said they were not sure what having an intersex variation means or how that differs from being transgender.[[79]](#footnote-80)
  9. We understand that people with innate variations of sex characteristics think about their variation in different ways. Some consider it to be a foundational part of their identity. Some see it purely as a medical issue. Some see it as both.
  10. People with innate variations of sex characteristics also identify their gender in a variety of ways, including some who are transgender or non-binary and many who are cisgender.[[80]](#footnote-81) Reporting on findings from the 2023 Census, Stats NZ said people who knew they were born with a “variation of sex characteristics” were more likely to belong to a transgender and non-binary subgroup or to have a sexual orientation other than heterosexual when compared to the overall adult population.[[81]](#footnote-82)
  11. A variety of terms are used by people with innate variations to describe themselves. Although ‘intersex’ is one of the more common terms, not everyone likes it. Some people prefer to talk simply about having a variation or innate variation of sex characteristics. Some prefer to use the name of their specific variation.[[82]](#footnote-83) We understand that medical terms such as ‘difference of sex development’ are not always popular in community settings.
  12. ‘Hermaphrodite’ is an older term that some think is demeaning but others have reclaimed.[[83]](#footnote-84)
  13. Some people may use different terms in different contexts, for example, one term with friends but another with a doctor.[[84]](#footnote-85)
  14. People with innate variations of sex characteristics also think about their *sex* in different ways. Many people who have an innate variation of sex characteristics describe their sex as male or female. Others use the term ‘intersex’ to describe their sex but we understand this is presently uncommon.

### Terms we use in this report

* 1. In this report, we generally use the term ‘innate variation of sex characteristics’ rather than other terms such as ‘intersex’ or ‘differences of sex development’. As noted, not all people with an innate variation of sex characteristics like the term ‘intersex’, and the term ‘differences of sex development’ is mainly used in medical contexts. These terms may also exclude some innate variations. It is desirable in a review of anti-discrimination law to use the most inclusive language available.
  2. The letter of referral from the Minister who initiated this review referred to this group as people who have “diverse sex characteristics”. As that expression is not in common usage, we do not adopt it in this report. We understand from discussions with officials that it was intended to refer to people who have an innate variation of sex characteristics.
  3. We use the adjective ‘innate’ to clarify that we mean variations that are congenital. Some variations of sex characteristics can result from a medical procedure or injury, and some people who are transgender consider themselves to have a variation or an innate variation of sex characteristics. We do not use the term ‘innate variation’ in this way. We need to have language that enables us to consider independently the needs, interests and concerns of people who have a congenital variation of sex characteristics — as we consider we are required to do by the letter of referral from the Minister.
  4. We use more specific or different language when the context requires. For example, in some instances, we reflect language used in source material on which we are relying.
  5. The term ‘endosex’ means someone who does not have an innate variation of sex characteristics.[[85]](#footnote-86) We avoid that term in this report because it is not widely understood.

## Experiences of discrimination

* 1. In the Issues Paper, we discussed the prejudice, social stigma, marginalisation and discrimination experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics in Western societies throughout modern history.[[86]](#footnote-87) We also set out the data that were available indicating that people in these groups continued to experience discrimination in contemporary Aotearoa New Zealand.
  2. We do not think it is helpful to replicate that discussion in full in this report. However, in Chapter 4, we summarise some new data that have become available since the Issues Paper was published. As we explain further in that chapter, we are left in no doubt that people who are transgender or non-binary or who have an innate variation of sex characteristics have been subject to long histories of violence, stigmatisation, marginalisation and discrimination and that they continue to experience high levels of discrimination in many areas of life.
  3. In Chapter 17 of this report, we discuss medical interventions on infants and children with innate variations of sex characteristics, which we heard is an issue of particular concern for many people.

## Experiences, perspectives and concerns of Māori: updating information

* 1. An understanding of Māori perspectives, experiences and concerns relevant to this review helps us to discharge our statutory responsibility to take into account te ao Māori in our work,[[87]](#footnote-88) to comply with constitutional fundamentals that we discuss in Chapter 3 and to ensure our law reform recommendations meet the needs of all New Zealanders.
  2. In the Issues Paper, we summarised some perspectives and concerns that were conveyed to us at a wānanga (a gathering to discuss an issue or issues) of Māori pūkenga (experts). We also set out some tikanga that wānanga participants identified as relevant.[[88]](#footnote-89)
  3. Rather than replicate that discussion in this report, we focus here on updating information. We set out relevant data that have been published since we finalised the Issues Paper, and we explain the feedback that we received during consultation on relevant issues.
  4. We focus in this chapter on the experiences, perspectives and concerns of Māori who are gender diverse or who have an innate variation of sex characteristics as well as on tikanga that submitters told us were relevant to those experiences. In Chapter 5, we reflect some wider feedback from Māori about issues relevant to the review. We also discuss in that chapter our understanding of sex-differentiated tikanga practices and their implications for the review.
  5. Overall, the feedback we received indicates there are a wide range of views on issues relevant to this review among Māori. We acknowledge we have likely only heard a small sample of those views. Although we received some submissions from people indicating they were Māori and from organisations that represent Māori or have Māori in their senior leadership, these comprised a small proportion of the submissions we received.

### Population figures

* 1. According to data from the 2023 Census, 1 per cent of the Māori population group were transgender.[[89]](#footnote-90) In the 2022 Counting Ourselves survey of people who are transgender or non-binary, one in seven respondents said they were Māori.[[90]](#footnote-91) There are no data currently available on Māori who have an innate variation of sex characteristics.[[91]](#footnote-92)

### Te reo Māori terms

* 1. There are many different kupu Māori that relate to gender. In the 2022 Counting Ourselves survey of people who are transgender or non-binary, the most common reo Māori term used by Māori respondents to describe themselves was takatāpui, with a third of respondents using that term. Although some people understand this kupu to mean close or intimate friend of the same sex,[[92]](#footnote-93) others use it more expansively as “an umbrella term that embraces all Māori with diverse gender identities, sexualities and sex characteristics”.[[93]](#footnote-94)
  2. Other common terms that *Counting Ourselves* respondents used included whakawahine (9 per cent), irawhiti (9 per cent), tāhine (7 per cent) and tangata ira tāne (5 per cent).[[94]](#footnote-95)
  3. Not all Māori respondents used kupu Māori to describe themselves.

### Identity and belonging

* 1. In the Issues Paper, we set out our understanding from preliminary engagement (including from the wānanga) that many Māori who are gender diverse or who have an innate variation of sex characteristics do not see these features as centrally defining of their identity and consider their identity as Māori to be more important.[[95]](#footnote-96) Some submitters and others with whom we consulted agreed with this, with some emphasising the holistic and interwoven nature of Māori identity.[[96]](#footnote-97) For example, some people told us that many takatāpui see their sex, sexuality and gender as innately intertwined with their Māoritanga or said their takatāpui identity is not a gender identity but a blend of sex, gender and spirituality.
  2. Tīwhanawhana Trust commented that takatāpui refers to:

1. … a form of radical inclusion for all Māori who identify with diverse genders, sexualities and innate variations of sex characteristics. Takatāpui is an ancient Māori term. It is both an umbrella term and a personal identity. Being takatāpui is just a way of being Māori.
   1. We also explained in the Issues Paper that we had heard that many Māori who are gender diverse or who have an innate variation of sex characteristics feel more acceptance and belonging in te ao Māori than in other settings. Some people with whom we consulted agreed with this. Some people linked this to their belief that gender diversity and fluidity were normal in pre-colonial Māori society.[[97]](#footnote-98)
   2. In the 2022 Counting Ourselves survey of people who are transgender or non-binary, Māori respondents “were more likely to *somewhat* or *strongly agree* that their **identity helps them feel connected** to both their cultural identity and their gender identity (70% vs 59%)”.[[98]](#footnote-99) Māori respondents were less likely than respondents generally to report negative experiences of disconnection from their cultural community.
   3. On the other hand, Māori respondents in the 2022 Counting Ourselves survey were more likely to report certain negative family experiences, including being insulted, mocked or put down, being ignored, being excluded from family events, having a sexual comment made about them or having family members be violent towards them.[[99]](#footnote-100) They were also more likely to report being shamed or coerced into gender-conforming behaviour, being taught to be something else or being made to believe that their gender identity or expression was a defect.[[100]](#footnote-101)
   4. As we discuss in Chapter 5, some submitters told us that holding multiple minority identities can heighten discrimination and that the discrimination experienced by Māori who are transgender or non-binary or who have an innate variation of sex characteristics is often compounded by racism. On the other hand, the 2022 Counting Ourselves survey indicated that Māori who are transgender or non-binary experience discrimination at statistically similar levels to people in the general population who are transgender or non-binary.[[101]](#footnote-102)
   5. Some submitters told us that the disadvantage and discrimination experienced by Māori who are gender diverse or who have an innate variation of sex characteristics is a result of the disruptive effects of colonisation.[[102]](#footnote-103) Other submitters objected to this characterisation of pre-colonial Māori society. We explore this disagreement further in Chapter 5.

### Relevant tikanga

* 1. In the Issues Paper, we set out and explained our understanding of four tikanga that wānanga participants identified as particularly relevant to the experiences and perspectives of Māori who are gender diverse or who have an innate variation of sex characteristics: whakapapa, mauri, tapu and mana.[[103]](#footnote-104) We asked submitters for feedback on the tikanga we had identified, on how we described them and on other tikanga relevant to the review.
  2. None of the submissions we received from people who told us they were Māori or from organisations with Māori in their senior leadership explicitly disagreed with the tikanga we identified or how we described them, and some explicitly agreed these tikanga were relevant. For example, Tīwhanawhana Trust said: “whakapapa, mana, mauri, tapu and tikanga are critical and [we] support how you have captured them”. Tīwhanawhana Trust also supplied descriptions of these tikanga taken from Te Whare Takatāpui, a framework developed by Dr Elizabeth Kerekere.[[104]](#footnote-105)
  3. Some submitters said discrimination against people who are transgender or non-binary or who have an innate variation of sex characteristics is an attack on the mauri, tapu and mana of those people, their whānau and their community.
  4. Other things submitters told us about mauri, tapu and mana included:
     + 1. the mana, mauri and tapu of takatāpui is relevant across the whole review, not just in Māori settings, as Māori exist in every setting;
       2. tapu recognises the intrinsic value and sacredness of each person, informing legal perspectives on human dignity and the inalienable rights of all individuals; and
       3. to fuel a young person’s mauri means to recognise and support their evolving sense of self, including their gender identity.
  5. Some submitters told us of other tikanga they considered relevant. Tīwhanawhana Trust identified wairua as a tikanga that is important to this review. It said wairua refers to a spiritual dimension and the relationship with atua, tīpuna and the whenua, saying: “We gain our gender and sexuality through our wairua as it drives us to be who we are.”
  6. Another Māori submitter also emphasised the importance of wairua to our review, saying:

1. I was raised with the understanding that our wairua comes to us through our tipuna, and that it’s our wairua and not our tinana that our tipuna know us by. It’s our wairua and not our tinana that leaves a path for our mokopuna. For me, limiting ourselves to the form we’re born in is a Western idea.
   1. Other tikanga that submitters said might be relevant to the treatment of people who are transgender or non-binary or who have an innate variation of sex characteristics included manaakitanga, whanaungatanga, kaitiakitanga, aroha and utu.
   2. Finally, many submitters made two general points. First, submitters cautioned against state regulation of tikanga in any form. Second, several submitters emphasised the need to recognise that tikanga and kawa differ between iwi, hapū and whānau.

## Experiences, perspectives and concerns of New Zealand’s ethnic minority communities: updating information

* 1. Aotearoa New Zealand is a diverse and multicultural society. The Law Commission Act 1985 requires the Law Commission to “give consideration to the multicultural character of New Zealand society”.[[105]](#footnote-106)
  2. In the Issues Paper, we acknowledged that other cultures have different ways of thinking about sex and gender and we summarised our understanding of how some other cultures think about sex and gender.[[106]](#footnote-107) In this section, we summarise what we have since learned about people in New Zealand’s ethnic minority communities who are gender diverse or who have an innate variation of sex characteristics.

### Some identity terms used by people in New Zealand’s ethnic minority communities

* 1. The acronym MVPFAFF+ is sometimes used to refer to some of the words used in Pacific cultures to describe sexual orientation and gender identity. This acronym refers to māhū (Hawai’i and Tahiti), vakasalewalewa (Fiji), palopa (Papua New Guinea), fa’afafine or fa’atama (Samoa), akava’ine (Cook Islands), fakafifine (Niue) and fakaleitī/leitī (Tonga).[[107]](#footnote-108)
  2. In the Issues Paper, we acknowledged that these Pacific indigenous terms do not map neatly onto Western ideas about gender.[[108]](#footnote-109) Some submitters and others with whom we engaged also made this point. For example, we were told that Pacific indigenous terms such as fa’afafine have complex cultural nuances that do not track neatly onto the Western concept of gender identity. We also heard that not all Pacific peoples who are gender diverse use these traditional terms.
  3. People from New Zealand’s other ethnic minority communities may use different terms to describe themselves, including, in some cases, English terms.[[109]](#footnote-110) In the 2022 Counting Ourselves survey of people who are transgender or non-binary, some terms that respondents used to describe their gender included neamh-dhénártha (Irish), kua xing bie (Mandarin), babaylan (Filipino), tumtum (Hebrew), neo-bhinearaidh, tar-bhoireannach, tar-ghnèitheach (Scottish Gaelic), two-spirit (North American) and anneuaidd (Welsh), along with terms in Asian scripts.[[110]](#footnote-111)

### Population figures

* 1. As we discussed above, 2023 Census data showed that 0.7 per cent of the total New Zealand population aged 15 and over were “transgender”.[[111]](#footnote-112) According to disaggregated data, transgender people made up 0.5 per cent of the Asian ethnic group,[[112]](#footnote-113) 0.8 per cent of Pacific Peoples[[113]](#footnote-114) and 1 per cent of people in the Middle Eastern/Latin American/African statistics grouping.[[114]](#footnote-115) However, the differences between these population groups is small and Stats NZ advises caution in placing emphasis on them.[[115]](#footnote-116) For data quality reasons, Stats NZ has not published ethnic group comparisons for “persons who know they were born with a variation of sex characteristics”.[[116]](#footnote-117)
  2. In a 2023 survey of Pacific rainbow people in Aotearoa New Zealand, around 52 per cent of respondents identified as outside the gender binary or with a Pacific indigenous term.[[117]](#footnote-118) In response to a different question, around 28 per cent of respondents identified as either transgender or non-binary, 52 per cent as cisgender and the other 20 per cent said none of these statements applied to them.[[118]](#footnote-119) Five per cent of respondents said they were intersex or were “carrying a chromosomal variation”. However, the authors of the survey questioned whether that figure was impacted by levels of awareness around intersex peoples within Pacific communities.[[119]](#footnote-120)

### Experiences of discrimination

* 1. In the 2022 Counting Ourselvessurvey of people who are transgender or non-binary, Asian respondents were more likely than European respondents to report that they had experienced discrimination in the last 12 months (59 per cent compared to 42 per cent).[[120]](#footnote-121) Asian respondents were almost twice as likely as European respondents to say someone tried to make them believe that their gender identity or expression was a defect (41 per cent compared to 22 per cent).
  2. Although we did not ask submitters to provide demographic information such as their ethnic group, we received a number of submissions from people who told us they belong to an ethnic minority community or from groups that represent ethnic minority communities. We also held or attended some consultation hui specifically for people from ethnic minority communities.
  3. From the feedback we received, it was clear that people in New Zealand’s ethnic minority communities who are gender diverse or who have an innate variation of sex characteristics experience discrimination. For example, we were told of experiences of discrimination in education, employment and health care and in accessing goods and services. Some participants in the consultation meeting we held with F’INE Pasifika Aotearoa Trust commented on the magnitude of discrimination they faced, estimating that they experienced between 30 and 100 instances of discrimination daily. We were told that the constant anticipation of discrimination can have a similar impact on the individual to experiencing discrimination itself.
  4. We also heard that people from non-Western communities face some unique forms of disadvantage. Several organisations urged the Law Commission to consider the importance and role of intersectionality in our review.[[121]](#footnote-122)
  5. Chinese Pride New Zealand commented that queer Chinese people find it difficult to explicitly embrace rainbow identities because of prevailing social norms in their ethnic communities. It said that, because of this, people from the communities it represents may find it difficult to relate to grounds that are protected by anti-discrimination law.
  6. The organisation also highlighted the discrimination experienced by immigrants and those seeking asylum. For example, it referred to asylum seekers having to submit a birth certificate that does not match their gender as part of an immigration or asylum process and being perceived as “providing misinformation” and “demonstrating bad characteristics”.
  7. Other submitters mentioned related issues stemming from the inability of immigrants to access the administrative mechanisms that are available to people born in Aotearoa New Zealand to change the sex marker on their birth certificate.[[122]](#footnote-123) For example, Rainbow Path told us that rainbow refugees and asylum seekers can experience discrimination in daily life if they do not have official documentation from their country of origin, or from Aotearoa New Zealand, with their correct name and gender.
  8. One distinctive issue we heard about in consultation with people from Pacific communities was the important role of religion in many Pacific people’s lives and the role of churches as places of both community and discrimination. Although we were told that churches could be places where people experience discrimination, some people also emphasised that they did not want to resort to anti-discrimination law to navigate these issues.

## Experiences, perspectives and concerns of disabled people

* 1. Both in preliminary engagement and during consultation, we were told that many people who are transgender or non-binary or who have an innate variation of sex characteristics are neurodivergent or are disabled. In its submission, Community Law Centres o Aotearoa told us that one of its member centres, Auckland Disability Law, has reported that its clients can experience compounded discrimination because of this intersectionality.
  2. According to the 2022 Counting Ourselves survey of people who are transgender or non-binary, 42 per cent of respondents were disabled, which is much higher than the rate for the general population (10 per cent).[[123]](#footnote-124) Sixty-two per cent of respondents reported being neurodivergent, with respondents most commonly reporting having ADHD or autism,[[124]](#footnote-125) and 35 per cent of respondents were both disabled and neurodivergent.[[125]](#footnote-126)
  3. A report based on the 2022 Counting Ourselves survey commented:[[126]](#footnote-127)

1. Many trans and non-binary people are neurodivergent, which some experience as a disability. Other trans and non-binary people become disabled across their life course, as a result of the physical and mental health impacts of experiencing gender-based stigma, discrimination and violence.
   1. Data from the Household Disability Survey 2023 showed that the disability rate for the LGBTIQ+ population was 29 per cent compared to 17 per cent of the non-LGBTIQ+ population.[[127]](#footnote-128) Stats NZ has observed that, according to the 2023 Census, all transgender and non-binary groups were more likely to be disabled compared to cisgender men and women.[[128]](#footnote-129)
   2. Similarly, data from the 2023 Census showed that people born with a variation of sex characteristics were more likely to be disabled (11.6 per cent) compared to those who were not born with a variation of sex characteristics (7.6 per cent).[[129]](#footnote-130)
   3. Respondents in the 2022 Counting Ourselves survey who were disabled were much more likely to report they had experienced discrimination in the past year compared to non-disabled respondents (55 per cent compared to 35 per cent).[[130]](#footnote-131) Disabled respondents were also more likely to say they experienced discrimination because they were transgender or non-binary than non-disabled respondents (42 per cent compared to 28 per cent) or that they were verbally harassed for this reason (63 per cent compared to 47 per cent).[[131]](#footnote-132) One respondent commented: “Jobs seem to go wrong when people discover I am more than one minority. Being trans and disabled seems like too much to accommodate.”[[132]](#footnote-133)

## Other terminology relating to gender

* 1. Two other terms we use in this report warrant brief explanation.

### Cisgender

* 1. Because we have been asked to examine the protections in the Human Rights Act for people who are transgender or non-binary, we also need to have language to describe people who are *not* transgender or non-binary.
  2. In this report, we use the term ‘cisgender’ to refer to people whose internal experience of their gender matches their sex assigned at birth. Many submitters told us they do not like this term. However, we have been unable to find another that clearly and concisely conveys the same idea.

### Gender-critical

* 1. In this report, we use the term ‘gender-critical’ to encompass a range of beliefs that are sceptical or cautious about ideas of gender identity and gender fluidity. There is no one fixed collection of gender-critical beliefs. Some views commonly held by people and organisations who describe their beliefs as gender-critical include that sex is binary, innate and immutable, that there is no such thing as a gender identity separate from a person’s sex and that the rights of cisgender women are being diluted by a focus in public policy and social discourse on gender identity.[[133]](#footnote-134)
  2. There are a number of organisations in Aotearoa New Zealand that consider it important to advocate for gender-critical beliefs.[[134]](#footnote-135) We held consultation hui at which representatives from several such groups attended and received submissions from many individuals and groups who hold gender-critical views.
  3. Although we use the term ‘gender-critical’ broadly in this report, not all individuals and groups who hold beliefs of this kind consider themselves gender-critical. For example, some people who have similar beliefs about gender that are linked to their religion do not necessary call themselves gender-critical.

CHAPTER 3

# Key considerations underlying this review

## Introduction

* 1. In this chapter, we set out the key reform considerations that we used to guide this review. The purpose of identifying key reform considerations was to support a principled, coherent and systematic approach to our policy analysis.
  2. In the Issues Paper, we proposed key reform considerations falling into the categories of:[[135]](#footnote-136)
     + 1. coherence of the Human Rights Act 1993;
       2. core values underlying the Human Rights Act;
       3. consistency with fundamental constitutional principles and values;
       4. needs, perspectives and concerns of New Zealanders;
       5. evidence-led reform; and
       6. other principles of good law making.
  3. In this chapter, we analyse the feedback we received on these key reform considerations, explain why we remain of the view that they are appropriate for this review, and explain why some other matters identified by submitters do not need to be stated separately as key reform considerations.
  4. Although not explicitly framed as key reform considerations, many submitters told us about two other issues that they thought were of foundational importance for the review: the meaning of the term ‘sex’ and assumptions about the validity of transgender identities. Given the significance some submitters attached to these issues, we address them in this chapter.

## Overview of feedback

* 1. Those submitters who gave feedback on our proposed key reform considerations were fairly evenly divided between those who ticked a box indicating they agreed with the key reform considerations we had proposed and those who indicated they did not agree.[[136]](#footnote-137) However, the most common reason given by those who indicated they did not agree was opposition to any reform of the Human Rights Act. Typically, these submitters did not mention the key reform considerations in their supporting reasons.
  2. Where submitters gave substantive feedback about our proposed key reform considerations, it was generally positive. Many organisations who submitted on this issue said they agreed with the key reform considerations we had identified.[[137]](#footnote-138) Legal experts Professor Dean Knight and Dr Eddie Clark also agreed with our key reform considerations.
  3. A small number of submitters gave specific feedback on one or more of the considerations we had proposed. This was usually to comment on how they thought a particular consideration should be applied or on whether they thought it supported or undermined the case for reform.
  4. Below, we explain and respond to submitters’ feedback on each category of key reform consideration.

## Coherence of the Human Rights Act

* 1. A statute should be internally coherent and make sense as a scheme.[[138]](#footnote-139) As we explained in Chapter 1, we have not been asked to conduct a general review of the Human Rights Act. Therefore, to ensure our proposed reforms do not create incoherence, we need to understand the policy intent that underlies existing provisions and give effect to that policy intent where possible.
  2. For example, to decide whether new prohibited grounds of discrimination should be added to section 21 of the Human Rights Act, we need to understand the reasons that underlie the selection of the existing grounds. Similarly, to understand whether and how particular exceptions in Part 2 of the Human Rights Act should apply to any new grounds we propose, we need to understand the policy rationales that underlie each exception.
  3. No submitter told us coherence of the Human Rights Act was an inappropriate reform consideration for the review. However, in consultation, some people told us we should not allow concerns about coherence to undermine the review’s protective focus.
  4. We agree that the value of coherence must be weighed against other considerations. We also agree that this review should have a protective focus. That idea is captured in other key reform considerations, especially our emphasis on core values underlying the Human Rights Act.
  5. Coherence of the Human Rights Act is nevertheless a very important consideration for this review, which will sometimes override other considerations.

## Core values that underlie the Human Rights Act

* 1. The Human Rights Act is an anti-discrimination law. As such, it reflects values and ideals common to liberal democratic societies.
  2. In the Issues Paper, we identified some core values that thread through the Human Rights Act and that underlie all domestic and international human rights instruments. We expressed these values as four pairs: equality/fair play; dignity/self-worth; autonomy/privacy; and limits/proportionality.[[139]](#footnote-140)
  3. No submitter told us we had misidentified these core values or that we should not treat them as key reform considerations. Legal experts who commented on this issue agreed that it was correct to have identified these as core values underlying the Human Rights Act.[[140]](#footnote-141) Of the small number of submitters who gave feedback on specific key reform considerations, several singled out one or more of these values as particularly important to the review (with dignity/self-worth being the most common).
  4. We remain of the view that these core values underlie the Human Rights Act and that they should guide us in our review. We explain the meaning of these concepts and how they relate to each other more fully in the Issues Paper and provide a summarised version below.

### Equality/fair play

* 1. The idea of equality not only sits at the heart of anti-discrimination law and human rights law but of almost all contemporary liberal moral and political theories.[[141]](#footnote-142) In the Issues Paper, we linked it to ideas of ‘fair go’ or ‘fair play’ that feature in New Zealand’s political culture.[[142]](#footnote-143)
  2. The Human Rights Act does not define equality and does not reflect one single vision of equality. In the Issues Paper, we described the meaning of equality as complex and unsettled. We suggested that, when examining whether and how a particular provision in the Human Rights Act seeks to advance equality, we need to consider the particular vision of equality underlying that provision.[[143]](#footnote-144)
  3. In that context, we pointed out that many provisions in the Human Rights Act reflect a substantive rather than a formal view of equality — one that acknowledges that treating everyone the same does not always lead to equality of outcome. We gave the example of section 73 of the Act, which exempts certain kinds of “measures to ensure equality” from being considered discrimination.[[144]](#footnote-145)
  4. A small number of submitters took issue with this passage in the Issues Paper, which they took to suggest that the concept of equality underlying the Human Rights Act as a whole is substantive equality. Some submitters said this was a “redefinition” of equality.
  5. We did not and do not suggest that all provisions in the Human Rights Act reflect a substantive vision of equality. Rather, we consider that, when seeking to understand the policy rationale underlying specific provisions in the Act, it is sometimes helpful to identify the particular vision of equality that underlies that provision.

### Dignity/self-worth and autonomy/privacy

* 1. Dignity and autonomy are two further cardinal values that underlie anti-discrimination law and human rights law.
  2. As we explained in the Issues Paper, the idea of human dignity is used in human rights contexts in two different senses:[[145]](#footnote-146)
     + 1. to explain an inherent quality that all humans are born with and that cannot be taken from them; and
       2. to explain feelings of self-worth that can be harmed through ill treatment, including discrimination.
  3. Autonomy refers, in general terms, to a person’s right “to make choices and have their choices respected without being dictated to by the state or others”.[[146]](#footnote-147) In the context of the Human Rights Act, autonomy plays two roles. First, it is closely connected to the realisation of equality. Second, it also underlies some of the limits the Human Rights Act places on the reach of anti-discrimination laws. As we explained in the Issues Paper, liberal democracies recognise an area of liberty within which people are entitled to act on their individual preferences in relation to matters of concern to them.[[147]](#footnote-148)
  4. As we also explained in the Issues Paper, there is a close connection between autonomy and privacy.[[148]](#footnote-149)
  5. No submitter disagreed that dignity/self-worth and autonomy/privacy are core values underlying the Human Rights Act. Of the small number of submitters who gave specific feedback on these reform considerations, several expressed views about whose dignity/self-worth or autonomy/privacy we should prioritise in this review. Some submitters thought we should focus on the dignity/self-worth and autonomy/privacy of people who are transgender or non-binary or who have an innate variation of sex characteristics. They said this was because these are marginalised communities that have suffered from the absence of reliable anti-discrimination protections.
  6. Other submitters highlighted the dignity/self-worth and autonomy/privacy of cisgender women and said we had not prioritised these sufficiently in the Issues Paper.
  7. Human rights belong to all individuals by virtue of their humanity.[[149]](#footnote-150) We agree that the dignity/self-worth and autonomy/privacy of people who are transgender or non-binary or who have an innate variation of sex characteristics is an important starting point in this review. These are the groups whose protection from discrimination we have been asked to consider. Unlike many other marginalised or disadvantaged groups in Aotearoa New Zealand, they do not already have clear protection under the current grounds in section 21 of the Human Rights Act.
  8. We also agree that we need to consider the impact of any proposed reforms on the dignity/self-worth and autonomy/privacy of cisgender women and girls. A key issue in this review is whether to amend exceptions in Part 2 of the Human Rights Act that currently allow for differences of treatment on the prohibited ground of sex. These exceptions have particular significance for women, and many submitters have raised with us concerns about the impact of reform specifically on cisgender women. We have considered these concerns carefully at all points of the review.
  9. We also need to consider the impacts of reform on other people living in Aotearoa New Zealand whose rights and interests might be affected by any reforms we propose. For example, at various parts of this report, we discuss the rights, interests and concerns of employers, landlords, businesses, insurers, residents, religious groups, Māori, ethnic minority communities, children and others.
  10. Where tensions arise between the dignity/self-worth and autonomy/privacy of different groups, we need to resolve them as fairly as possible, bearing in mind the fourth pair of core values we identified in the Issues Paper to which we now turn.

### Limits/proportionality

* 1. In the Issues Paper, we explained that the right to freedom from discrimination is not absolute and that the Human Rights Act contains rules designed to balance this right against other rights, interests and concerns that Parliament deemed to be important. We also explained that, to be considered legitimate in contemporary human rights law, limits on rights should be proportionate.[[150]](#footnote-151) This means they should create a benefit to society sufficient to justify the intrusion on people’s rights and freedoms. In simple terms, you should not use a sledgehammer to crack a nut.[[151]](#footnote-152)
  2. We explained in the Issues Paper that this idea of proportionality is reflected in section 5 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).[[152]](#footnote-153) It says the rights and freedoms in the NZ Bill of Rights may only be subject to reasonable limits that are “prescribed by law” and “demonstrably justified in a free and democratic society”. This second requirement of demonstrable justification is often said to equate to a requirement of proportionality.[[153]](#footnote-154)
  3. No submitter told us these underlying propositions were incorrect. However, we heard different views about the significance of these matters for this review. Some submitters urged us to ensure that any limits that are put on the anti-discrimination rights of people who are transgender or non-binary or who have an innate variation of sex characteristics meet a genuine need that cannot be addressed in any other way. Others expressed a concern that adding new grounds to section 21 would have a disproportionate effect on other groups, particularly cisgender women.
  4. Several submitters expressed concern about the long-term impact of reform and our ability to assess long-term risks. For example, the Women’s Rights Party submitted that the “benefit (or harm) to children and to society cannot be assessed” and that, without this evidence base, the proposed reforms cannot be demonstrably justified.
  5. As we explained in the Issues Paper, the twin ideas of limits and proportionality have two key implications for our policy analysis in this review. First, the core value of proportionality requires us to ensure, as far as possible, that any amendments we propose strike a fair balance between all relevant rights, interests and concerns — one that does not result in unjustified limits on any rights protected by the NZ Bill of Rights. As already mentioned, this will involve considerations of the rights, interests and concerns of people who are transgender or non-binary or who have an innate variation of sex characteristics, of cisgender women and children and of many other groups.
  6. We agree that, where they can be identified, it is appropriate to assess the long-term effects of reform. However, we do not consider that an unsubstantiated concern about long-term impacts should stand in the way of law reform when the evidence that is available supports reform. Nor do we think amending the Human Rights Act to clarify that certain groups are protected from discrimination will create harms to children.
  7. Second, when considering reform of the exceptions in Part 2 of the Human Rights Act that specify circumstances in which it is lawful to treat people differently based on a prohibited ground, we also need to consider the reasons the enacting Parliament deemed were sufficient to justify differences of treatment in the particular context. The desirability of coherence suggests that, where possible, we should make law reform recommendations that reflect these existing rationales.
  8. Given many of the Part 2 exceptions were modelled on earlier provisions in the Human Rights Commission Act 1977 (1977 Act), some of the reasons deemed sufficient to justify differences in treatment now seem outdated. We doubt all these reasons would be considered sufficient in today’s terms to justify limiting the right to be free from discrimination. That means there is sometimes a tension between maintaining coherence in the Act and upholding the idea embodied in section 5 of the NZ Bill of Rights that limits on rights must be demonstrably justified.[[154]](#footnote-155) Where those tensions arise in this review, we reconcile them as best we can in the light of all our key reform considerations.

## Constitutional fundamentals

* 1. In the Issues Paper, we suggested that law reform in Aotearoa New Zealand should be consistent with fundamental constitutional principles and values that underpin New Zealand’s legal system. We identified three as relevant to this review:
     + 1. tikanga;
       2. te Tiriti o Waitangi | Treaty of Waitangi; and
       3. human rights obligations in domestic and international law.

### Tikanga

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

1. The considerations of the Treaty of Waitangi and tikanga, in particular, are absolutely critical and fundamental for any legal changes in Aotearoa and help to ensure that proposed reforms will respect and incorporate our unique legal and cultural context.
   1. The kind of recommendations Te Aka Matua o te Ture | Law Commission makes in respect of tikanga can differ substantially depending on the scope and nature of a particular review.[[155]](#footnote-156) Within the limited scope of this review, we are primarily concerned to consider and address the potential impacts of any law reform recommendations we might make on the ability of Māori to live in accordance with tikanga. The need to make those inquiries is reinforced by the Legislation Design and Advisory Committee’s *Legislation Guidelines* (LDAC guidelines), by the Law Commission’s governing statute and by international law.[[156]](#footnote-157)

### Treaty of Waitangi

* 1. Feedback on whether the Treaty of Waitangi should be a key reform consideration was divided. Some said the Treaty was a fundamental law reform consideration in Aotearoa New Zealand. For example, Te Kāhui Tika Tangata | Human Rights Commission said: “As our foundational constitutional document, human rights in Aotearoa New Zealand must be grounded on Te Tiriti and therefore must reflect te ao Māori values.” The Mental Health Foundation of New Zealand submitted that we “cannot sufficiently evaluate the values that underpin the [Human Rights Act] without also ensuring we give effect to the relevant Articles of Te Tiriti o Waitangi”. The Wellington Pride Festival said Treaty principles and Māori perspectives need to be integrated into the key reform considerations.
  2. Other submitters said the Treaty of Waitangi has no relevance to the review. Most of these submitters said the Treaty is irrelevant because it does not mention people who are transgender or non-binary or who have innate variations of sex characteristics. Some said these concepts or the concept of gender did not exist in 1840, some said te ao Māori does not recognise gender diversity and others thought the Treaty is too old to have relevance today.
  3. Except for this last point, submitters did not seem to be objecting to the relevance of the Treaty of Waitangi to law reform generally. Rather, their argument was that, properly understood, the Treaty did not support the reforms we were considering of section 21 of the Human Rights Act.
  4. We address arguments of that kind in Chapter 5. The prior question addressed in this chapter is whether it is desirable for us to be undertaking those inquiries. For the reasons we set out in the Issues Paper, we consider it beyond doubt that the Treaty of Waitangi is an appropriate consideration to guide our policy work. Analysis of the Crown’s obligations under the Treaty has been an expectation of good policy design for nearly four decades. The Law Commission cannot make robust and enduring recommendations for law reform in Aotearoa New Zealand without considering those implications.

### Human rights obligations in domestic and international law

* 1. In the Issues Paper, we said we would need to consider the government’s human rights obligations found in domestic and international law.
  2. No submitter disagreed that human rights obligations were an important consideration for our review. Many submitters shared views about which rights and whose rights were most relevant and important. Some placed particular emphasis on the right of people to be free from discrimination that is due to their gender identity or sex characteristics. The Human Rights Commission referred to international law authorities on this issue. We analyse these authorities in Chapter 4.
  3. Other submitters emphasised the rights of other groups in the community. Many emphasised the rights and freedoms in the NZ Bill of Rights, including the freedoms of thought, conscience, religion, belief, expression and association. A few referred to specific international instruments, most commonly, the Convention on the Elimination of All Forms of Discrimination against Women.
  4. One submitter expressed a concern that there is pressure for reform from the United Nations. We heard a similar sentiment from a handful of people who provided general feedback on the review to Kia Rangona te Kōrero | Free Speech Union.

#### International law

* 1. International treaties impose obligations on the New Zealand government that are binding on it as a matter of international law. It would be irresponsible for the Law Commission to ignore relevant treaties or to make recommendations for law reform that would bring New Zealand into breach of its international obligations.
  2. Statements from international bodies (such as United Nations committees) are not direct sources of binding obligation in and of themselves.[[157]](#footnote-158) Rather, they are sources of interpretive authority (sometimes persuasive) that help us to understand the meaning and scope of relevant international law obligations.
  3. International law developments are particularly relevant to this review because both the Human Rights Act and the NZ Bill of Rights mention international treaties in their Long Titles. The Long Title to the Human Rights Act refers to protecting human rights “in general accordance” with United Nations Covenants and Conventions. The Long Title to the NZ Bill of Rights describes it as an Act “to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”.

#### Convention on the Elimination of All Forms of Discrimination against Women

* 1. A few submitters singled out the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as an essential consideration in this review. For example, Women’s Declaration International NZ said CEDAW is vitally important to this review, that the “sex provisions” of the Human Rights Act were brought in to comply with CEDAW and that including new prohibited grounds in the Human Rights Act for characteristics like gender identity would conflict with CEDAW.
  2. CEDAW is one of the treaties that warrant consideration in this review alongside other international human rights treaties to which New Zealand is a party. We address its scope and significance in later chapters, especially Chapter 4.
  3. However, to suggest that the “sex provisions” in the Human Rights Act were brought in to comply with CEDAW overstates the position.
  4. Sex became a prohibited ground of discrimination in New Zealand with the passage of the 1977 Act. Most of the current sex exceptions in Part 2 of the Human Rights Act are based on exceptions in that Act and some use very similar language.
  5. The text of CEDAW was not adopted by the United Nations General Assembly until 1979. The treaty entered into force in 1981. New Zealand signed it in 1980 and ratified it (creating binding obligations) in 1985.
  6. Negotiations in the United Nations that eventually culminated in CEDAW were likely an important part of the background against which the decision was made to prohibit sex discrimination in New Zealand law. CEDAW was preceded in the United Nations by the adoption in 1967 of a (non-binding) Declaration on the Elimination of Discrimination against Women. Further, by 1977, work on CEDAW itself was well under way.
  7. We have not, however, found any suggestion in the legislative history of the 1977 Act that specific provisions in the Act were drafted with CEDAW in mind or that any of the sex exceptions in the Act were thought necessary to comply with specific obligations in CEDAW. Nor is a direct relationship of this kind suggested by similarities in the wording of the two instruments (few of which exist).
  8. The direct impetus for the 1977 Act was the 1975 report of a Select Committee established to investigate the extent of discrimination against women in New Zealand and to recommend policies for its elimination.[[158]](#footnote-159) In its extensive recommendations, the Committee referred only briefly to international law, noting in passing that anti-discrimination legislation was required to incorporate “relevant international law declarations and conventions”.[[159]](#footnote-160)
  9. As introduced in 1976, the Long Title to the Human Rights Commission Bill did not refer to international law. However, following select committee consideration, the Bill was amended to refer to “the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights”. This reference likely anticipated New Zealand’s ratification of the international covenants on civil and political rights, and economic, social and cultural rights, the following year.
  10. Similarly, when the Human Rights Act was enacted in 1993, international law commitments were an important background consideration. As noted, the Long Title to the 1993 Act refers to protecting human rights “in general accordance” with United Nations Covenants and Conventions. However, we have found no evidence to suggest that, even in 1993, international treaties closely influenced the scope and wording of specific provisions. This is perhaps unsurprising given that the relevant treaties tend to state anti-discrimination obligations at a broad level and do not go into the same detail as the Human Rights Act about how competing rights and interests are to be balanced in specific contexts.

#### Freedoms of thought, conscience, religion, belief, expression and association

* 1. In their feedback on key reform considerations and in other feedback, many submitters stressed the importance of freedom of expression and, to a lesser extent, the related freedoms of thought, conscience, religion, belief and association. These are found in the NZ Bill of Rights as well as at international law. Some submitters told us we had undervalued the importance of these rights in the Issues Paper.
  2. We agree that these rights are important considerations for us in this review. As well as here, their significance is reflected in two other places in our key reform considerations.
  3. First, we have identified autonomy as a core value underlying the Human Rights Act. Autonomy is a broad overarching concept that encapsulates the freedoms submitters have identified. As we explained earlier, preservation of autonomy is a rationale that underpins many exceptions in the Human Rights Act.
  4. Second, we have identified limits/proportionality as a pair of core values underlying the Human Rights Act. This acknowledges that the right to freedom from discrimination is not absolute. As we noted in the Issues Paper, it must sometimes give way to the rights of others as well as to other important interests of government or society.[[160]](#footnote-161)
  5. Importantly, though, the rights to freedom of expression and association and to manifest religion and belief must themselves sometimes give way to other rights or interests. Under section 5 of the NZ Bill of Rights, they may be subject to reasonable limits that are prescribed by law and demonstrably justified in a free and democratic society.[[161]](#footnote-162)
  6. In Chapter 6 of this report, we explore these rights in depth and examine closely whether any limits on them that might arise as a result of reform of section 21 of the Human Rights Act are demonstrably justified.

## Needs, perspectives and concerns of New Zealanders

* 1. No submitter disagreed that the needs, perspectives and concerns of New Zealanders should be a key reform consideration. However, some submitters expressed views on whose needs, perspectives and concerns we should prioritise. For example, some thought we should place special priority on the needs, perspectives and concerns of people who are transgender or non-binary or who have an innate variation of sex characteristics. Others stressed the importance of understanding the needs, perspectives and concerns of other groups in the community, predominantly cisgender women.
  2. Good law reform is best advanced through a broad appreciation of the needs, perspectives and concerns that people have relevant to the proposed reform.[[162]](#footnote-163) This includes people who are affected by the reform as well as others who have relevant knowledge or expertise.
  3. We do not think it is helpful for us to treat particular views as having priority. We accept that, in this review, understanding the needs, perspectives and concerns of people who are transgender or non-binary or who have an innate variation of sex characteristics is an important starting point. However, we also need to understand and consider the needs, perspectives and concerns of others in the wider community.
  4. Public consultation is a key tool the Law Commission uses to understand the needs, perspectives and concerns of people in Aotearoa New Zealand on issues we are reviewing. In Chapter 1, we outlined the consultation process we held for this review. This was the largest public consultation the Law Commission has run for several years, and the feedback we received helped us to understand a variety of relevant perspectives.
  5. It is, however, useful to highlight two limitations of our public consultation process. First, we are conscious that we have not heard all relevant perspectives on all issues in this review. Some groups are harder to reach than others. We contacted many people and organisations we thought might be affected by the review or could have relevant expertise, including many industry bodies. While some chose to make a submission, many did not.
  6. Second, a Law Commission consultation is not a survey or referendum. It does not measure the level of public support for a particular policy option. There are many variables that influence whether individuals and organisations submit on a public consultation. These include whether they are aware of the consultation, how much they feel their interests are personally affected, the time and resources they have available to them, how easy or difficult they find it to engage with supporting materials and the extent to which advocacy groups are encouraging or supporting public engagement.
  7. The only way to measure the level of community support for a particular reform option is through a well-designed and properly administered survey. For reasons of timing, resourcing and expertise, the Law Commission does not generally conduct surveys of that kind. However, on some issues relevant to the review, we have been able to locate survey data. For example, there are data available about the experiences of discrimination of people who are transgender or non-binary (less so for people who have innate variations of sex characteristics).[[163]](#footnote-164) There is also a limited amount of data available about wider community perspectives on some relevant reform questions.[[164]](#footnote-165) Where we have been able to locate survey evidence, we discuss it in relevant chapters.
  8. Even where survey evidence is available, the role of the Law Commission is not to search for a reform option with which everyone agrees nor even for the reform option supported by the greatest number of people. The extent of community support for a measure (where that can be accurately assessed) is one factor that we have considered alongside others in determining whether law reform on a particular issue is necessary and desirable.

## Evidence-led law reform

* 1. No submitter disagreed that our law reform analysis should be grounded in evidence, and some submitters told us specifically that basing our review on evidence was important.
  2. We heard a range of different perspectives about what evidence we should rely on and how it should be prioritised. For example, some submitters expressed a concern that there are currently high levels of misinformation circulating about issues relevant to this review. Some submitters told us we should prioritise the evidence of one particular group over another. Some submitters criticised particular evidence we had relied on in the Issues Paper. For example, a few submitters said we should not consider, or should give less weight to, the laws of other countries.
  3. Throughout this report, we try to ground our assessment of the nature and extent of any need for reform in the best available evidence. Where there are gaps in our evidence base, we identity those gaps and discuss their implications for reform.
  4. The laws in other countries with similar legal systems are one source of evidence we consider in this review alongside many others. Examining relevant law and practice in other countries helps us to identify a range of potential approaches to regulating a particular issue as well as problems that may arise in practice with particular reform options. It is regarded as best practice when advising the New Zealand government on law reform.[[165]](#footnote-166)
  5. Specifically in the context of anti-discrimination law, there is a high degree of cross-pollination between our legislation, anti-discrimination protections in international treaties and the anti-discrimination laws of some other jurisdictions with a similar legal heritage to our own. As we explain further in Chapter 4, New Zealand legislators have looked to the laws of other countries to justify past extensions to the scope of New Zealand’s anti-discrimination laws. They have considered it significant if New Zealand law is out of step with other countries with similar legal and social systems.
  6. That does not mean we are bound to follow approaches taken in other jurisdictions. In this report, we sometimes recommend approaches to reform that have been taken elsewhere and sometimes recommend novel approaches that we think are best suited to New Zealand’s particular regulatory context. We also sometimes identify difficulties with placing too much reliance on overseas approaches. For example, in Chapter 8, we explain some differences in the way exceptions are crafted in some overseas discrimination regimes that make it difficult to draw direct parallels.

## Other principles of good law making

* 1. In the Issues Paper, we explained there are other principles of good law making that are relevant to law reform and gave examples drawn from the LDAC guidelines.[[166]](#footnote-167) No submitters told us we should not treat these principles of good law making as key reform considerations. Some submitters underlined specific considerations as important to this review, principally accessibility and certainty.
  2. We agree that accessibility is an important principle for us to bear in mind in this review. Laws need to be accessible so that people can find them, navigate them and understand them.[[167]](#footnote-168) Advising on how to make law as understandable and accessible as possible is one of the Law Commission’s statutory functions.[[168]](#footnote-169)
  3. We also agree that law makers should strive to promote certainty. The challenge, however, is to provide adequate certainty while preserving flexibility for the law to respond to new situations as they arise.[[169]](#footnote-170) We grapple with this challenge at several places in this report.
  4. Principles such as accessibility and certainty can be expressed in other ways. For example, in *For Women Scotland Ltd v Scottish Ministers*, the United Kingdom Supreme Court emphasised the desirability of statutes being “predictable, workable and capable of being consistently understood and applied”.[[170]](#footnote-171) The Court also stressed the desirability of words in a statute having the same meaning each time they are used.[[171]](#footnote-172) These are all related and helpful ideas.
  5. Other relevant principles of good law making stated in the LDAC Guidelines include that:
     + 1. Law reform should only be undertaken if it is necessary and if it is the most appropriate way to achieve a policy objective. Before proposing reform, we should be satisfied the costs of legislating do not outweigh the benefits.[[172]](#footnote-173)
       2. Laws should be carefully designed to achieve their goals and to ensure they do not overreach or result in unintended consequences.[[173]](#footnote-174)
  6. These also remain important considerations for this review.

## Suggestions we received for additional key reform considerations

* 1. In consultation, we heard two suggestions for matters that should be stated separately as key reform considerations: safety/freedom from violence and the rights of cisgender women. For the reasons explained below, we are satisfied these can be adequately considered within the existing categories of key reform considerations.

### Safety/freedom from violence

* 1. Some submitters suggested that our key reform considerations should reflect more clearly the importance of safety and/or freedom from violence. For example, several submitters said it was important for the Law Commission to treat the safety of people who are transgender or non-binary or who have an innate variation of sex characteristics and the goal of protecting them from harm as key considerations for this review. Conversely, some submitters mentioned safety as a key reason to justify exceptions to a protection from discrimination.
  2. Safety and freedom from violence are vital concerns for all people in New Zealand and a special concern for people in marginalised groups. We acknowledge that people in marginalised groups are often at increased risk of being the victims of crimes such as sexual violence and assaults. As we discuss in Chapter 4, data about the experiences of people in Aotearoa New Zealand who are transgender or non-binary suggest this is so for them.[[174]](#footnote-175) The same prejudices that underlie discriminatory treatment can also result in threats or acts of violence. This link between prejudice and physical harm is reflected in New Zealand’s sentencing laws, which treat the fact a crime was motivated by hostility towards a group of people who have “an enduring common characteristic” as an aggravating factor.[[175]](#footnote-176)
  3. We agree, therefore, that the goal of protecting people in marginalised groups from threats to their bodily integrity is closely linked to the goals of an anti-discrimination regime. When the state fails to protect people from violence, the core values of autonomy and dignity are manifestly undermined.[[176]](#footnote-177)
  4. Anti-discrimination laws are not, however, the primary legal tool for protecting personal safety. Along with all other people in Aotearoa New Zealand, people who are transgender or non-binary or who have an innate variation of sex characteristics are protected from harm and threats of harm by many laws, including the Crimes Act 1961.
  5. Although the goals of personal safety and freedom from violence underlie some exceptions in Part 2, they are not a constant theme. As we discuss elsewhere in this report, the exceptions in Part 2 advance a range of different objectives, including national security, fair competition in sport, privacy, religious freedom, fair pricing in insurance and many others.
  6. Where issues of personal safety are relevant to specific reform issues we address in this report, we agree they should be evaluated carefully in the light of available evidence. Our key reform considerations support that evaluation. We did not, however, single out issues of personal safety as a key reform consideration that we needed to assess systematically throughout our policy analysis.

### Rights of cisgender women

* 1. Several submitters suggested that the rights of cisgender women are so fundamental to this review that they should be treated as their own category of key reform consideration.
  2. The key reform considerations are articulated at the level of general principle to support consideration of the rights, needs, perspectives and concerns of all New Zealanders as they relate to particular policy issues. We have not singled out any group’s rights as a separate category.
  3. The rights, needs, perspectives and concerns of cisgender women are relevant to several of the key reform considerations we have identified. We acknowledge earlier in the chapter that we need to consider them carefully at all points of the review.
  4. There is, however, a danger that, in singling out the rights of cisgender women as its own category, we might downplay the potential effects of reform on other affected groups or communities or appear to treat cisgender women as a homogeneous group with one agreed set of rights, interests and perspectives. There are many groups whose rights, needs, perspectives and concerns we need to consider in this review. Our key reform considerations support that assessment.

## Other foundational issues

* 1. Although not explicitly framed as key reform considerations, many submitters told us about two issues that they thought we should treat as foundational to this review: the meaning of sex and the validity of the concept of gender identity. Given the significance submitters attached to these two issues, we think it is appropriate to address them in this chapter.

### Meaning of sex

* 1. Many submitters felt that the review could not and should not proceed without a clear statement of the meaning of sex and that this should guide our analysis and recommendations. Some also considered that our failure to define sex in the Issues Paper indicated assumptions we had made but not articulated about this concept.
  2. We mainly heard this concern from submitters who were opposed to reform of the Human Rights Act. These submitters considered that we should take as our starting point that sex is biological, binary, immutable and objectively verifiable.[[177]](#footnote-178) Other submitters disagreed with this view of sex.[[178]](#footnote-179)
  3. For reasons we explore further below, we do not accept that sex has one objective meaning across all the contexts in which it is used. Our research indicates that sex is a functional term that is used in different ways depending on the relevant context and the purpose for which the term is being used. Nor do we think that defining what sex means at the outset of our analysis is a helpful starting point for this review.

#### Sex in biology

* 1. The purpose of sex classification in biology is to compare reproductive system differences at a species level.[[179]](#footnote-180) This means the definition used by biologists needs to be capable of being applied to every species of sexually reproducing organism (and not just humans). The classical biological definition of sex focuses on the type of gametes (reproductive cells) produced by an organism.[[180]](#footnote-181) As there are only two gametes (eggs and sperm), this approach is necessarily binary.[[181]](#footnote-182)
  2. Although a gamete-based definition of sex is used in biology, it may be less useful for other purposes. One author explains:[[182]](#footnote-183)

1. The biological understanding of sexes has been shaped for the comparative study of reproductive systems across the diversity of life, not for making decisions about the social or legal status of human beings.
   1. Some scientists consider this binary sex classification to be an overly simplistic way of understanding sex in humans.[[183]](#footnote-184) For example, some scientists describe sex as a spectrum or a continuum[[184]](#footnote-185) or refer to the variability of human sex characteristics as a reason why a binary classification is overly simplistic.[[185]](#footnote-186)

#### Sex in medical contexts

* 1. When considering sex in medical contexts, clinicians and researchers are usually concerned with how to classify an individual on a practical level — for example, when determining the sex of a baby, treating a patient or considering sex as a variable in medical research. The focus is not on classifying sex at a species level.
  2. Medical explanations of sex generally focus on a range of sex characteristics (such as chromosomes, hormones and reproductive organs) without identifying a single sex trait as determinative.[[186]](#footnote-187) This seems to reflect what happens in practice. For example, medical practitioners identify babies as male or female at birth based on a visual inspection of external genitalia.[[187]](#footnote-188) Where the baby’s sex appears unclear based on visual observation, further investigation such as genetic testing, imaging or hormone measurement may be used.[[188]](#footnote-189)
  3. Guidance from Te Whatu Ora | Health New Zealand states that “the sex related information which is needed for clinical purposes is complex and varied”.[[189]](#footnote-190)

#### Sex in New Zealand legislation

* 1. There is no single definition of sex in New Zealand law, and the word sex is used in different ways in different contexts.
  2. Our research has located over 100 New Zealand Acts or regulations that contain a reference to sex,[[190]](#footnote-191) none of which provide a definition of the term.[[191]](#footnote-192) In many cases, the terms ‘sex’ and ‘gender’ are used in the same legislation, sometimes interchangeably.[[192]](#footnote-193) In others, the legislation seems to be using the terms ‘sex’ and ‘gender’ to mean different things but does not define either term.[[193]](#footnote-194)
  3. Some legislative references to sex are clearly related to physical characteristics. For example, the Contraception, Sterilisation, and Abortion Act 1977 sets out reporting requirements about whether abortions are being sought “because of a preference for the fetus to be of a particular sex”.[[194]](#footnote-195)
  4. Other legislative references to sex are less obviously about physical characteristics. For example, various provisions require an agency to list identifying details about a person such as their name, age, sex, address and occupation.[[195]](#footnote-196)
  5. The Corrections Regulations 2005 contain detailed provisions on how a person’s sex should be determined for the purposes of prison placement, and this is not limited to physical characteristics.[[196]](#footnote-197) The regulations specify that the chief executive of Ara Poutama Aotearoa | Department of Corrections can consider a range of factors, including the person’s nominated sex, how long they have lived as a person of that nominated sex, their birth certificate, whether the person has undergone any gender-affirming medical treatment and any advice from a medical practitioner.[[197]](#footnote-198)
  6. The Births, Deaths, Marriages, and Relationships Registration Act 2021 enables people who are transgender or non-binary and who are born in Aotearoa New Zealand to obtain a birth certificate with a sex marker that reflects their “nominated sex” (either male, female or non-binary).[[198]](#footnote-199) The person must make a statutory declaration verifying that they identify as a person of the nominated sex but does not need to have undergone any medical treatment. The sex listed on a person’s birth certificate can be taken into account alongside other evidence in determining a person’s sex for other purposes but is not definitive.[[199]](#footnote-200)
  7. Many other jurisdictions have equivalent provisions enabling a person to change the sex marker on their birth certificate or to obtain some other type of identification document recording a nominated sex. Each jurisdiction has its own eligibility criteria and its own rules about the legal significance of such a document once it is obtained.
  8. In *For Women Scotland Ltd v Scottish Ministers*, the United Kingdom Supreme Court considered a presumptive rule in the Gender Recognition Act 2004 (UK) that the gender recorded on a person’s Gender Recognition Certificate is to be treated as their sex.[[200]](#footnote-201) The Court held that this presumption was overcome by statutory indicators in the United Kingdom’s anti-discrimination legislation that the meaning of sex in that statute was “biological”.[[201]](#footnote-202) However, the Court stressed this was a matter of statutory interpretation and that the gender recorded on a person’s Gender Recognition Certificate might be determinative of their sex in other legislative contexts.[[202]](#footnote-203) In other words, the Court acknowledged that sex does not have a single uniform meaning in United Kingdom law.
  9. The Australian decision of *Tickle v Giggle for Girls Pty Ltd (No 2)* considered the impact of a person having changed how their sex was listed on the register of births in accordance with the Births, Deaths and Marriages Registration Act 2003 (Qld).[[203]](#footnote-204) Under the relevant provision, the person’s sex as recorded on the register of births was to be treated definitively as the person’s sex. On that basis, the Federal Court had no difficulty in concluding that the plaintiff was of that sex for the purposes of Commonwealth anti-discrimination law.[[204]](#footnote-205)
  10. These overseas cases illustrate that the legal meaning of sex can vary depending on context and to achieve different policy aims.

#### Sex in New Zealand case law

* 1. Relatively few cases in New Zealand have considered the meaning of sex or how it should be determined. In cases about the validity of marriages involving transgender people (prior to the law allowing same-sex marriage), courts did not consider a person’s genetics to be determinative when determining their sex for this purpose.[[205]](#footnote-206) In a case involving an application to change the sex recorded on a person’s birth certificate (prior to the self-identification regime being introduced), the Family Court declined to specify any general test for determining when someone had changed their sex but said it was not necessary for an applicant to have undergone “full gender reassignment surgery” in all cases.[[206]](#footnote-207)

#### Sex in the Human Rights Act

* 1. As we explain further in Chapter 4, the meaning of sex in the Human Rights Act is not settled. There is no definition of sex in the Act.[[207]](#footnote-208) There has been no case law that has examined the scope of sex as a prohibited ground of discrimination or provided a definition of what it means.
  2. Sex became a prohibited ground of discrimination in New Zealand with the passage of the Human Rights Commission Act 1977. As we explained earlier, the direct impetus for that Act was the 1975 report of a Select Committee established to investigate the extent of discrimination against women in New Zealand and to recommend policies for its elimination. It is clear from that report that protections from sex discrimination were designed to remedy historical discrimination that women experienced when compared to men.[[208]](#footnote-209) As Government MP Barry Brill explained at the second reading of the Human Rights Commission Bill 1976, the Committee’s recommendations and consequent National Party policy were to “do away with the traditional stereotyping that a man is a person of particular ambitions or abilities and a woman is a person of different abilities and ambitions”.[[209]](#footnote-210)
  3. The term ‘sex’ appears in the list of prohibited grounds of discrimination in section 21 and in 19 different exceptions. As we illustrate in later chapters, we think the word sex serves a range of functions in these exceptions.

#### Settling a meaning of sex at the outset of this review is unhelpful

* 1. In sum, sex is a functional term that is used in different ways depending on the context.
  2. We do not think that fixing a particular meaning of sex at the outset is a helpful way to advance this review. Our task is 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 that we analyse throughout this report with reference to relevant legal, social and practical considerations.
  3. This task would be no different even if we were to agree that sex (in the Human Rights Act and more generally) has a narrow and biologically determined meaning. The meaning given to the word sex would not answer the policy question of whether and how anti-discrimination laws should apply to people who are transgender or non-binary or who have an innate variation of sex characteristics.
  4. This is consistent with the approach in comparable jurisdictions we have analysed. For example, in *For Women Scotland Ltd v Scottish Ministers*, theUnited Kingdom Supreme Court held that the terms ‘sex’, and ‘man’ and ‘woman’ have a biological meaning in the United Kingdom’s anti-discrimination statute but stressed this was a matter of statutory interpretation, not of policy, stating:[[210]](#footnote-211)

1. It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the words “woman” other than when it is used in the provisions of [the relevant United Kingdom statute].
   1. In reaching a different conclusion about the meaning of sex in Australian federal anti-discrimination law, the Federal Court of Australia in *Tickle v Giggle for Girls Pty Ltd (No 2)* similarly saw the issue before it as one of statutory interpretation and noted that it did not “need to determine the metes and bounds of the meaning of sex”.[[211]](#footnote-212)
   2. We consider in Chapter 7 whether it is desirable, from the perspective of advancing good policy outcomes, to add a definition of sex to the Human Rights Act.

### Assumptions about the validity of transgender identities

* 1. 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. Many submitters urged on us particular approaches to this issue, and some told us we needed to state more clearly our underlying assumptions.
  2. Of those submitters who opposed reform of the Human Rights Act, many told us that gender identity is an “ideology”, a “belief system” or “a new social construct”, with some accordingly questioning the validity of transgender and non-binary identities. Some submitters told us it was obvious from the Issues Paper that the Law Commission had ascribed to “gender ideology”.
  3. For example, Lesbian Action for Visibility Aotearoa stated in its submission:

1. [The Issues Paper] uses the language and concepts of the transgender belief system (trans ideology) throughout, thus giving a very clear message to potential submitters, that the authors, and indeed the Law Commission itself, unreservedly accepts that belief system … Gender Identity is not based in material reality. It is a purely subjective feeling … [Gender identity and gender expression] are part of a belief system held by only some of our population.
   1. Speak Up for Women commented (emphasis in original):[[212]](#footnote-213)
2. … gender identity refers to those who choose to **believe** they are living as either the opposite sex, or living outside the binary concept of sex. ***The idea is gender, the reality is sex***.
   1. By contrast, some submitters who were supportive of reform saw the legitimacy of transgender and non-binary identities as an essential starting point for our review. For example, Victoria Casey KC stated:
3. The starting point must be to acknowledge that trans, gender diverse and intersex people exist. They do: that is a matter of fact, not opinion or ideology up for debate.
   1. Countering Hate Speech Aotearoa commented:
4. … the Law Commission jumps straight to the fact that transgender people, non-binary people and people with innate variations of sex characteristics experience discrimination without first acknowledging the epistemically prior fact that these groups of human beings exist. CHSA argues it is necessary to start at the beginning to ground the reforms correctly.
   1. We agree that the Issues Paper proceeded 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. That remains a starting point for this review.
   2. 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.
   3. Recognition that it is legitimate for a person’s gender identity to differ from the sex the person was assigned at birth is deeply embedded in New Zealand law, including in the Human Rights Act itself. Section 63A of that Act makes it unlawful to perform or arrange a conversion practice, including one that is intended to change or suppress a person’s gender identity.[[213]](#footnote-214) Other New Zealand laws that explicitly recognise gender identity include:
      * 1. the Births, Deaths, Marriages, and Relationships Registration Act, which enables a person to change the sex marker on their birth certificate so that it aligns with their gender identity;[[214]](#footnote-215)
        2. the Integrity Sport and Recreation Act 2023, which requires Te Kahu Raunui | Sport Integrity Commission to have procedures that reflect the needs of participants, including needs based on gender identity and expression;[[215]](#footnote-216)
        3. the Legislation Act 2019, which defines a de facto relationship as a relationship between two people, regardless of their gender identity;[[216]](#footnote-217)
        4. the Oranga Tamariki Act 1989, which requires a holistic approach to be taken to decisions about a child’s well-being, including a child’s gender identity;[[217]](#footnote-218) and
        5. the Sentencing Act 2002, which treats hostility towards a group of persons with common characteristics as an aggravating factor in sentencing and gives gender identity as an example.[[218]](#footnote-219)
   4. The same is true in other Commonwealth jurisdictions with which we share a close legal heritage. As we explain further in Chapters 4 and 7, gender identity or an equivalent is a prohibited ground of discrimination in statutes throughout Australia, Canada and the United Kingdom.
   5. The legitimacy of the concept of gender identity is recognised by international treaty bodies,[[219]](#footnote-220) the World Health Organization[[220]](#footnote-221) and medical organisations.[[221]](#footnote-222) Contrary to the suggestion of some submitters, the validity of transgender identities was also accepted by Dr Hilary Cass in her report on gender identity services in the United Kingdom. Dr Cass acknowledged that for some young people presenting to gender identity services, “the best outcome will be transition”[[222]](#footnote-223) and explained that the review was not about “undermining the validity of trans identities”.[[223]](#footnote-224)
   6. We do not think it is open for us in this review to take a different approach.

CHAPTER 4

# The core case for reform

## Introduction

* 1. In this chapter, we address the key question in this review: whether section 21 of the Human Rights Act 1993 should be amended to clarify that it covers discrimination that is due to a person being transgender or non-binary or having an innate variation of sex characteristics. We recommend that section 21 should be amended to this effect.
  2. We present in this chapter the core case for reform.
  3. First, we identify the rationales that underlie the existing grounds in section 21 and that have been relied on in the past in Aotearoa New Zealand and overseas to justify extending protection from discrimination to new groups. We explain why we consider these are appropriate matters for us to consider when assessing the case for reform, and why we consider these rationales support protecting people who are transgender or non-binary or who have an innate variation of sex characteristics from discrimination.
  4. Second, we explain why we consider the current law does not provide adequate protection from discrimination for people in these groups.
  5. Although the arguments we explore in this chapter comprise what we consider to be the core case for reform, there are other implications of reform of section 21 that we address in later chapters. We explain later in the chapter where in the report we propose to address some other key implications of reform. Ultimately, our decision to recommend reform is based on the analysis we present throughout the report.

## Section 21 of the Human Rights Act

* 1. Section 21 of the Human Rights Act sets out 13 prohibited grounds of discrimination. They are: sex; marital status; religious belief; ethical belief (which is defined as the lack of a religious belief); colour; race; ethnic or national origins; disability; age (but only if you are 16 or over); political opinion; employment status; family status; and sexual orientation.
  2. 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 the discrimination was “by reason of” a prohibited ground in section 21, a claim of discrimination under the Human Rights Act will fail.
  3. Further, section 21 is also a gateway to protection from discrimination under some other New Zealand statutes. For example, the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) protects people from discrimination “on the grounds of discrimination in the Human Rights Act 1993”.[[224]](#footnote-225)
  4. Section 21 does not refer expressly to people who are transgender or non-binary or who have an innate variation of sex characteristics. It does not use related terms such as gender, gender identity, gender expression or intersex status. The key issue in this review is whether section 21 should be amended to include new grounds along these lines.

## Overview of feedback

* 1. In the Issues Paper, we analysed this issue in two parts. First, we identified six rationales that have been used previously (in Aotearoa New Zealand and overseas) to justify bringing new grounds within the protection of anti-discrimination laws.[[225]](#footnote-226) We also identified a seventh rationale that we derived from our key reform considerations — to meet the Crown’s obligations under te Tiriti o Waitangi | Treaty of Waitangi.
  2. Based on these rationales, we reached the preliminary 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.
  3. Second, we asked whether current law already provides sufficient protection. We reached the preliminary conclusion that it does not and that amendments to section 21 are necessary and desirable.
  4. We sought feedback from submitters on this preliminary conclusion. More submitters answered this question than any other. Many submitters also made comments in their answers to other questions that were, in substance, a response to this question.
  5. The feedback we received directly through our submissions process was very evenly balanced between opposition and support for reform of section 21, with slightly more submitters supporting reform. Support was particularly strong in those submissions we received from organisations — 42 organisations clearly supported amending the Human Rights Act to better protect people who are transgender or non-binary or who have an innate variation of sex characteristics.[[226]](#footnote-227)
  6. Eight organisations opposed amending section 21 of the Human Rights Act to provide clearer protection from discrimination for people who are transgender or non-binary but supported other reform of section 21 (either to define the ground of sex or to introduce a new ground related to innate variations of sex characteristics).[[227]](#footnote-228) Ten organisations opposed reform entirely.[[228]](#footnote-229)
  7. The overarching issue of reform of section 21 was a key focus of discussion at consultation hui we held in partnership with community organisations. In general, the feedback we received at hui we held in partnership with rainbow groups expressed support for reform, whereas participants at hui we held in partnership with groups that advocate for gender-critical views expressed opposition to reform.
  8. The feedback we received in a spreadsheet from Kia Rangona te Kōrero | Free Speech Union (largely based on form text made available on the Free Speech Union’s website) was also focused, in substance, on this question of reform of section 21.[[229]](#footnote-230) People who provided feedback this way opposed reform, primarily due to concerns about free speech. We discuss this feedback in more depth in Chapter 6.
  9. The emails we received on the last day of the consultation period (largely based on form text supplied by Voices for Freedom) also expressed general opposition to reform of the Human Rights Act.[[230]](#footnote-231)

## Rationales underlying existing protections

* 1. We have identified six rationales that underlie the current prohibited grounds in section 21 of the Human Rights Act and that explain why anti-discrimination protections have been extended to new groups in the past both in Aotearoa New Zealand and overseas.[[231]](#footnote-232)
  2. These six rationales provide a principled and coherent basis for assessing whether additional groups should be protected from discrimination in Aotearoa New Zealand. Reliance on rationales that already underlie anti-discrimination law ensures that any new grounds that are added to section 21 promote the coherence of the Human Rights Act, consistent with our key reform considerations. Some of these six rationales also give effect to other key reform considerations such as the core values of dignity and autonomy and the focus on evidence-based reform.
  3. Taken together, these six rationales strongly support the conclusion that people should be protected from discrimination that is due to being transgender or non-binary or having an innate variation of sex characteristics. We discuss them in turn.

### A history of disadvantage

* 1. In the Issues Paper, we explained that a common rationale for extending the protection of anti-discrimination laws to a new group is that people in that group have experienced a history of discrimination, disadvantage, prejudice, stigma or stereotyping.

#### Whether this is an appropriate matter for us to consider

* 1. Few submitters commented specifically on whether this is an appropriate matter to consider (although some submitters made arguments for and against reform based on an assumption that it is a relevant consideration). No submitter explicitly disagreed this is an appropriate matter for us to consider.
  2. A history of disadvantage is often relied on by overseas courts and international treaty bodies when explaining which groups should be protected from discrimination.[[232]](#footnote-233) For example, the Committee on Economic, Social and Cultural Rights said grounds are commonly recognised as an “other status” in article 2(2) of International Covenant on Economic, Social and Cultural Rights if they “reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization”.[[233]](#footnote-234)
  3. During the 1977 and 1993 debates on the Human Rights Commission Bill and the Human Rights Bill, respectively, individual members of Parliament occasionally referred (albeit in passing) to a history of marginalisation or related concepts when talking about why a new ground was needed.[[234]](#footnote-235)
  4. We think a history of disadvantage is a helpful factor to consider when assessing whether the law should protect particular groups from discrimination. It has a clear basis in precedent and is an obvious explanation for many (although we acknowledge not all) of the characteristics already listed in section 21. It links protection from discrimination closely to dignity and autonomy, which are core values underlying the Human Rights Act. It also links protection to evidence of actual need.

#### Whether this rationale supports the case for reform

* 1. This rationale supports the case for protecting people from discrimination that is due to being transgender or non-binary or having an innate variation of sex characteristics. 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.
  2. We set out our understanding of these experiences of discrimination in the Issues Paper.[[235]](#footnote-236) We do not repeat that analysis here except to set out some relevant data from the 2022 Counting Ourselves survey of people who are transgender and non-binary, which were published after the Issues Paper.[[236]](#footnote-237)
  3. In the 2022 survey, 44 per cent of respondents reported experiencing discrimination in the last year, which was more than double the rate reported by the general population in the General Social Survey (21 per cent).[[237]](#footnote-238) Counting Ourselves respondents were over five times more likely than the general population to report discrimination when seeking medical care and almost four times more likely than the general population to report discrimination while on the street or in a public place.[[238]](#footnote-239) In all but one of the situations Counting Ourselves asked about, respondents reported experiencing discrimination in the last 12 months at rates at least twice as high as the general population.[[239]](#footnote-240)
  4. The Counting Ourselvesdata also indicate that these communities experience high rates of violence. For example, 42 per cent of respondents reported that someone had forced them, or tried to force them, to have sexual intercourse.[[240]](#footnote-241) This was more than twice the rate reported by the general population (16 per cent).
  5. Responding to several questions that were indicators of mental wellbeing, 77 per cent of respondents reported high or very high psychological distress compared to 12 per cent of the general population.[[241]](#footnote-242)
  6. We acknowledge we have little specific data about the experiences of discrimination of people in Aotearoa New Zealand who have an innate variation of sex characteristics.[[242]](#footnote-243) However, as we explained in the Issues Paper, for many centuries, people with innate variations of sex characteristics have been dehumanised, pathologised and subjected to violence and discrimination. The Identify Survey said in its submission to us that its data showed intersex young people faced “distinct and increased discrimination” compared to rainbow young people who were not intersex.
  7. In the Issues Paper, we asked whether submitters had any other information about discrimination experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics that they thought it was important for us to consider. Many submitters told us they agreed with our analysis in the Issues Paper. They said the experiences of discrimination detailed in the Issues Paper matched what they had heard from others or experienced themselves.
  8. We also heard from transgender and non-binary participants at consultation hui about the discrimination they experienced. For example, participants told us that they experienced discrimination daily, that discrimination often started happening at a young age and that navigating daily life could be exhausting.
  9. Intersex Aotearoa said the discrimination and ill treatment faced by intersex people and the experiences of intersex people were well covered in the Issues Paper. In interviews conducted on our behalf with people with an innate variation of sex characteristics, participants discussed historical and ongoing discrimination in the healthcare sector and in other areas of life and work.
  10. As we discussed in Chapter 2, some people told us about the compounding effect of having multiple marginalised identities such as being transgender and also part of one of New Zealand’s ethnic minority communities. Some submitters thought that discrimination that is based on multiple characteristics is poorly provided for in the Human Rights Act.
  11. Conversely, many submitters disagreed with what we said in the Issues Paper about experiences of discrimination. There were five common themes, which we explore in turn.
  12. First, some submitters said self-reported data about discrimination cannot be relied on as evidence for reform. While we accept that self-reported data have certain limitations, it is difficult to think of a way to gather data about experiences of discrimination except through self-reporting. To mitigate the limitations of self-reported data, we rely where possible in this report on data that can be compared to (self-reported) data about the general population.[[243]](#footnote-244)
  13. Second, some submitters said people who are transgender or non-binary or who have an innate variation of sex characteristics do not face discrimination. This is contrary to the evidence and to what we heard during consultation. The history of disadvantage, marginalisation and discrimination experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics is beyond doubt.
  14. Third, some submitters said the discrimination experienced by people in these groups is no worse than that experienced by other minorities. Whether or not this is true, it is irrelevant. Many disadvantaged groups are already protected by the extensive grounds in section 21 of the Human Rights Act. It is neither necessary nor desirable for us to rank the experiences of disadvantage of New Zealand’s minority communities in this review.
  15. Fourth, some submitters said transgender and non-binary identities are not valid. We addressed that argument in Chapter 3 and do not repeat it here.
  16. Fifth, some submitters said, if people in these groups face discrimination, it is of their own making. This argument seems more relevant to the next rationale, to which we now turn.

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

* 1. In the Issues Paper, we identified a second rationale that overseas courts have relied on to extend the protection of anti-discrimination laws. Several courts have suggested that protection should be extended to personal characteristics that are either:[[244]](#footnote-245)
     + 1. immutable (that is, the individual has no power to change them); or
       2. so closely tied to a person’s sense of identity that they should not be expected to hide or change the characteristic to avoid stigmatisation or discrimination.

#### Whether both (a) and (b) are appropriate matters for us to consider

* 1. Submitters who commented on this rationale generally agreed that the first limb (immutability) is an appropriate matter for us to consider. However, some submitters told us they did not consider the second limb (characteristics closely tied to a person’s identity) is relevant. A few submitters went so far as to suggest that some existing grounds in section 21 of the Human Rights Act (such as religious belief, ethical belief and employment status) should not be protected because they are not immutable.
  2. We do not agree that a narrow focus on immutability (to the exclusion of the broader consideration stated in the second limb) is appropriate. First, immutability is a poor explanation for many of the current grounds in section 21 of the Human Rights Act, for example, marital status, religious belief, ethical belief, political opinion and family status. Many of these grounds reflect instead a view that the law should protect certain choices that are closely connected to a person’s sense of identity. Therefore, a narrow focus on immutability is not supported by our key reform consideration of coherence.
  3. Second, a narrow focus on immutability is not supported by the overseas case law. For example, in *Corbiere v Canada*, McLachlin and Bastarache JJ said:[[245]](#footnote-246)

1. … what [the grounds listed in the Charter] have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds … is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.
   1. Third, extending protection from discrimination to characteristics that are closely tied to personal identity advances the core value of autonomy. It protects a zone of personal freedom within which individuals should not be penalised for exercising deeply personal choices.
   2. Fourth, it also upholds the core value of human dignity. It is particularly demeaning and harmful to dignity to be denied opportunities to participate in society because of something that is intimately connected to your sense of personal identity.[[246]](#footnote-247)

#### Whether this rationale supports the case for reform

* 1. This rationale supports the extension of anti-discrimination protections to people who have an innate variation of sex characteristics, and no submitter disagreed with that. A person should not have to hide or change an innate variation of sex characteristics to protect themselves from discrimination. Such variations are congenital and can only be altered, if at all, through medical interventions.[[247]](#footnote-248) An expectation that someone undertake medical treatment to avoid discrimination has no possible rational basis and would be inconsistent with the right to refuse to undergo medical treatment in section 11 of the NZ Bill of Rights.
  2. This rationale also supports the extension of anti-discrimination protections to people who are transgender or non-binary. Overseas case law supports the proposition that gender identity is something closely tied to a person’s identity.[[248]](#footnote-249) The European Court of Human Rights has described gender identity as “a most intimate part of an individual’s life”[[249]](#footnote-250) and has said the freedom to define one’s own gender identity is “one of the most basic essentials of self-determination”.[[250]](#footnote-251)
  3. Many people agreed in their feedback that this rationale supports reform. On the other hand, many others disagreed. Some said they considered that being transgender or non-binary is a voluntary choice and that, if people in these groups face discrimination, it is of their own making.
  4. Authorities vary on whether gender identity is immutable.[[251]](#footnote-252) For the reasons explained above, that is not a determinative issue from the perspective of anti-discrimination law. It is enough if a characteristic is so closely tied to a person’s sense of identity that they should not be expected to hide or change the characteristic to avoid stigmatisation or discrimination.
  5. As we explained in Chapter 3, recognition that it is legitimate for people to have a deeply felt, internal and individual experience of gender that does not correspond with the sex they were assigned at birth is embedded in New Zealand law and policy. Many people told us in consultation how integral their gender identity was to their sense of self. For example, submitters talked about having to defend their right to exist or about the impact they felt from being discriminated against for simply existing. Community Law Centres o Aotearoa said:

1. … being transgender or non-binary is something deeply personal and connected to one’s identity and should not be something that people need to hide or change to avoid discrimination (similarly with sex characteristics).
   1. We conclude that this rationale supports the extension of anti-discrimination protections to all three groups.

### Distinctions that harm human dignity

* 1. In the Issues Paper, we explained that overseas case law about recognising new grounds of discrimination often refers to the role played by anti-discrimination laws in enhancing human dignity.

#### Whether this is an appropriate matter for us to consider

* 1. In feedback, only a few submitters commented directly on whether this is an appropriate matter for us to consider, although several others mentioned human dignity in passing when explaining why they considered reform was appropriate. Community Law told us expressly that it thought human dignity is a helpful rationale to consider.
  2. Overseas courts often discuss the importance of dignity and related concepts to anti-discrimination law. For example, in *Egan* *v Canada*, Cory J said: “The fundamental consideration underlying the [Court’s analysis of whether to protect new grounds] is whether the basis of distinction may serve to deny the essential human dignity of the Charter claimant.”[[252]](#footnote-253) In *R (Carson)* *v Secretary of State for Work and Pensions*, Lord Walker said it was important to consider whether the particular type of discrimination is “intrinsically demeaning” (therefore requiring a high level of scrutiny).[[253]](#footnote-254)
  3. Some overseas courts treat harm to human dignity as an overarching test for when to recognise a new ground of discrimination.[[254]](#footnote-255)
  4. As we explained in Chapter 3, dignity/self-worth is one of the pairs of values that underlie the Human Rights Act. The link between human dignity and New Zealand’s anti-discrimination laws was acknowledged in parliamentary debates leading to the enactment of the Human Rights Commission Act in 1977.[[255]](#footnote-256) It is also reflected in a provision empowering Te Taraipiunara Mana Tangata | Human Rights Review Tribunal to award damages for “humiliation, loss of dignity, and injury to the feelings of the complainant”.[[256]](#footnote-257)
  5. In assessing which grounds should be protected from discrimination under New Zealand law, it is helpful to consider the extent to which discrimination on those grounds affects human dignity. That said, as we explained in the Issues Paper, this inquiry into harms to human dignity overlaps significantly with the first two rationales. Differential treatment is more likely to feel demeaning if it unfolds against a history of discrimination,[[257]](#footnote-258) or if it is because of a characteristic that is immutable or closely tied to a person’s sense of self.

#### Whether this rationale supports the case for reform

* 1. Some submitters who supported reform of section 21 mentioned dignity as part of their reasons. For example, Professor Dean Knight said reform of section 21 was important to ensure people who are transgender or non-binary or who have an innate variation of sex characteristics are protected and “may flourish in society with dignity”.
  2. Some talked about the impact of discrimination in equivalent terms. For example, some submitters who are transgender or non-binary or who have an innate variation of sex characteristics said that being deemed unworthy by society takes a widespread toll on them and that the discrimination they experience is humiliating and dehumanising. Some people we heard from in consultation referred to the psychological impact of routine discrimination and how they live their lives in constant fear of ill treatment.
  3. A few submitters who opposed reform said they did not think discrimination against people who are transgender or non-binary was harmful to human dignity or did not think it was demeaning. However, such comments were not very common.
  4. We consider this rationale supports the argument 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. It is clearly 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. In *P v S*, the European Court of Justice relied on the concept of dignity when holding that the dismissal of a transsexual person was discrimination on grounds of “sex”:[[258]](#footnote-259)

To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.

### Consistency with international law

* 1. In the Issues Paper, we identified international law developments as a key driver of past reform of anti-discrimination laws in Aotearoa New Zealand.

#### Whether this is an appropriate matter for us to consider

* 1. Many submitters referred to international law as a reason to amend or not amend section 21 of the Human Rights Act. Community Law said more specifically that it supported laws that uphold international human rights standards. As we explained in Chapter 3, a few people expressed concern in their feedback about United Nations’ influence on reform in this area.
  2. We consider it is important to consider the position at international law when assessing whether the law should protect new groups of people from discrimination. As we explained in Chapter 3, promoting consistency with constitutional fundamentals (including international law) is one of our key reform considerations. International treaties contain obligations that are binding on the New Zealand government.
  3. More specifically, developments in international law have been drivers of past reform of New Zealand’s anti-discrimination legislation. This is reflected in the Long Title to the Human Rights Act, which states one of the Act’s aims as “to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights”.

#### Whether this rationale supports the case for reform

* 1. We observed in the Issues Paper that the position at international law is complex. However, there is a large and growing body of international authority that interprets 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.
  2. Several submitters agreed with this analysis, and we continue to think it is correct. Gender identity, sex characteristics or equivalents are not mentioned explicitly as grounds of discrimination in any human rights treaties to which Aotearoa New Zealand is a party. However, three of these treaties have an open-ended “other status” ground under which the treaty bodies responsible for monitoring the treaties can acknowledge new grounds as deserving of protection.[[259]](#footnote-260) These treaty bodies have stated repeatedly in interpretive statements (general comments) that discrimination directed at people who are transgender or intersex violates the respective treaty.[[260]](#footnote-261)
  3. The United Nations Human Rights Committee has also upheld individual complaints of discrimination on the basis of gender identity.[[261]](#footnote-262) We are not aware of any equivalent complaints being taken to the Human Rights Committee by people with an innate variation of sex characteristics. A chamber of the European Court of Human Rights upheld such a complaint under the European Convention on Human Rights but, on referral to the Grand Chamber, the discrimination claim was ruled inadmissible for jurisdictional reasons.[[262]](#footnote-263)
  4. More broadly, the treaty bodies associated with six human rights treaties to which Aotearoa New Zealand is a party make frequent mention in their general comments of the histories of violence, discrimination and exclusion suffered by people who are transgender or intersex. The treaty bodies conclude accordingly that people with these characteristics warrant careful protection under international human rights law.[[263]](#footnote-264)
  5. The absence of express grounds of protection for people who are transgender or non-binary or who have an innate variation of sex characteristics in section 21 of the Human Rights Act has attracted negative attention in various United Nations reporting processes.[[264]](#footnote-265)
  6. Some submitters referred to international law as a reason not to amend the Human Rights Act. For the most part, they focused on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). For example, the Women’s Rights Party said CEDAW was something we should pay “serious attention to” and that:

1. … any changes to the law which reduced or removed the protections on the grounds of sex, both the anti-discrimination provisions and the exceptions where discrimination is permitted on the grounds of safety, dignity and privacy, would be in breach of CEDAW.
   1. Women’s Declaration International NZ referred us to a declaration that develops similar arguments.[[265]](#footnote-266) Women’s Declaration International authored this declaration and is collecting signatures to it. As of early 2025, it had collected around 39,000 internationally. A core plank of the argument found in this declaration is that CEDAW protects sex-based rights and that sex in this context is defined in biological terms.
   2. The core obligation in CEDAW is to take all appropriate measures to prohibit and eliminate discrimination against women and to promote the equality of men and women.[[266]](#footnote-267) Discrimination against women is defined in article 1 as:
2. … any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
   1. CEDAW does not define “women”, and the preparatory materials for CEDAW indicate the drafters did not consider the scope of that word. We doubt the drafters in the 1970s thought much, if at all, about the need to protect transgender women. But equally, we doubt they were concerned to protect the position of cisgender women as compared to transgender women.
   2. The current Special Rapporteur on violence against women and girls has said that CEDAW only protects sex-based (biological) rights and does not cover transgender women.[[267]](#footnote-268) However, the United Nations committee responsible for monitoring CEDAW takes a different view. In a series of general comments made over the last decade or so, and in observations made in a decision on an individual complaint, it has consistently assumed that transgender and intersex women fall within CEDAW’s scope of protection.[[268]](#footnote-269)
   3. In *Tickle v Giggle for Girls Pty Ltd (No 2)*,the Federal Court of Australia said CEDAW responds to the inequality that women experience in society compared to men. The Court did not think CEDAW is concerned with “discrimination as between different groups of women”.[[269]](#footnote-270)
   4. Whether or not this is correct, we do not consider that CEDAW is an impediment to reform. Neither the core obligation in article 2 nor any other obligation set out in CEDAW is incompatible with protecting people who are transgender or non-binary or who have an innate variation of sex characteristics from discrimination.
   5. As we explained in Chapter 3, when considering each reform issue in this report, we have paid close attention to the potential impact of reform on the rights and interests of cisgender women. Alongside others in the community, cisgender women have rights to equality/fair play, dignity/self-worth and autonomy/privacy that need to be protected. In a general sense, CEDAW affirms these rights. However, the obligations it contains are stated at a high level of generality and do not generally dictate a specific resolution to any of the policy issues we consider in this review.

### Consistency with other liberal democratic nations

* 1. In the Issues Paper, we explained that, when extending the grounds of discrimination in the past, legislators have measured Aotearoa New Zealand against the approach taken in other liberal democratic societies with which we share a common legal heritage.

#### Whether this is an appropriate matter for us to consider

* 1. Of those submitters who supported reform, few commented on this rationale. Of those submitters who opposed reform, some questioned whether we should follow other countries. Some said they thought the impact of discrimination protections in other comparable societies had been negative (often referring to *Tickle v Giggle* *for Girls* *Pty Ltd (No 2)* in Australia).[[270]](#footnote-271)
  2. As we explained in Chapter 3, when engaging in law reform work, it is regarded as best practice to examine the approaches taken in other countries.[[271]](#footnote-272) This is part of what an evidence-based approach to policy development involves. Examining overseas practice can be useful in the context of anti-discrimination law because there is a high degree of cross-pollination between our legislation, anti-discrimination protections in international treaties and the anti-discrimination laws in some other countries with similar legal systems. There are also commonalities in the prohibited grounds.
  3. In the parliamentary debates that preceded the enactment of the Human Rights Act, several MPs referred to the need to keep pace with developments in other countries.[[272]](#footnote-273) For example, the sponsoring minister noted that the Bill “enables us to measure ourselves against other developed nations and to say that we too are a country that places the highest value on the freedom and equality of all our people”.[[273]](#footnote-274)
  4. We consider that the approach in other countries that share a similar legal heritage to Aotearoa New Zealand is an appropriate factor to consider in assessing the case for reform because being out of step with other countries can indicate that New Zealand law may require updating.

#### Whether this rationale supports the case for reform

* 1. We have looked most closely at the United Kingdom, Australia and Canada. New Zealand law shares many similarities with these countries and often looks to their developments in law and policy.
  2. The United Kingdom has protected “gender reassignment” in its anti-discrimination statutes since 1999.[[274]](#footnote-275)
  3. The Australian Commonwealth and all of Australia’s states and territories have anti-discrimination statutes that list gender identity or an equivalent. Five of these jurisdictions have anti-discrimination statutes that expressly refer to people who are non-binary (generally under the definition of “gender identity”).
  4. In Canada, gender identity is a protected ground of discrimination in all 13 provinces and territories and in federal legislation.
  5. In sum, all federal and sub-national jurisdictions in the United Kingdom, Australia and Canada have express protection for gender identity or an equivalent. We discuss the way these various protections are framed more closely in Chapter 7, including the extent to which gender expression is protected either alongside or as part of gender identity.
  6. Grounds aimed specifically at protecting people who have an innate variation of sex characteristics are less common. Seven Australian anti-discrimination statutes now include a ground of this kind. However, there is no such protection in United Kingdom law or in any of the Canadian anti-discrimination statutes.
  7. The slower evolution of protection for people with innate variations of sex characteristics is likely explained by the fact that, until recently, people in this group had little visibility. The shame and secrecy often associated with innate variations of sex characteristics has made it difficult for this group to secure legal protections.
  8. We have also examined the position in Ireland and the United States. The Irish Equal Status Act 2000 and the Employment Equality Act 1998 both list, as one of their “discriminatory grounds”, that “one [person] is male and the other is female” and call it the “gender ground”.[[275]](#footnote-276) There are no grounds directed more specifically at protecting people who are transgender or non-binary or who have an innate variation of sex characteristics. However, the Irish Human Rights and Equality Commission and the Irish Equality Tribunal (now the Workplace Relations Commission) have interpreted the gender ground as protecting transgender people.[[276]](#footnote-277)
  9. The approach in the United States is extremely varied, and the situation is rapidly evolving. At the federal level, there are no grounds aimed specifically at protecting people who are transgender or non-binary or who have an innate variation of sex characteristics. In one case, the United States Supreme Court said the ground of sex in Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against people who are transgender.[[277]](#footnote-278)
  10. States in the United States take a variety of approaches to protecting gender identity. We understand that just under half of the 50 states have legislation that explicitly prohibits discrimination in employment based on a person’s gender identity.[[278]](#footnote-279) Other states interpret sex discrimination to include gender identity (taking an analogous approach to the United States Supreme Court in *Bostock*). Still others are taking steps to clarify that people do not receive protection from discrimination on the basis of gender identity (usually by adding a restrictive definition to a sex ground).[[279]](#footnote-280)
  11. In sum, reform of section 21 of the Human Rights Act to provide clearer protection from discrimination for people who are transgender or non-binary would bring New Zealand law into closer conformity with many of the jurisdictions with which we share the closest legal ties. This rationale does not provide as strong support for protecting people who have an innate variation of sex characteristics. There are, however, other reasons for extending anti-discrimination protections to this group based on the other rationales we have considered.

### Changing social norms

* 1. In the Issues Paper, we explained that changing social norms is another reason that has been relied on by legislators in Aotearoa New Zealand for adding new prohibited grounds of discrimination. However, we also signalled the need for caution given the very purpose of anti-discrimination laws is to protect people from societal prejudice.

#### Whether this is an appropriate matter for us to consider

* 1. In general, submitters seemed to think it is relevant to consider changes in social attitudes when deciding whether to extend protection to new groups. We heard different views about whether the law has a role in leading social change or should follow it.
  2. Community perspectives are always a relevant consideration in law reform. Further, anti-discrimination laws in Aotearoa New Zealand have developed incrementally to reflect changing social attitudes. In parliamentary debates leading to the enactment of the Human Rights Act, Graeme Reeves MP said (in relation to the addition of new grounds): “Things can happen only as societal attitudes become receptive to new ideas, to changing values, and to changing perceptions of what is just.”[[280]](#footnote-281) Although an evolution in social attitudes is a necessary precursor to the extension of anti-discrimination protections to new grounds, that does not mean there needs to be social consensus before reform can happen. If there was consensus, protections from discrimination would be unnecessary. Social consensus and changing social norms are also hard to measure.

#### Whether this rationale supports the case for reform

* 1. Unsurprisingly, we heard mixed views from submitters about whether there is community support for law reform on this issue. Of those submitters who supported reform, some said reform was necessary to keep the Human Rights Act up to date with changing social norms and needs or to align it with what most New Zealanders want. Of those submitters who opposed reform, some said there was no social consensus on these issues and some said they thought most New Zealanders would oppose reform. At a consultation hui we held in partnership with some groups that advocate for gender-critical views, we heard that change should not happen until there is more social consensus.
  2. For the reasons we explained in Chapter 1, the number of submissions expressing a particular view to Te Aka Matua o te Ture | Law Commission is not a good measure of the level of public support for a particular reform. Community attitudes can only be accurately ascertained from well-designed and properly administered surveys.
  3. To the extent such data are available, they indicate increasing levels of acceptance of people who are transgender or non-binary in recent years and high levels of agreement they should be protected from discrimination. Surveys of attitudes to gender by Te Kaunihera Wahine o Aotearoa | National Council of Women of New Zealand found increasing acceptance of transgender and non-binary people between its 2019 and 2023 surveys. For example, in 2023, at least 70 per cent of people were comfortable with transgender and non-binary people being part of their family or having a role such as a colleague, doctor or sports teammate (with the percentage varying depending on the particular role). These numbers reflected increases of between 6 and 16 per cent from 2019, again depending on the specific role.[[281]](#footnote-282) In an Ipsos Survey conducted in 2023, 84 per cent of New Zealanders agreed that transgender people should be protected from discrimination in employment, housing and access to businesses such as restaurants and stores.[[282]](#footnote-283)
  4. We have very little information about changing social norms relating to innate variations of sex characteristics. We suspect that public knowledge about innate variations of sex characteristics remains low. On the other hand, the issues faced by people with innate variations of sex characteristics are increasingly being discussed and debated in professional contexts, for example, by human rights institutions and international bodies. One international report has described this as a “spectacular success” by intersex advocacy groups.[[283]](#footnote-284)
  5. No submitter commented on changing social norms as a reason to extend or not extend protection to people with an innate variation of sex characteristics. To the extent submitters mentioned people with innate variations at all in the general context of reform of section 21, submitters agreed that they deserve protection from discrimination.

### Conclusion

* 1. No single rationale explains all the characteristics currently found in section 21 of the Human Rights Act or provides a unified justification for extending protection to new grounds. Therefore, we have not treated any one of these six rationales as overriding. Rather, we have reached a conclusion about reform based on an overarching analysis of all of them. That conclusion points strongly towards the desirability of providing legal protection from discrimination to people who are transgender or non-binary or who have an innate variation of sex characteristics.

## Current law does not provide adequate protection

* 1. The second question we address in this chapter is whether the current law is adequate to protect people who are transgender or non-binary or who have an innate variation of sex characteristics from discrimination. This question arises because the New Zealand government already acts on the basis that section 21 of the Human Rights Act protects people from discrimination that is based on their gender identity or sex characteristics under the prohibited ground of sex.[[284]](#footnote-285)
  2. In 2006, Te Tari Ture o te Karauna | Crown Law issued an opinion saying that discrimination based on a person’s gender identity is sex discrimination.[[285]](#footnote-286) The reasoning in this opinion focused on discrimination against transgender people who identify as male or female. However, the government has since stated that protection extends to people who are “gender diverse” or “intersex”.[[286]](#footnote-287)
  3. Te Kāhui Tika Tangata | Human Rights Commission also believes that discrimination against people who are transgender or non-binary or who have an innate variation of sex characteristics is sex discrimination. It accepts and mediates complaints on these bases.[[287]](#footnote-288) We are aware that Te Kahu Raunui | Sport Integrity Commission, Te Mana Whanonga Kaipāho | Broadcasting Standards Authority and Te Mana Whakaatu | Classification Office all accept complaints of discrimination based on a person’s gender identity.[[288]](#footnote-289)
  4. Although claims of discrimination linked to a person’s gender identity have succeeded under a prohibited ground of sex in several other jurisdictions,[[289]](#footnote-290) as far as we have been able to ascertain, no New Zealand court or tribunal has determined whether discrimination based on a person’s gender identity or sex characteristics falls under the ground of sex in section 21 of the Human Rights Act.
  5. In some countries, transgender complainants have also successfully relied on a prohibited ground of disability (generally in tandem with a sex or gender ground).[[290]](#footnote-291) As far as we are aware, no New Zealand court or tribunal has ever considered whether being transgender or non-binary or having an innate variation of sex characteristics could fall within the ground of disability. For reasons we discuss further below, we understand that relying on this ground is not an attractive option for many people in these groups. However, the argument is potentially available.[[291]](#footnote-292)
  6. Against that background, a key question to consider is whether amendments to clarify the scope of section 21 are needed. As we explained in Chapter 3, legislative reform should only occur when it is necessary and when it is the most appropriate way to achieve underlying policy objectives.
  7. For the following overlapping reasons, we have concluded that reform of section 21 is necessary and appropriate.

### Certainty of the law

* 1. During consultation, we heard a range of views about legal certainty. Many people were concerned that the current position is too uncertain. Some said it is risky to rely on the existing grounds or on the Crown Law opinion. Some were concerned about potential gaps in coverage. Some said the need to bring test cases to clarify the scope of protection puts an unfair burden on affected communities and individual litigants.
  2. Other submitters took the contrary view. Some said section 21 already gives sufficient protection. For example, Speak Up for Women and Women’s Declaration International NZ said the ground of sex is sufficient because it covers discrimination based on sex stereotypes or on gender non-conforming presentation.
  3. For reasons we now explain, we do not think the current law provides sufficient certainty about the protections that are available to people who are transgender or non-binary or who have an innate variation of sex characteristics.

#### It is uncertain whether any protection is available

* 1. First, it is unclear whether section 21 protects people from discrimination that is due to being transgender or non-binary or having an innate variation of sex characteristics. Although it is nearly two decades since the Crown Law opinion, there is no decision from any New Zealand court or tribunal clarifying the law.
  2. We acknowledge there are several decisions from overseas courts and tribunals that reach a similar conclusion to the Crown Law opinion. It is therefore possible (perhaps even likely) that a court or tribunal will eventually find that section 21 already provides protection. However, it is by no means certain. Some commentators have expressed concerns about whether Crown Law’s conclusion can be relied on.[[292]](#footnote-293) For example, Elisabeth McDonald has pointed out that the grounds in section 21 of the Human Rights Act are more detailed and prescriptive than in many other jurisdictions and do not generally leave much to judicial interpretation. She said: “The conclusion that there can be comfortable reliance on judicial interpretation rather than legislation [to expand the explicit scope of protection] is a contentious point.”[[293]](#footnote-294)
  3. In *For Women Scotland Ltd v Scottish Ministers*, the United Kingdom Supreme Court held that the meaning of sex in the Equality Act 2010 (UK) is confined to “biological sex”.[[294]](#footnote-295) The finding on this point does not have direct relevance to this review as the Equality Act also has a “gender reassignment” ground and differs from the New Zealand legislation in several other relevant respects. Nevertheless, the decision reinforces the uncertainty that exists as to whether the view expressed in the Crown Law opinion will ultimately be shared by the Human Rights Review Tribunal or courts on appeal.

#### If protection is available, the scope is uncertain

* 1. Even if some degree of protection is ultimately found to exist, the scope of that protection is unclear. Protection might be held to extend broadly to all aspects of a person’s gender identity and sex characteristics. However, it is also possible the protection that is found to exist will be uneven, fact-dependent or incomplete.
  2. For example, we have not found overseas authority for extending protection under the ground of sex to people who are non-binary or who have an innate variation of sex characteristics. Although some commentators argue persuasively these groups would be entitled to protection, their position is more vulnerable.[[295]](#footnote-296)
  3. It is similarly unclear whether people would receive protection under the prohibited ground of sex if they are gender fluid or early in their transition. During the Human Rights Commission’s 2008 inquiryinto discrimination experienced by transgender people, it was told that protection is particularly important for people who are questioning or exploring their gender identity and that this is when people can be the most visible and vulnerable to discrimination.[[296]](#footnote-297)
  4. There might also be uneven coverage under the disability ground (assuming anyone chooses to rely on it). In overseas cases we are aware of where transgender plaintiffs have successfully relied on a disability ground, protection has been based on a formal diagnosis of gender dysphoria. It is possible plaintiffs might be less likely to succeed if they have not been able, or have not wished, to access a diagnosis.
  5. Again, those in an early stage of transition may face particular difficulties. Although the legislative definition of disability is wide, Te Kōti Matua | High Court has said that a condition needs to have an element of gravity or permanence to qualify.[[297]](#footnote-298)
  6. Even if protection is eventually extended to all these groups under one or both of the sex or disability grounds, it may take some time for this to become clear. As we explained in Chapter 1, complaints under the Human Rights Act are made first to the Human Rights Commission, which assists parties to resolve disputes voluntarily in “the most efficient, informal, and cost-effective manner possible”.[[298]](#footnote-299) It does not issue binding decisions. Only a small proportion of these complaints result in a case being filed with the Human Rights Review Tribunal, and even fewer result in a substantive decision.[[299]](#footnote-300)

#### How the sex exceptions in Part 2 of the Human Rights Act apply is uncertain

* 1. A third and significant respect in which the current legal position is uncertain relates to the application of the sex exceptions in Part 2 of the Human Rights Act (the anti-discrimination rules for the private sector). As we explained in Chapter 1, Part 2 states situations in which it is lawful to treat someone differently from others based on one or more of the prohibited grounds in situations that would otherwise constitute discrimination. Several of these “exceptions” set out circumstances in which it is permissible for distinctions to be drawn based on a person’s sex.[[300]](#footnote-301)
  2. The Crown Law opinion did not discuss how the sex exceptions apply in cases of gender identity discrimination, and we do not think the answer is obvious.
  3. There is also a significant danger that courts and tribunals will feel compelled for reasons of consistency and coherence to take a blanket approach to the sex exceptions — in other words, that either the sex exceptions all allow for differences of treatment based on the fact someone is transgender or that none of them do. That was the outcome in *For Women Scotland Ltd v Scottish Ministers*, in which the United Kingdom Supreme Court held that the word “sex” needs to be given a consistent meaning throughout the United Kingdom’s anti-discrimination statute.[[301]](#footnote-302)
  4. The Court in *For Women Scotland Ltd v Scottish Ministers* was careful to specify that its decision was one of statutory interpretation, not legislative policy.[[302]](#footnote-303) From a policy perspective, we do not think a blanket approach to sex exceptions is desirable. As we explore in later chapters, the sex exceptions in the Human Rights Act exist for a variety of purposes. In some cases, these purposes are advanced by extending the relevant exception to gender identity or sex characteristics. In other cases, they are not. Legislative reform can ensure the scope of the exceptions is addressed on a case-by-case basis.

#### Response to submitters’ concerns that reform will create uncertainty

* 1. Some submitters made contrary arguments about legal certainty. First, some submitters expressed concern that, because gender identity is a matter of self-identification, people might be liable for discriminating against a person they did not realise was transgender.
  2. This concern is based on a misunderstanding of how the Human Rights Act works. Actions can only amount to discrimination if they are “by reason of” a prohibited ground.[[303]](#footnote-304) This means the person accused of discrimination must have known or believed the other person had the protected characteristic.[[304]](#footnote-305)
  3. Second, many submitters told us that adding gender identity (or similar) would decrease legal certainty because the concept is vague and contested, could change over time, is subjective and will be confusing. Several organisations, including Speak Up for Women, Lesbian Action for Visibility Aotearoa, Free Speech Union and Feminist Older Women Lobbyists, shared this view.
  4. As we have explained, some overseas jurisdictions have had a ground of gender identity (or similar) for decades. In *Tickle v Giggle for Girls Pty Ltd (No 2)*, the Federal Court of Australiarejected an argument that gender identity is too nebulous or vague to be a protected characteristic under the International Covenant on Civil and Political Rights. The Court also said the definition of gender identity in the Sex Discrimination Act 1984 (Cth) is sufficiently clear and many other prohibited grounds of discrimination are similarly malleable. It gave the example of political opinion.[[305]](#footnote-306)
  5. This argument applies by analogy to the Human Rights Act. If the concern is that gender identity is subjective and a matter of self-identification, it is no different from grounds such as sexual orientation, religious belief and political opinion.[[306]](#footnote-307)
  6. In Chapter 7, we make specific recommendations for the wording of new grounds. We are satisfied that our recommendations, if adopted, will result in a legal position that is significantly more certain than under the current law.

### Accessibility

* 1. Reform of section 21 would improve the accessibility of the law. It would mean people do not need to rely on statements from Crown Law or the Human Rights Commission or on advice from lawyers or community organisations to understand their rights and obligations.
  2. Accessibility is one of the principles of good law making that we discussed in Chapter 3. According to the Legislation Design and Advisory Committee’s *Legislation Guidelines*, laws need to be accessible so people can find, navigate and understand them.[[307]](#footnote-308) Inaccessible laws inhibit access to justice.
  3. It is striking that, despite the high rates of self-reported discrimination in the 2022 Counting Ourselves survey, no case of discrimination due to a person being transgender or non-binary or having an innate variation of sex characteristics has yet been determined by the Human Rights Review Tribunal. The number of complaints the Human Rights Commission receives each year from people in these groups is also low.[[308]](#footnote-309)
  4. The Human Rights Commission has said it is consistently told by people who are transgender or non-binary that they do not feel protected by section 21.[[309]](#footnote-310) We also heard this in feedback. For example, Warren Lindberg MNZM, a former Human Rights Commissioner, said his experience was that the “common understanding” of the ground of sex was that it was about the “range of concerns from women against discrimination from men” and so people who were transgender or intersex did not have confidence they were covered. Te Pūkenga Here Tikanga Mahi | Public Service Association said the current “untested and unclear” state of the law is not sufficient to give confidence to people who are transgender, non-binary or intersex “that they have legal protection from discrimination and that they have available sufficient recourse if such discrimination were to occur”.
  5. Several submitters told us that one problem with relying on the existing grounds of sex and disability is that these grounds do not accurately describe the real basis on which people in these groups generally experience discrimination.[[310]](#footnote-311)
  6. Overseas, new prohibited grounds (including grounds relating to gender identity) have sometimes been added to anti-discrimination statutes specifically to deal with accessibility issues of this kind. For example, in Canada, a new ground of gender identity or expression was added to federal anti-discrimination law even though protection was arguably already available under existing grounds.[[311]](#footnote-312) In Parliament, the Minister of Justice said:[[312]](#footnote-313)

1. Canadians should have a clear and explicit statement of their rights and obligations. Equal rights for trans persons should not be hidden but be plain for all to see.
2. … Making a formal claim of discrimination can be an intimidating process. Explicitly including gender expression or identity in the Canadian Human Rights Act would make it easier to interpret for those who have suffered this kind of discrimination, instead of forcing them to explain how the law on sex discrimination covers their situation.
   1. During the 1993 legislative debates on the Human Rights Bill, one member of Parliament noted, of the decision to state explicitly in section 21 that the prohibited ground of sex includes “pregnancy or childbirth”:[[313]](#footnote-314)
3. … employers will be discouraged from taking discrimination action in the first place when they know that it is spelt out very clearly in the law. As is always the case, prevention is much better than cure …

### Symbolic value of anti-discrimination law

* 1. Finally, although it is not a primary consideration for us in recommending reform, we also accept that clearer protections from discrimination for people who are transgender or non-binary or who have an innate variation of sex characteristics will serve an important symbolic and expressive function.[[314]](#footnote-315) Many submitters to this review referred to the symbolic value of the law. The symbolic function of anti-discrimination protections was also mentioned by parliamentarians during legislative debates on the Human Rights Bill.[[315]](#footnote-316) During the third reading, the sponsoring minister said “human rights laws are symbolic; they are not really punitive … they are really an endeavour by Parliament to send a signal that certain behaviour is unacceptable”.[[316]](#footnote-317)
  2. By signalling to people in marginalised communities that they are worthy of protection, protections from discrimination affirm the core values of dignity/self-worth that underlie the Human Rights Act. Further, studies in New Zealand and overseas suggest a link between express legal protections from discrimination (specifically, for people who are transgender or non-binary), institutional trust, reduced psychological distress and good mental health outcomes.[[317]](#footnote-318)

## Other implications or concerns

* 1. This chapter has presented the key reasons we recommend reform of section 21 of the Human Rights Act. We explore many other potential implications of reform of section 21 in other chapters. For example, we address:
     + 1. Implications for reform arising from the Treaty of Waitangi and tikanga in Chapter 5.[[318]](#footnote-319)
       2. Implications for reform arising from the freedoms of thought, conscience, religion, belief, expression and association in Chapter 6.
       3. Implications of reform for the private sector in Chapters 8 to 17. We discuss a range of specific policy issues in these chapters that were of concern to some submitters.[[319]](#footnote-320)
       4. Implications of reform for public sector agencies in Chapter 18.
       5. Implications of reform for other laws in Chapter 19.
  2. In the remainder of this chapter, we respond to some other concerns submitters raised with us that we think can be addressed more briefly.

### The meaning of sex

* 1. Some submitters said their reason for opposing reform is their view that sex is biological, binary and immutable.
  2. In Chapter 3, we set out our understanding of the different ways the term ‘sex’ is used in fields such as biology, medicine and law. No meaning that could be given to the word sex (including the one proposed by these submitters) can justify denying people protection from discrimination based on their gender identity.
  3. We think the underlying worry held by many people who expressed their objections in this way is that reform of the Human Rights Act will undermine the sex exceptions in Part 2 of the Human Rights Act that allow for women-only spaces and facilities in certain circumstances. As we explained earlier, the question of how each of these sex exceptions should apply to people who are transgender or non-binary is best addressed on a case-by-case basis. In later chapters, we look closely at each of the sex exceptions and make specific reform recommendations.

### Compliance burden and intrusion by government

* 1. Some submitters opposed reform because they were concerned about the compliance burden or about the government intruding inappropriately into their lives.
  2. As we explained in Chapter 1, the Human Rights Act imposes obligations (and therefore compliance burdens) on private people and organisations when they engage in certain public-facing activities such as employing staff, renting out properties or making facilities or services available to the public. Some of the situations that submitters were concerned about would clearly not fall within the scope of the Human Rights Act. For example, we heard concerns about people being required by law to use a family member’s preferred pronouns or lesbians being expected to date transgender women.
  3. We do not recommend in this review any expansion to the areas of life that the Human Rights Act regulates. We simply recommend the Act clarify that the obligations people already have not to discriminate when engaging in one of those public-facing activities include obligations to people who are transgender or non-binary or who have an innate variation of sex characteristics.
  4. Given this may already be the legal position, it is possible that any relevant compliance burdens already exist (even if they are not well appreciated). Further, there are some significant advantages for people and agencies who are subject to the Human Rights Act in having the scope of their legal obligations clarified.
  5. It is possible the reforms we propose would result in more complaints of discrimination to the Human Rights Commission or, to a lesser extent, the Human Rights Review Tribunal. Given the low number of complaints currently, we do not see this as necessarily problematic. It is the corollary of access to justice.
  6. To the extent this may result in increased compliance burdens, we do not think this cost outweighs the benefits of protection.

### Negative impact on society more generally

* 1. A few submitters, including Whānau Tahi Aotearoa | Family First, expressed concerns about the negative impact of reform on society. These submitters suggested, for example, that reform might increase social and political polarisation, heighten social tensions, increase discrimination or reinforce sex stereotypes.
  2. While impacts of this kind cannot be ruled out, we are not aware of any evidential basis for these concerns.

### Slippery slope argument

* 1. Some submitters opposed reform because they thought adding new grounds would mean the law would then need to protect various other (currently unprotected) groups. Some submitters thought this would result in absurd categories of protection.
  2. As we explained in Chapter 1, New Zealand’s anti-discrimination laws have developed incrementally with new prohibited grounds being added from time to time as attitudes and values change. It is possible that, in the future, additional grounds will be added to section 21. If and when that happens, the analysis we present in this chapter of underlying reasons for reform may assist in ensuring it is done on a principled and coherent basis.

### Special treatment

* 1. Some submitters said people who are transgender or non-binary should not be singled out or prioritised over other groups and some were opposed to the law prioritising a minority group over the majority. Relatedly, some submitters said they opposed reform because everyone is already covered by the Human Rights Act.
  2. These views reflect misunderstandings about how the Human Rights Act works. The purpose of anti-discrimination law is to protect minority groups. However, the Act only protects people from discrimination based on the prohibited grounds listed in section 21.
  3. Many minority groups in Aotearoa New Zealand are already protected by section 21. Adding new grounds would not prioritise the rights of new groups. It would simply bring them onto an equal footing with other protected minorities.
  4. Some submitters suggested all references to prohibited grounds should be removed from the Human Rights Act. While it might be possible to substitute the prohibited grounds with a general right to equality, this would have significant implications well beyond the scope of this review.

## Conclusion and recommendation

1. Section 21 of the Human Rights Act 1993 should be amended to clarify that the Human Rights Act covers discrimination that is due to being transgender or non-binary or having an innate variation of sex characteristics.
   1. Based on both the core case for reform we present in this chapter and the analysis of other implications we present throughout this report, we recommend that section 21 of the Human Rights Act be amended to clarify that the Human Rights Act covers discrimination that is due to being transgender or non-binary or having an innate variation of sex characteristics.
   2. As we said in Chapter 1, the recommendations we present in this report are intended to work as a coherent package. Reform of section 21 is only desirable if it is accompanied by other amendments to clarify the implications of adding new prohibited grounds of discrimination in the specific contexts that the Human Rights Act regulates, and to ensure that rights and interests are fairly balanced. If that does not happen, the costs of legislating may outweigh the benefits.
   3. This chapter does not consider how any amendments to section 21 of the Human Rights Act should be worded. We make detailed recommendations on that issue in Chapter 7.

CHAPTER 5

# Te ao Māori

## Introduction

* 1. In this chapter, we consider the implications of te Tiriti o Waitangi | Treaty of Waitangi and tikanga for the reforms we propose of section 21 of the Human Rights Act 1993. We address some other issues relevant to te ao Māori in Chapters 2 and 7.
  2. As we explained in Chapter 3, law reform in Aotearoa New Zealand should be consistent with fundamental constitutional principles and values that underlie New Zealand’s legal system.[[320]](#footnote-321) These include the Treaty of Waitangi and tikanga.
  3. Neither the Treaty of Waitangi nor tikanga received systematic consideration when the Human Rights Act was enacted in 1993. On a broader review of the Human Rights Act, various aspects of the Act’s relationship with these constitutional fundamentals would likely require careful consideration. We have, however, identified two issues that we think need to be addressed within the narrow focus of this review.
  4. The first is whether adding new prohibited grounds of discrimination to section 21 of the Human Rights Act is necessary to protect the rights of Māori individuals or groups under the Treaty of Waitangi. We conclude that, although reform of section 21 is broadly consistent with the protection ethos that underlies the Treaty, on the evidence currently available to us, reform is not required to comply with the Crown’s Treaty obligations.
  5. The second is whether adding new prohibited grounds of discrimination to section 21 of the Human Rights Act would interfere with the ability of Māori to live in accordance with tikanga (and, through that, with the Crown’s commitment in article 2 of the Treaty of Waitangi to protect the exercise of tino rangatiratanga by Māori). We conclude that adding new grounds to section 21 is unlikely to increase the potential for state law to interfere with tikanga and is therefore not an obstacle to reform.
  6. In the Issues Paper, we also sought feedback on some possibilities for specific amendments to the Human Rights Act to address its relationship with tikanga. We discuss those in this chapter but do not propose reform on this issue.

## Whether reform is required to uphold Treaty obligations

* 1. In the Issues Paper, we sought feedback about the implications of the Treaty of Waitangi for whether a person who is transgender or non-binary or who has an innate variation of sex characteristics should be protected from discrimination.
  2. We heard a range of views on this issue in feedback. Some submitters said amendments to section 21 are required for consistency with the Treaty of Waitangi. Others said the Treaty has no relevance.
  3. Amendments to section 21 of the Human Rights Act along the lines we propose would be in harmony with the general ethos of protection that underlies the Treaty of Waitangi.[[321]](#footnote-322) For example, the Māori text of the preamble begins “Ko Wikitoria, te Kuini o Ingarani, *i tana mahara atawai* ki nga Rangatira me nga Hapu o Nu Tirani …” [emphasis added]. This translates as “Victoria, the Queen of England, *in her concern to protect* the chiefs and the subtribes of New Zealand …”.[[322]](#footnote-323) In the English text, the Treaty’s preamble states that the Crown is “anxious to protect [the] just rights and property” of Māori.
  4. Ultimately, however, we do not think that adding new grounds to section 21 of the Human Rights Act along the lines we propose is needed to comply with the Crown’s obligations under the Treaty of Waitangi. That conclusion might need to be revisited in future if evidence emerges that Māori who are gender diverse or who have an innate variation of sex characteristics experience disproportionate rates of discrimination.
  5. We explain this conclusion below by reference to specific articles of the Treaty.

### Article 2

* 1. The Crown undertook in article 2 of the Treaty to protect the exercise by Māori of tino rangatiratanga over their lands, villages and all their treasures — “ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu — ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa”.[[323]](#footnote-324)
  2. Based on our preliminary research and analysis, in the Issues Paper, we did not identify the Crown’s obligations under article 2 of the Treaty of Waitangi as a potential reason why the reform of section 21 of the Human Rights Act being considered in our review might be necessary and desirable. However, some submitters took a different view.
  3. Submitters identified three closely related reasons why they considered amendments to section 21 of the Human Rights Act are required to comply with article 2. First, several submitters (including Te Ngākau Kahukura and the Professional Association for Transgender Health Aotearoa) submitted that takatāpui and takatāpuitanga[[324]](#footnote-325) are a taonga over which Māori have tino rangatiratanga. Te Ngākau Kahukura referred to the work of Dr Elizabeth Kerekere, in which she states:[[325]](#footnote-326)

Our tūpuna who had fluid genders or sexuality were accepted within their whānau long before Pākehā came to Aotearoa. We know this from mōteatea, waiata, karakia and whakairo (traditional chants, songs, incantations and carvings).

* 1. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal has said the guarantee of tino rangatiratanga over “taonga katoa” includes all highly prized things both tangible and intangible, including values, traditions and customs.[[326]](#footnote-327) Te reo Māori, haka and the mauri of a river are examples of intangible valuables that the Waitangi Tribunal has acknowledged are taonga. In the 2021 Waitangi Tribunal Inquiry *He Pāharakeke*,the Crown accepted that “tamariki Māori and the whānau unit comprise a ‘taonga requiring protection’ and this status gives rise to the Crown’s obligations”.[[327]](#footnote-328) The Waitangi Tribunal went on to conclude that the guarantee of tino rangatiratanga over Māori kāinga and taonga includes the fundamental right to care for and raise tamariki Māori.[[328]](#footnote-329)
  2. It is therefore possible for a group of people to be a taonga protected by the guarantee of tino rangatiratanga in article 2 of the Treaty of Waitangi. We are not, however, aware of the proposition that takatāpui are a taonga yet having widespread support from Māori pūkenga (experts). More information about this might emerge in the context of the Waitangi Tribunal’s Mana Wāhine Kaupapa Inquiry.[[329]](#footnote-330) In the meantime, we do not think it is for Te Aka Matua o te Ture | Law Commission to declare what is or is not a taonga. Therefore, we are not able to take the analysis on this point any further.
  3. The second argument we heard from some submitters about article 2 of the Treaty of Waitangi was that Māori who are gender diverse or who have an innate variation of sex characteristics deserve to have these identities recognised and protected through an understanding held by their ancestors.
  4. In the Issues Paper, we referred to the work of several scholars who describe how pre-colonial understandings of sexual fluidity and gender fluidity in te ao Māori have likely morphed or been erased as a result of colonisation and the introduction of Christianity.[[330]](#footnote-331) For example, some scholars point to early colonisers physically destroying whakairo (carvings) depicting same-sex relationships.[[331]](#footnote-332)
  5. We explained in the Issues Paper that it is impossible to reconstruct fully pre-colonial Māori understandings of gender fluidity or of variations of sex characteristics. Some scholars point to fragments from traditional stories or carvings that might suggest evidence of gender fluidity or variations of sex characteristics.[[332]](#footnote-333) However, these are very few and their meanings are not always clear.
  6. In consultation, submitters who identified themselves as Māori shared a range of views about gender fluidity in te ao Māori prior to colonisation. Some submitters said gender fluidity was normal in te ao Māori and many of these submitters pointed to colonisation as disrupting this. Four organisations also made comments of this nature: Te Ngākau Kahukura, Hohou Te Rongo Kahukura, Gender Minorities Aotearoa and Tīwhanawhana Trust.
  7. Other submitters said “transgenderism” is a new concept and diverse ideas about gender have not always formed part of Māori society. Some submitters, including Mana Wāhine Kōrero and Resist Gender Education, said the absence of carvings, waiata and mōteatea was evidence of this.
  8. As noted, the Waitangi Tribunal has explained that the guarantee of tino rangatiratanga under article 2 extends to values, traditions and customs. However, it is difficult for us to identify what this means for Māori who are gender diverse or who have an innate variation of sex characteristics, because of the way pre-colonial understandings on these issues have been erased. The information that is available about pre-colonial understandings of gender fluidity or variations of sex characteristics in te ao Māori is even more fragmentary than that available in respect of sexual fluidity. Much of the scholarship we have read on these issues focuses on the latter.
  9. Based on the evidence available to us, we do not think it would be appropriate for us to reach conclusions in this review about Māori customary understandings of gender fluidity and variations in sex characteristics. Again, this is an issue on which further evidence may emerge in the context of the Waitangi Tribunal’s Mana Wāhine Kaupapa Inquiry.
  10. Even if we felt able to reach a conclusion that gender fluidity was normal in pre-colonial Māori society or that takatāpui are taonga for the purposes of article 2 of the Treaty of Waitangi, submitters did not explain how the absence of specific protection in section 21 of the Human Rights Act interferes with the tino rangatiratanga of Māori collectives. Tino rangatiratanga has been explained as the unqualified exercise of the chieftainship or trusteeship of rangatira (chiefs) in accordance with their customs.[[333]](#footnote-334) It can also involve the authority and responsibilities of Māori collectives, including hapū, whānau and non-tribal/non-kin groups.[[334]](#footnote-335) According to the Waitangi Tribunal, tino rangatiratanga requires the Crown “to allow Māori to manage their own affairs in a way that aligns with their customs and values”.[[335]](#footnote-336)
  11. It is not clear to us how this fundamental right of Māori collectives to manage their own affairs (and accompanying rangatiratanga responsibilities) is disrupted by the absence of specific protections in section 21 of the Human Rights Act for people who are transgender or non-binary or who have an innate variation of sex characteristics.
  12. The third argument we heard from some submitters relevant to article 2 was that Māori who are gender diverse or who have an innate variation of sex characteristics have a right to tino rangatiratanga over their own identities. Although an individual may have autonomy and self-determination over their identity, we do not understand this to be the meaning of tino rangatiratanga in article 2 of the Treaty of Waitangi. As just explained, article 2 is about the exercise of rangatiratanga in respect of Māori groups. Its particular focus is “the distribution of political authority, both within Māori society and between Māori and the state”.[[336]](#footnote-337)
  13. In sum, we do not think an amendment to section 21 of the Human Rights Act is required to secure compliance with article 2 of the Treaty of Waitangi.

### Article 3

* 1. In the Issues Paper, we sought feedback about whether reform of section 21 of the Human Rights Act (along the lines we indicated we were considering) is required to comply with the Crown’s obligations under article 3 of the Treaty of Waitangi. Some submitters told us article 3 does have this effect, although submitters did not generally explain their reasons.
  2. Under article 3, the Crown undertook to protect Māori and to give them the same rights and duties of citizenship as British subjects — “Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.” Article 3 obliges the government to exercise the kāwanatanga (governorship) conferred on it by article 1 of the Treaty of Waitangi to care for Māori and to ensure outcomes for Māori are equivalent to those enjoyed by non-Māori.[[337]](#footnote-338) It is a guarantee of equity that obliges the Crown to address disparities between Māori and other New Zealanders.[[338]](#footnote-339) It underpins Treaty principles of active protection and equity.[[339]](#footnote-340)
  3. Article 3 is most obviously relevant to the Law Commission’s work when we are reviewing laws, policies and practices that have a disproportionate impact on Māori. One possible evidential basis for a disproportionate impact of this kind would be if the proportion of people who are gender diverse or who have an innate variation of sex characteristics were significantly greater among Māori than among the general population. Data from the 2023 Census showed a slight disparity of this kind: 1 per cent of people in the ‘Māori’ ethnic group aged 15 years and over were transgender compared to 0.7 per cent in the ‘Total New Zealand population’ group.[[340]](#footnote-341) The difference was, however, small and there is a need for caution in placing emphasis on it.[[341]](#footnote-342)
  4. For data quality reasons, Tatauranga Aotearoa | Stats NZ has not published ethnic group comparisons for “persons who know they were born with a variation of sex characteristics”.[[342]](#footnote-343)
  5. We have also considered whether Māori who are gender diverse or have innate variations of sex characteristics suffer more discrimination than non-Māori with those characteristics. This might be an alternative evidential basis for concluding that the absence of clear protection in section 21 of the Human Rights Act has a disproportionate impact on Māori.
  6. In feedback, we heard from some submitters that holding multiple minority identities can exacerbate discrimination and that discrimination against Māori who are gender diverse or who have an innate variation of sex characteristics is compounded by racism.[[343]](#footnote-344) One submitter put it the following way:

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

* 1. There is a significant literature recognising that holding multiple minority identities can compound people’s experience of discrimination.[[344]](#footnote-345) Some authors consider that the Human Rights Act does not respond effectively to discrimination that is based on multiple characteristics.[[345]](#footnote-346)
  2. Nevertheless, the evidence about whether Māori who are transgender or non-binary have a particular need for legal protection from discrimination (over and above non-Māori) is somewhat equivocal. On the one hand, in the 2022 Counting Ourselvessurvey of people who are transgender or non-binary, Māori respondents reported experiencing a variety of forms of harm and suffering at higher levels than the overall sample. For example, Māori respondents were more likely to report having ever experienced threats of physical violence (65 per cent compared to 54 per cent), physical violence (58 per cent compared to 46 per cent), unwanted or offensive sexual contact (76 per cent compared to 62 per cent) or another type of sexual harassment (53 per cent compared to 38 per cent).[[346]](#footnote-347)
  3. Māori respondents were more likely than the overall sample to report having experienced homelessness (31 per cent compared to 19 per cent), having needed to access an organisation for emergency housing (25 per cent compared to 14 per cent) or having moved cities or towns in Aotearoa New Zealand to feel safer as a transgender or non-binary person (23 per cent compared to 16 per cent).[[347]](#footnote-348) They were also more likely to report having considered suicide at least once in the last 12 months (63 per cent compared to 53 per cent) or having attempted suicide in the last 12 months (16 per cent compared to 10 per cent).[[348]](#footnote-349)
  4. These data indicate that Māori who are transgender or non-binary are an extremely vulnerable cohort. Further, many of the harms just mentioned are closely adjacent to, and in some cases synonymous with, discrimination. For example, sexual harassment is a form of discrimination recognised by Part 2 of the Human Rights Act. Further, as we noted in Chapter 3, the same prejudices that underlie discriminatory treatment can also result in threats or acts of violence.
  5. On the other hand, on a range of questions relating more directly to experiences of discrimination, the Counting Ourselves data did not evidence disparities for Māori.[[349]](#footnote-350) The report listed separate data on Māori whenever the differences between Māori and the overall survey sample were statistically significant.[[350]](#footnote-351) It did not report statistically significant differences of this kind for questions such as:[[351]](#footnote-352)
     + 1. whether respondents had ever experienced discrimination;
       2. whether respondents had been discriminated against in the last 12 months;
       3. whether respondents had experienced discrimination in the last 12 months in specific places (for example, in shops or restaurants, at work or at school);
       4. whether respondents had avoided particular places because they thought they would be mistreated for being transgender or non-binary; and
       5. whether respondents had ever been treated unfairly or verbally harassed when visiting or using certain public services.
  6. Based on these data, we do not consider we can conclude that adding new prohibited grounds to section 21 of the Human Rights Act is positively required to comply with the Crown’s obligations under article 3. A further obstacle to that conclusion is the fact that race, colour and ethnic origin are already prohibited grounds of discrimination in section 21.

## Whether reform would interfere with tikanga

* 1. For reasons we explain below, an issue that requires careful consideration is whether the reforms we propose would interfere with the ability of Māori to live in accordance with tikanga. Public sector guidance about good law reform practices says those designing legislation should identify the potential effect of reform on any practices governed by tikanga and ensure new legislation is, as far as practicable, consistent with tikanga.[[352]](#footnote-353) Reforms that interfere with the ability of Māori to live in accordance with tikanga would also be inconsistent with the commitment in article 2 of the Treaty of Waitangi to protect the exercise of tino rangatiratanga by Māori.
  2. In consultation, many submitters told us that state law should not interfere with tikanga and with the tino rangatiratanga of Māori. For example, the Rainbow Support Collective and InsideOUT Kōaro each said:

1. We support a framework which is clear that tikanga occurs at the level of whānau, hapū, and iwi depending on the context and place, and that state law cannot dictate tikanga.
   1. ICONIQ Legal Advocates submitted:
2. Legislation should not seek to interfere with the tino rangatiratanga of Māori nor should it seek to codify cultural practice that is held by Māori.
   1. There are some situations in te ao Māori where wāhine and tāne have different roles or where sex is significant to differences in particular cultural practices. For reasons we explain below, we need to consider carefully whether the reforms we propose would interfere with the ability of Māori to practise these sex-differentiated tikanga activities unimpeded.

### Sex-differentiated tikanga activities

* 1. In the Issues Paper, we summarised our understanding of sex-differentiated tikanga activities based on preliminary research and on what we heard at a wānanga that we held. We explained that, while tikanga activities involving differentiated roles for wāhine and tāne are relatively common in Aotearoa New Zealand, the circumstances in which a person’s sex is relevant to the roles they perform differs among hapū and iwi. So, too, do the circumstances in which a person who is transgender or non-binary or who has an innate variation of sex characteristics can fulfil a particular sex-differentiated role.[[353]](#footnote-354)
  2. During consultation, we received only limited feedback on this part of the Issues Paper, and the feedback we did receive confirms our understanding of these issues.
  3. We understand that the situations in te ao Māori where wāhine and tāne play different roles or where sex is significant are usually tapu (spiritually restricted). They include:
     + 1. practices associated with pōwhiri (a formal welcoming ceremony) such as karanga (a welcome call) and whaikōrero (a formal speech);
       2. the practice of kawanga whare (a ceremony to open a new building);
       3. tā moko (traditional Māori tattooing); and
       4. kapa haka and poi (types of Māori performing arts).
  4. Practices vary between different hapū, iwi or other Māori groups, so a person’s sex may not always be an important factor.[[354]](#footnote-355)
  5. We have been told that it is important to understand the intention behind the different roles played by men and women, which is itself dictated by tikanga. Participants at the wānanga emphasised the importance of tiaki (protection) as a frequent rationale for sex-differentiated activities. For example, the desire to protect women from the possibility of abuse is one reason that women often stand in the middle of the ope (group) during the karanga and sit behind men during whaikōrero. It is also a reason we have seen given for the prohibition on women delivering whaikōrero.[[355]](#footnote-356) For some hapū and iwi, it is the tapu of all women that requires such protection as spiritual attacks could affect not only the woman but also her progeny for all time to come.[[356]](#footnote-357) Other hapū and iwi consider that a post-menstrual woman who can no longer bear children is exempt from this vulnerability.[[357]](#footnote-358)
  6. As noted, an issue with which some Māori groups are grappling is what roles Māori who are transgender or non-binary or who have an innate variation of sex characteristics can fulfil in relation to sex-differentiated activities. Examples are whether a person who is transgender can fulfil a role that aligns with their gender identity and whether a person who identifies outside the gender binary can move between male and female roles. We understand that different accommodations are being reached on these issues by hapū, marae and whānau and that there is no uniform response.
  7. We have identified several examples of transgender Māori women performing karanga both on marae and in community settings.[[358]](#footnote-359) We have also heard examples of transgender women who wanted to karanga being turned down by their community. However, we had been told this may sometimes be due to the person lacking the skills and seniority to perform the role rather than necessarily because they are transgender.
  8. We have not had examples shared with us of transgender Māori men or non-binary Māori taking the role of kaikōrero in their Māori group (although that does not mean it does not happen). We have heard of people who identify outside the gender binary and who were assigned male at birth performing whaikōrero in educational settings. We have not heard about the experiences of people with an innate variation of sex characteristics in relation to karanga and whaikōrero.
  9. We have heard there can be particular challenges for people who do not identify as male or female to find their place in sex-differentiated tikanga activities.
  10. We understand that, in kapa haka, groups are taking different approaches when deciding where to place members who are transgender or non-binary.[[359]](#footnote-360) For example, we have heard of one group that agreed to maintain traditional sex-differentiated roles in a particular waiata but to permit transgender wāhine to perform the roles assigned to wāhine. In the last few years, members of the kapa haka group Angitū have woven together actions that might have traditionally sat with the wāhine or tāne side in its performances at Te Matatini (the national kapa haka festival).[[360]](#footnote-361)
  11. In feedback, some submitters shared their understandings about the roles that could be played by gender-diverse people in sex-differentiated tikanga activities. For example, one submitter said:

1. The kaaranga is widely understood to be performed only by women who have given birth. While some hapuu might sanction men who believe in gender identity performing these duties, others will see it as a serious breach of protocol. The kai kaaranga is the physical representation of the mana of the waahine – sacred, and fertile. The bringer of life – that is the mana to give birth.
   1. Another submitter shared their experience growing up in a small rural settlement. They said:
2. Growing up I never saw a gender non-conforming Māori person permitted to adopt the opposite sex role in any sex-differentiated cultural practice. I don’t deny that in other whānau, hapū or iwi this may have been different.
   1. Other submitters also stressed that tikanga and kawa differ between hapū and iwi and told us we need to recognise such differences. For example, ICONIQ Legal Advocates said: “There is no single or universally accepted way in which transgender, non-binary and intersex people are treated in te ao Māori. Tikanga/tikaka is intensely contextual.”

### Relationship between tikanga and the Human Rights Act

* 1. The 2008 decision of Te Taraipiunara Mana Tangata | Human Rights Review Tribunal in *Bullock v Department of Corrections* raised questions about the relationship between tikanga and the Human Rights Act.[[361]](#footnote-362) In that case, a (Pākehā) government employee succeeded in her sex discrimination complaint because she had been expected to participate in a poroporoaki (leaving ceremony) at which tikanga was being observed in a role that aligned with her sex.[[362]](#footnote-363) Specifically, the Tribunal found a breach of section 22(1)(c) of the Human Rights Act, which states that it is unlawful for an employer to subject an employee to a “detriment” (as compared to other employees) by reason of a prohibited ground of discrimination.[[363]](#footnote-364)
  2. The *Bullock* case prompted substantial commentary about the potential for conflict between an individual’s right to freedom from discrimination based on their sex and the collective right of Māori to have Māori culture respected and accommodated.[[364]](#footnote-365)
  3. If new grounds are added to section 21 of the Human Rights Act as we propose, it is possible to imagine the logic of *Bullock* being applied to these grounds. For example, if a transgender man was asked to sit with the women at a pōwhiri, he might argue that is discrimination based on his gender identity.
  4. For that reason, in the Issues Paper, we discussed whether adding new grounds to section 21 would increase the potential for state law to interfere with tikanga and sought feedback on this issue.

### Reform will not increase potential for interference with tikanga

* 1. The relationship between te ao Māori, tikanga and state enforcement of anti-discrimination laws would benefit from consideration in a full review of the Human Rights Act. In this review, however, we cannot address that existing relationship. We can only address the implications for this relationship of adding the proposed new prohibited grounds of discrimination.
  2. In the Issues Paper, we expressed the tentative view that adding new grounds to section 21 would make little difference in practice to the potential for state law to interfere with sex-differentiated tikanga activities. We asked submitters to indicate whether they agreed, agreed in part, disagreed or were unsure.
  3. The most common response from submitters was that they were unsure, possibly due to the technical legal nature of this question. The next most common response was agreement with our preliminary view that amending section 21 would not significantly alter the balance between state law and tikanga. For example, takatāpui community organisation Tīwhanawhana Trust agreed with this preliminary view.
  4. For three reasons, we remain of the view that there is little potential for the new grounds of discrimination to exacerbate existing tensions between the Human Rights Act and tikanga.

#### Bullock may no longer reflect how cases would be decided

* 1. First, it is not clear that a case like *Bullock* would be decided the same way if it came before the Human Rights Review Tribunal now. *Bullock* is a first instance tribunal decision that has never been confirmed by a court. It is 17 years old. Since it was determined, Te Kōti Mana Nui | Supreme Court has affirmed on several occasions that tikanga is part of the common law of Aotearoa New Zealand.[[365]](#footnote-366) In the light of that development, we think it is questionable whether *Bullock* remains good law.
  2. We received very little feedback on this point in consultation. Te Kāhui Ture o Aotearoa | New Zealand Law Society agreed with us that *Bullock* may no longer be good law. One submitter suggested the clash in *Bullock* was:

1. … not a matter of anti-discrimination and tikanga being innately incompatible, but instead that it is down to the government agency sitting in between, treating the two as rocks to be crudely bashed together without good consideration for either, or as things that can be reduced to abstracted modules for convenient handling.
   1. We suggest a court or tribunal today would likely take a different approach to the relationship between tikanga and the Human Rights Act.[[366]](#footnote-367) Specifically, we question whether the Human Rights Review Tribunal would still conclude that asking a person to participate in a poroporoaki in a role that accorded with the tikanga of the event would constitute a “detriment” in breach of section 22(1)(c) of the Human Rights Act. This evaluation would ultimately depend on the facts and evidence. However, in applying a standard such as “detriment”, the Tribunal (or appeal courts) might weigh the benefits of enabling people to participate in tikanga activities against the somewhat minor inconvenience to the complainant. It might also consider relevant:
      * 1. the role of the Treaty of Waitangi as an aid to the interpretation of legislation;[[367]](#footnote-368)
        2. the rights of Māori, as people who belong to “an ethnic, religious, or linguistic minority in New Zealand”, to enjoy their culture in community with others;[[368]](#footnote-369) and
        3. the United Nations Declaration on the Rights of Indigenous Peoples with its emphasis on respecting indigenous peoples’ self-determination and autonomy.[[369]](#footnote-370)
   2. Similar considerations would be relevant to the interpretation and application of other Part 2 discrimination protections, including others that use the word “detriment” or refer similarly to people being treated “less favourably” than others.[[370]](#footnote-371)
   3. Ultimately, if the Tribunal did not consider it possible to conclude there was no breach of discrimination protections in Part 2, it might invoke section 21B of the Human Rights Act. It states that an act or omission is not unlawful under Part 2 if it is “authorised or required … by law”.
   4. Under Part 1A of the Act (regulating public functions), a difference in treatment is not unlawful discrimination unless it results in “material disadvantage” when viewed in context and is not “demonstrably justified in a free and democratic society”.[[371]](#footnote-372) A Part 1A complaint that a sex-differentiated activity is unlawful under the Human Rights Act might well fall at one or both of these gateways if it is in accordance with applicable tikanga.
   5. In short, although much would depend on the facts and the evidence, we consider it questionable whether the Tribunal would decide a case such as *Bullock* the same way today or that, if it did, that it would be upheld on appeal.

#### If Bullock remains good law, a complaint is already available

* 1. If, to the contrary, *Bullock* remains good law, a person who is transgender could already challenge a sex-differentiated tikanga activity as sex discrimination. Adding the new grounds we propose would not enlarge the circumstances in which such a challenge is available (although we acknowledge that it might make it more likely in practice that a transgender person would choose to bring a claim).
  2. In the Issues Paper, we gave the example of a transgender man who argues that asking him to sit with the women at a pōwhiri is discriminatory. If *Bullock* is correct, this person already has a Human Rights Act claim available to him. He can argue that the reason for the discrimination was the discriminator’s belief that he is a woman. He would not have been asked to sit with the women if the discriminator believed him to be a man. Therefore, a sex discrimination claim is available to him on exactly the same basis it was available to Ms Bullock. That claim is available regardless of whether the opinion from Te Tari Ture o te Karauna | Crown Law (that the ground of sex includes gender identity) is correct.
  3. In consultation, we received very few submissions that addressed this part of our analysis. Of those we received, some told us that they agreed with our analysis. Others said they thought amendments to section 21 would create conflict in marae kawa or increase the chance of conflict but did not give examples of how this would occur. Others raised concerns about amendments having unintended consequences.
  4. We did not hear anything in consultation to make us reconsider our legal analysis on this point. No one identified any scenario in which a transgender person could argue a tikanga activity amounts to gender identity discrimination where they could not also frame their complaint as sex discrimination.

#### Many sex-differentiated tikanga activities fall outside the scope of the Human Rights Act

* 1. Finally, many sex-differentiated tikanga activities occur in situations that are beyond the reach of the Human Rights Act altogether. The Act only regulates government functions (Part 1A) and certain specified areas of life such as employment, education, provision of housing, and access to goods and services (Part 2). Many sex-differentiated tikanga activities fall outside of those categories. For example, they take place as part of a private activity such as a hui-ā-hapū, a whānau celebration or a tangi.
  2. Some sex-differentiated tikanga activities do occur in situations that are regulated by the Human Rights Act. Māori-led organisations and businesses sometimes engage in activities regulated by Part 2 such as providing education or offering goods, facilities and services to the public. Sometimes other organisations adopt or apply tikanga (such as the government department in *Bullock*). Even some activities on marae may fall within the jurisdiction of the Human Rights Act — at least on the face of it. An example might be where a marae has been hired out as a venue or is being used to deliver government services such as providing health care.
  3. Nevertheless, we think it is relevant that many contexts in which sex-differentiated tikanga activities take place will not be regulated by the Human Rights Act at all.
  4. In the Issues Paper, we also expressed the view that it was unlikely Māori would use the Human Rights Act to challenge tikanga activities.[[372]](#footnote-373) This was based on views shared with us at the wānanga. Participants at that wānanga told us that Māori who are transgender or non-binary or who have innate variations of sex characteristics have no interest in involving state law institutions in the conversations they are having with their hapū and whānau about how to accommodate them in tikanga activities.
  5. Although submitters did not address this question directly, we received many submissions saying that state law should not interfere in these matters. Tīwhanawhana Trust said the rights of people who are transgender or non-binary or who have an innate variation of sex characteristics “on marae and other places where the rituals of encounter take place must be negotiated with each marae and sometimes case by case by event”. We did not receive a single submission from a transgender or non-binary person or a person with an innate variation of sex characteristics suggesting they would want to use the Human Rights Act to challenge a sex-differentiated tikanga activity.
  6. We acknowledge that one submitter with relevant expertise, Professor Claire Charters, said we may have underestimated the number of Māori who might try to rely on the Human Rights Act or the New Zealand Bill of Rights Act 1990 if a Māori entity discriminates against them. We do not understand Professor Charters to be disagreeing with us that reform of section 21 is unlikely to exacerbate existing tensions between tikanga and anti-discrimination law. Rather, Professor Charters thought we focused too exclusively in the Issues Paper on tikanga. She suggested there might be a growing number of Māori who might want to explore the potential for Part 1A of the Human Rights Act to apply to the activities of Māori governance entities more generally.
  7. We address below these wider concerns about the potential of the Human Rights Act to regulate the acts of Māori governance entities. Focusing for now on tikanga, we acknowledge there are many voices we have not heard from in consultation. We cannot say with confidence that Māori or non-Māori people who are transgender or non-binary or who have an innate variation of sex characteristics would not use the Human Rights Act to challenge tikanga activities. However, this can only occur in circumstances that fall within the scope of the Human Rights Act. For the reasons we have explained, we think those circumstances are quite limited.

#### Conclusion

* 1. Taking these points together, the potential for the new grounds we propose to enlarge existing tensions in the relationship between tikanga and the Human Rights Act seems minimal. For that reason, we are satisfied that those existing tensions do not make reform of section 21 of the kind we propose inappropriate. Māori who are transgender or non-binary or who have an innate variation of sex characteristics want and need legal protections from discrimination. We do not think the Treaty of Waitangi or tikanga should be treated as obstacles to that protection given the risks of interference are largely hypothetical.
  2. We do, however, consider that the relationship between tikanga and the Human Rights Act deserves attention on any general review of the Act.

### Potential for interference with tino rangatiratanga of Māori governance entities

* 1. As noted, Professor Claire Charters suggested the Law Commission should consider the broader potential (beyond issues of tikanga) for Part 1A of the Human Rights Act to interfere with the tino rangatiratanga of Māori governance entities. Professor Charters gave the examples of entities providing social, health and educational services under co-governance arrangements or where powers are being exercised under Treaty settlement legislation. As she pointed out, these may well constitute public functions and therefore be regulated by Part 1A of the Human Rights Act.[[373]](#footnote-374)
  2. Professor Charters’ starting point was that any regulation by state law of te ao Māori breaches Māori self-determination and tino rangatiratanga and is illegitimate. She referenced both the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples. She also referred to practice in other countries such as the Indian Civil Rights Act 1968 (in the United States), under which jurisdiction over discrimination issues is exercised exclusively by tribal courts.[[374]](#footnote-375)
  3. As things currently stand, Māori governance entities are not exempt from regulation by state law. A person (Māori or non-Māori) who believes a Māori governance entity has interfered with their legal rights has much the same avenues of complaint as any other person. For example, they could bring a claim for breach of contract, take a personal grievance to Te Ratonga Ahumana Taimahi | Employment Relations Authority or complain to Te Mana Mātāpono Matatapu | Privacy Commissioner, Te Toihau Hauora, Hauātanga | Health and Disability Commissioner or Mahi Haumaru Aotearoa | WorkSafe New Zealand.
  4. Putting aside the issues we addressed above about the potential for interference with tikanga, it is not obvious to us that the jurisdiction of the Human Rights Act is any different. Therefore, Professor Charters’ submission is, in effect, a broad submission about the constitutional position of Māori governance entities with respect to state law.
  5. The Law Commission aims to give practical effect to the Treaty of Waitangi within the limits of its statutory function. The broad underlying constitutional issues Professor Charters raises are ones that we anticipate will continue to be discussed in a range of fora, including, where appropriate, by the Law Commission. We consider, however, that they go beyond our remit on this review with its confined focus on the protections in the Human Rights Act for people who are transgender or non-binary or who have an innate variation of sex characteristics. We do not understand Professor Charters to disagree with this point. She acknowledges the Law Commission does not have the mandate in this project to conduct a general review of how domestic human rights law applies to Māori governance entities.
  6. In conclusion, we do not think the broad constitutional issues Professor Charters raises are ones we can usefully address in this report. Nor do we consider they are reasons not to recommend reform of section 21 of the Human Rights Act.

## Possibilities for specific reform

* 1. We consulted in the Issues Paper on some options for specific reform of the Human Rights Act to address any implications for tikanga of adding the new grounds we propose. Three of the possibilities we identified were aimed at limiting state interference with tikanga practices that specify distinct roles for tāne and wāhine or that occur on a marae.[[375]](#footnote-376) A fourth was aimed at the composition and process of the Human Rights Review Tribunal when it considers matters of tikanga.[[376]](#footnote-377)
  2. Although we consulted on these options, we expressed doubts about the desirability of reforms of this kind as part of this review. We suggested that we should only propose reform on this issue if there is a real potential for increased interferences with tikanga resulting from our review.
  3. As already noted, the relationship between tikanga and anti-discrimination law would benefit from consideration in a full review of the Human Rights Act. For the following reasons, we do not recommend reform to address that relationship as part of this review.
  4. First, for the reasons explained above, we think adding the proposed new grounds of discrimination will make little difference in practice to the potential for state law to interfere with tikanga.
  5. Second, it would be difficult to achieve this kind of reform within the scope of the review. As some submitters acknowledged, it would be odd and incoherent to craft an exception relating to tikanga that applies solely to new grounds such as gender identity when the problem already presents acutely in relation to sex.[[377]](#footnote-378) However, it is outside the scope of our review to make recommendations that broadly affect all the grounds of discrimination.
  6. Third, there are risks with introducing a specific tikanga exception into the Human Rights Act as this might suggest that, outside of the exception, the Act does apply to tikanga activities. In that way, it may unintentionally invite state law in. In consultation, several organisations were concerned about this.[[378]](#footnote-379)
  7. Fourth, although we did get some support for each of the reform options we had identified, the support was limited. Most submitters supported no reform on this issue.

CHAPTER 6

# Rights and freedoms

## Introduction

* 1. In this chapter, we consider the implications for this review of certain rights found in the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) and at international law. The 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.
  2. We explain in this chapter why we are satisfied that the reforms we propose will not breach the NZ Bill of Rights and will balance fairly the rights of different groups.
  3. The rights we discuss in this chapter can sometimes be in tension with the right to freedom from discrimination in the Human Rights Act. This is because what people say, the way they manifest their beliefs or their decisions about who they want to associate with can sometimes constitute discrimination. As we discuss in this chapter, New Zealand law has ways to manage situations like this when rights come into apparent conflict.
  4. Many submitters were concerned that a new ground to protect people who are transgender or non-binary would limit their rights unfairly. This is because some people in Aotearoa New Zealand have beliefs that are sceptical about gender that they want to express and act on. For example, some people believe that the idea of having a gender identity separate from one’s ‘biological’ sex is an ideology and that protecting the rights of people who are transgender will dilute the rights of cisgender women or result in harms to children. Some believe that God created two immutable sexes of male and female and that their faith requires them to speak and act consistently with this belief. In Chapter 2, we described this collection of beliefs as gender-critical.
  5. We begin this chapter by giving some background to the rights we are discussing and by explaining the rules that apply when the Human Rights Act and the NZ Bill of Rights come into conflict. We then consider, in turn, the likely impacts of our proposed reform on:
     + 1. what people are entitled to say or refuse to say;
       2. when people can refuse to provide a service for reasons of conscience; and
       3. freedom of association, in particular, the ability of cisgender women to exclude people not assigned female at birth from networks, associations and events.
  6. We do not propose specific reform on any of these issues.
  7. This chapter focuses on the implications these rights and freedoms have for a new ground of gender identity. We did not hear concerns from submitters about the impact on their rights and freedoms of adding a new ground to protect people with innate variations of sex characteristics.

## Rights about thought, belief, religion, expression and association

* 1. This chapter focuses on four rights in the NZ Bill of Rights that protect aspects of what people think or believe, how they express those thoughts and beliefs, and how they associate with others. These are:
     + 1. section 13 (freedom of thought, conscience, religion and belief);
       2. section 14 (freedom of expression);
       3. section 15 (manifestation of religion or belief in worship, observance, practice or teaching); and
       4. section 17 (freedom of association).
  2. These rights are also protected at international law.[[379]](#footnote-380)
  3. We explain below some background to each of these rights. We also discuss briefly two related grounds of discrimination in the Human Rights Act.
  4. Some submitters gave us feedback on the implications for this review of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). We discussed CEDAW in Chapters 3 and 4.

### Freedom of thought, conscience, religion and belief

* 1. Section 13 of the NZ Bill of Rights protects the right to freedom of thought, conscience, religion and belief, including the right to adopt and to hold opinions without interference.
  2. The freedom stated in section 13 has been described as “far-reaching and profound”.[[380]](#footnote-381) It encompasses all issues of belief, conscience and opinion regardless of the subject matter. It is also absolute — the courts have said no limit on section 13 (or its international counterparts) can ever be justified.[[381]](#footnote-382)
  3. On the other hand, the protection in section 13 only extends to what people are entitled to believe, not to whether they are entitled to express those beliefs in words or action. Rights to express one’s opinions and beliefs are found instead in sections 14 and 15.
  4. Neither Part 1A nor Part 2 of the Human Rights Act legalise interferences with section 13, and the reforms we propose of section 21 will not change that. Simply having a belief could never be discrimination contrary to Part 1A or Part 2 of the Human Rights Act.

### Freedom of expression

* 1. Section 14 of the NZ Bill of Rights protects “the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”. Te Kōti Pīra | Court of Appeal has said freedom of expression is “as wide as human thought and imagination”.[[382]](#footnote-383)
  2. The right to freedom of expression is engaged whenever a person is prevented from communicating something (whether orally or in writing) or is sanctioned for doing so. Section 14 also protects a right to refrain from speaking,[[383]](#footnote-384) and it sometimes protects expressive conduct as well as speech (the archetypal example being flag burning).[[384]](#footnote-385)
  3. Although section 14 is engaged in a broad range of circumstances, that does not mean all limits on speech are incompatible with the NZ Bill of Rights. As we explained in Chapter 3, section 5 of the NZ Bill of Rights says the rights in that Act can be made subject to “reasonable limits” that are “prescribed by law” and “demonstrably justified in a free and democratic society”. Unlike section 13 of the NZ Bill of Rights, the right to freedom of expression is not an absolute right.
  4. New Zealand law allows for limits on expression in many situations and for many reasons. Relevantly, these reasons sometimes include avoiding harms or offence to other people.[[385]](#footnote-386) Laws of this kind are not inconsistent with the NZ Bill of Rights as long as they are “demonstrably justified” in accordance with section 5.
  5. We also explained in Chapter 3 that section 5 is said to give rise to a ‘proportionality’ test. In simple terms, this means the gain to society that results from the particular law must be sufficient to justify the loss that is incurred by limiting the right.[[386]](#footnote-387)
  6. In this weighing exercise, some categories of speech are treated as weightier than others. As Tipping J said in *Hosking v Runting*:[[387]](#footnote-388)

1. The more value to society the information imparted or the type of expression in question may possess, the heavier will be the task of showing that the limitation is reasonable and justified.
   1. The weight judges attach to speech does not generally depend on its subject matter. Rather, it depends on how closely connected the type of speech is to the purposes or rationales that underlie freedom of expression. Those rationales are often said to be: democratic self-government, promoting the discovery of truth through unfettered competition in a ‘marketplace of ideas’, and self-fulfilment.[[388]](#footnote-389)
   2. Speech that asserts a fact, opinion or idea generally attracts careful protection because it contributes directly to the ‘marketplace of ideas’. More specifically, case law recognises, variously, that “political speech”,[[389]](#footnote-390) and speech on matters of “legitimate public concern”,[[390]](#footnote-391) have close connections to free speech rationales and should be carefully protected.
   3. By contrast, as we discuss further below, insulting or abusive speech contributes less obviously to the advancement of free speech rationales and therefore may receive weaker protection.[[391]](#footnote-392)

### Manifestation of religion or belief

* 1. Section 15 protects the right to manifest “religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private”. According to the European Court of Human Rights, “belief” is akin to “conviction” and “denotes views that attain a certain level of cogency, seriousness, cohesion and importance”.[[392]](#footnote-393)
  2. Section 15 only protects worship, observance, practice and teaching. It is most obviously engaged by laws or state practices that restrict religious observance. As we discuss further below, it is not always engaged if the conduct that is subject to restrictions is merely motivated by, or consistent with, a person’s religion or belief.[[393]](#footnote-394)
  3. Like section 14, the right to manifest religion and belief in section 15 is not absolute. It can be subject to reasonable limits that comply with section 5 of the NZ Bill of Rights. As with freedom of expression, the right to manifest one’s religion or belief includes a right not to manifest a religion or belief.[[394]](#footnote-395)

### Freedom of association

* 1. Section 17 of the NZ Bill of Rights states a right to “freedom of association”. Te Kōti Mana Nui | Supreme Court has said the purpose of this right is to enable people to “form or participate in an organisation, to act collectively, rather than simply to associate as individuals”.[[395]](#footnote-396) Subject to that limit on scope, freedom of association is a broad right that encompasses “a wide range of associational activities”.[[396]](#footnote-397) It includes the right of an organisation to determine its members.[[397]](#footnote-398)
  2. Like sections 14 and 15, the right to freedom of association can be subject to justified limits under section 5 of the NZ Bill of Rights.[[398]](#footnote-399)

### Prohibited grounds of discrimination: religious belief and political opinion

* 1. Two prohibited grounds in section 21 of the Human Rights Act also protect aspects of what people think and believe: “religious belief” and “political opinion”.[[399]](#footnote-400) However, these cover narrower aspects of thought and belief than the rights discussed above because they only cover beliefs that are “religious” and opinions that are “political”.
  2. Because of their narrower scope, we do not discuss these grounds of discrimination here except to note that, if they are the basis for adverse treatment, this can give rise to a complaint of discrimination under the Human Rights Act. In the United Kingdom, some people with gender-critical beliefs have relied successfully on a prohibited ground in United Kingdom legislation of religion or belief, which includes “any religious or philosophical belief”.[[400]](#footnote-401) One scholar has suggested the New Zealand ground of “political opinion” should be interpreted generously to extend similar protection but the law on this point is unsettled.[[401]](#footnote-402)

## How the NZ Bill of Rights and the Human RIghts Act interrelate

* 1. As we explain further below, a key concern we heard from some submitters was that, if a gender-related ground was added to the Human Rights Act, this would violate the rights and freedoms set out above.
  2. Protecting the right to freedom from discrimination may entail limits on other rights. This includes rights that protect how people express their beliefs or with whom they choose to associate. Discriminatory behaviour is often an expression of beliefs a person has about particular groups. Therefore, anti-discrimination laws function as a limit on rights to expression, belief and association in certain circumstances.[[402]](#footnote-403)
  3. In some cases, this may involve limits on what people can say.[[403]](#footnote-404) For example, if an employee is repeatedly subject to racist or homophobic slurs in their workplace, this might well constitute a “detriment” (the term used in the Part 2 provision about employment discrimination as well as in some other Part 2 provisions) and therefore be unlawful under the Human Rights Act. If a new ground of gender identity is added to section 21, this would clarify that verbal attacks that are related to a person’s gender identity might also constitute discrimination in similar circumstances.
  4. This does not mean the reforms we propose would breach the NZ Bill of Rights. Nor does it mean that, whenever anybody says something hostile to, or critical of, a person’s gender identity, it would be unlawful under the Human Rights Act. Whether such behaviour is unlawful depends, first and foremost, on whether legal tests in Part 1A or Part 2 of the Human Rights Act are met. Those legal tests must, however, be interpreted and applied consistently with the NZ Bill of Rights, including the rights we discuss in this chapter. This is because of section 6 of the NZ Bill of Rights, which requires other statutes to be given a meaning that is consistent with the NZ Bill of Rights whenever that is possible.
  5. The courts have read section 6 of the NZ Bill of Rights alongside section 5 (the provision about justified limitations). The courts have said that, read together, sections 5 and 6 require New Zealand laws to be interpreted and applied so as not to limit rights protected by the NZ Bill of Rights any more than can be demonstrably justified.[[404]](#footnote-405)

### Feedback on whether the proposed reform could breach the NZ Bill of Rights

* 1. In the Issues Paper, we discussed the implications of the NZ Bill of Rights for the reforms we were considering. In the context of an analysis of misgendering and deadnaming (two forms of expression that we discuss later in the chapter), we suggested that section 6 of the NZ Bill of Rights means discrimination protections in the Human Rights Act cannot be interpreted or applied in a manner that breaches the NZ Bill of Rights.[[405]](#footnote-406) This means, in effect, that the extent of harm caused by the misgendering or deadnaming must meet a certain threshold before it could be held to constitute discrimination.
  2. Submitters who commented on this part of our analysis were generally legal experts. Professor Graeme Austin, Dr Eddie Clark, Professor Dean Knight and Professor Paul Rishworth KC all indicated agreement that limits on misgendering or deadnaming could be a demonstrably justifiable limit on the rights in the NZ Bill of Rights if the behaviour was sufficiently serious.[[406]](#footnote-407) Te Kāhui Ture o Aotearoa | New Zealand Law Society agreed with our assessment of “the importance of freedom of expression and safeguards that exist in the law”. Community Law Centres o Aotearoa said it agreed with our reasons for why existing Part 2 protections “should be able to deal with misgendering and deadnaming”.
  3. Some organisations, by contrast, had concerns that amending section 21 of the Act could result in unjustified limits on free speech and related rights. Kia Rangona te Kōrero | Free Speech Union expressed generalised concerns about the direction of case law and legislation on free speech issues, pointing to a Te Mana Whanonga Kaipāho | Broadcasting Standards Authority decision that it said contains “concerning rhetoric”.[[407]](#footnote-408) The Free Speech Union said freedom of speech in government agencies could be significantly impeded by the reforms we were considering, for example, because health practitioners could be held to be discriminating for expressing their professional opinions.
  4. The Free Speech Union also indicated a concern about the breadth of the “detriment” test, which, as discussed above, is a test for unlawful conduct under several Part 2 discrimination protections.
  5. Ethos said the reforms we were considering would limit the rights to hold, express and manifest beliefs and could not be justified under section 5 of the NZ Bill of Rights. Its main reason was it did not consider there is a sufficient case for reform of section 21 at all. Assuming reform proceeded, Ethos was particularly concerned about the “more rigid” approach in Part 2. It agreed with a suggestion in the Issues Paper that the legal tests in Part 1A allow for a more fluid and context-specific approach.[[408]](#footnote-409)
  6. Save Women’s Sport Australasia said Part 2 of the Human Rights Act does not allow for appropriate consideration of relevant rights and pointed to an Australian decision about whether a transgender woman could be excluded from a women-only networking app.[[409]](#footnote-410)

### Analysis and conclusion

* 1. We consider that the discrimination protections in Part 1A and Part 2 of the Human Rights Act are capable of (and therefore must be) interpreted and applied consistently with sections 5 and 6 of the NZ Bill of Rights (that is, to avoid unjustified limits on rights). Therefore, amending section 21 to add a new ground of gender identity would not result in a breach of the NZ Bill of Rights.

#### Part 1A of the Human Rights Act

* 1. Part 1A applies to the public sector (with the notable exception of public sector employment issues, which are regulated under Part 2).[[410]](#footnote-411) The discrimination protections in Part 1A are stated broadly. Under Part 1A, public sector agencies must comply with a right to “freedom from discrimination” in section 19 of the NZ Bill of Rights and must only place limits on that right that are justified under section 5.[[411]](#footnote-412)
  2. Given the broad and evaluative nature of the legal tests in Part 1A, there can be no difficulty in interpreting and applying them consistently with the NZ Bill of Rights (as required by sections 5 and 6). If a finding of discrimination would unjustifiably limit free speech or related rights, a court or tribunal might either:
     + 1. conclude the speech or action did not constitute discrimination (for example, it might conclude the speech or action did not amount to worse treatment of a particular person by reason of a prohibited ground); or
       2. conclude the speech or action was a justified limit on the right to freedom from discrimination under section 5.[[412]](#footnote-413)

#### Part 2 of the Human Rights Act

* 1. Part 2 applies to the conduct of private people and organisations. It lists specific acts that, in a particular area of life, are unlawful if done by reason of a prohibited ground.
  2. Some Part 2 protections are broadly enough worded that they could encompass abusive or belittling speech in an appropriate case. For example, in three areas of life regulated by Part 2 (employment, partnerships and education), it is unlawful to subject someone to a “detriment” by reason of a prohibited ground.[[413]](#footnote-414)
  3. As discussed above, some submitters raised particular concerns about Part 2, with the Free Speech Union worrying about the breadth and vagueness of the concept of “detriment” and others worrying that the language of Part 2 is too rigid. We agree that the discrimination protections in Part 2 of the Human Rights Act are more rigid than those in Part 1A. For example, Part 2 does not contain a justified limitations provision like section 5 of the NZ Bill of Rights.
  4. Nevertheless, we are satisfied that the rules in Part 2 are capable of being (and therefore must be) interpreted and applied consistently with sections 5 and 6 of the NZ Bill of Rights. Case law has established that broad evaluative standards in legislation similar to “detriment” must be construed and applied so as not to result in an unjustified interference with the NZ Bill of Rights including, specifically, with the right to freedom from expression.[[414]](#footnote-415) In its decisions, the Broadcasting Standards Authority has stressed that it must apply standards such as discrimination or denigration in the Broadcasting Act 1989 and associated codes in a manner that avoids unjustified limits on freedom of expression.[[415]](#footnote-416)
  5. Finally, as a backstop, it might be possible to invoke section 21B of the Human Rights Act to ensure that Part 2 provisions are not applied in a way that breaches the NZ Bill of Rights. Section 21B states that an act or omission is not unlawful under Part 2 if it is authorised or required by law. It might also be possible to seek a declaration of “genuine justification” from Te Taraipiunara Mana Tangata | Human Rights Review Tribunal under section 97 of the Human Rights Act although, for reasons we discuss in Chapter 8, it is difficult to predict whether this would succeed.

## What people are entitled to say or refuse to say

* 1. Most of the feedback we received through our consultation process about the potential impact of reform of section 21 on the rights and freedoms discussed in this chapter concerned implications for what people are entitled to say or refuse to say. We have examined these implications and, for reasons we explain below, are satisfied they are appropriate.

### Overview of feedback

* 1. We received substantial feedback on this issue. This included feedback from people who were worried about the impact of the reform on their right to say what they like. It also included feedback from people who wanted us to understand the harms that some forms of speech cause to people who are transgender or non-binary.

#### Concerns about the Human Rights Act interfering with speech

* 1. Many people gave us feedback expressing concerns about the impact of reform of section 21 on their right to believe what they want and say what they want. Submitters often expressed these concerns at a high level of generality. However, some submitters mentioned specific rights and freedoms they were concerned about. Most commonly, submitters referred to freedom of speech (or expression), but all the other rights we set out earlier in this chapter were also mentioned.[[416]](#footnote-417)
  2. Concerns of this kind were a common reason some people gave for opposing reform of section 21 altogether. We also heard concerns of this kind in relation to specific contexts, for example, in relation to schools, workplaces and government agencies.[[417]](#footnote-418)
  3. The Free Speech Union provided us with feedback from 6,013 people collected via its website.[[418]](#footnote-419) People could indicate their support for one or more of four paragraphs of form text supplied by the Free Speech Union and could also supplement their feedback with individual comments.[[419]](#footnote-420) All four of the form text paragraphs expressed free speech concerns (focusing on different topics) and all four asked the government not to amend the Human Rights Act.
  4. Based on information the Free Speech Union provided to the public through an email to subscribers and on its website, the feedback we received from people in this cohort reflected a number of misunderstandings about the review. These misunderstandings included that Te Aka Matua o te Ture | Law Commission was proposing legal consequences for all misgendering (even if accidental), that the Law Commission was intending to recommend that misgendering should be a criminal offence and that the review was a way to achieve hate speech reforms by the ‘back door’.[[420]](#footnote-421) These misunderstandings may account for the level of concern about the review expressed by people who provided feedback through the Free Speech Union. However, this does not negate the fact that many people from whom we received feedback regarded the impact of the review on people’s rights and freedoms as matters of concern and urged the Law Commission to take those concerns seriously.
  5. Broadly speaking, people’s concerns about the impact of reform on what people are entitled to say or refuse to say can be divided into two categories.

##### Gender-critical speech expressing opinions and ideas

* 1. Many submitters were concerned that people might be penalised for expressing gender-critical opinions or ideas. Submitters said they were worried that law reform would stifle open debate and the exchange of ideas (including in workplaces and schools), that people would be penalised for questioning the concept of gender (such as facing adverse workplace consequences) or that gender-critical views would be branded hate speech. The Women’s Rights Party was concerned about the freedom of speech to “question the concept of ‘gender’ and to assert the sex-based rights of females”.[[421]](#footnote-422)

##### Misgendering and deadnaming

* 1. We had sought specific feedback in the Issues Paper about misgendering and deadnaming and therefore received a large amount of feedback on this topic. In broad terms, misgendering is referring to someone using pronouns, honorifics and other details that do not align with their gender identity. Deadnaming is a category of misgendering that involves referring to a person by a name they no longer use and that is inconsistent with their gender identity. In the remainder of this chapter, for simplicity, we generally use the umbrella term misgendering to cover both forms of speech.
  2. Many submitters were concerned about people being penalised for referring to someone using names, pronouns and other details that are consistent with their ‘biological sex’. Submitters told us that requiring someone to affirm another person’s gender is “compelled speech”, intrudes on matters of conscience and requires people to deny what they “see and know to be true”. One submitter said:

1. Making it illegal to misgender or deadname, effectively is forcing people to falsify their own views, beliefs and facts. This is one of the worst violations of speech rights possible.
   1. Some submitters were concerned about the impact of reform on religious beliefs. For example, Ethos said the belief that binary, biological sex was given to the world by God:
2. … is a widely-held and foundational belief; it is not simply one option on a menu of ideas but part of a coherent whole. Denying this belief or being forced to act contrary to it would unpick the entire fabric of a believer’s faith, involving a denial of God’s sovereignty and of the authority of the sacred texts He has given us.
   1. Many submitters worried that people would be jailed for misgendering or that some other significant penalty would automatically attach to misgendering, even when accidental. Submitters also raised concerns less focused on rights and freedoms such as that legal consequences for misgendering will cause resentment or lead to linguistic confusion.

#### Concerns about the harmful impacts of speech

* 1. We also received feedback from many people who had concerns about the harmful impacts of hostile speech on people who are transgender or non-binary. Submitters mentioned concerns of this kind in relation to various areas of life regulated by the Human Rights Act. For example:
     + 1. Some submitters told us about students being misgendered, deadnamed or outed at schools or universities, as well as facing other bullying and harassment.
       2. Some submitters told us about experiences that people who are transgender or non-binary face at work. For example, Wellington Pride Festival said people “frequently experience hostile work environments, including verbal harassment, misgendering, and invasive questions about their gender or sex characteristics”.
  2. Some submitters said the right to freedom of speech needs to be carefully balanced, with one submitter stating it should not become a “Right to Cause Harm”.
  3. In response to our consultation question about misgendering, submitters told us misgendering can be “abusive”, “psychologically harmful”, “significantly contribute to the marginalisation of trans people” and put people who are transgender or non-binary at risk. One submitter described misgendering as a “core part” of the abuse people who are transgender or non-binary face, one said harm resulting from misgendering is comparable to physical assault and another said misgendering was the same “in terms of awfulness” as sexual harassment they had experienced. Some submitters said misgendering can be a form of bullying. Some said it can be a barrier to health care. Others said it can sometimes result in people being outed, which may turn them into a target.

### Implications of the proposed reform

* 1. As we explained earlier, any legal limit on what people are entitled to say or to refuse to say engages the right to freedom of expression in section 14 of the NZ Bill of Rights. However, in assessing whether a particular limit on speech is justified, some categories of speech receive greater protection than others.
  2. We have analysed the likely impact of reform for what people are entitled to say or refuse to say in relation to three categories of speech that submitters were concerned about: speech that expresses opinions and ideas; insults and abuse; and misgendering. We acknowledge there is significant overlap between these categories.
  3. The analysis below draws on our earlier explanation that a finding that speech or action is unlawful under the Human Rights Act is not available unless:
     + 1. that would be a justified limit on relevant rights in the NZ Bill of Rights; and
       2. a legal test for discrimination in Part 1A or Part 2 of the Human Rights Act is met.
  4. Another important background consideration is that the Human Rights Act only covers the behaviour of private individuals when they engage in one of the public activities regulated by Part 2 (such as employing staff, providing goods or services or providing accommodation). For example, the only provisions in the Human Rights Act that apply generally to participation in online fora are those about sexual and racial harassment.[[422]](#footnote-423)

#### Gender-critical speech expressing opinions and ideas

* 1. Speech that attempts to inject opinions or ideas into debates on matters of public concern is accorded particular weight in free speech analysis. That includes gender-critical speech that expresses opinions or ideas.[[423]](#footnote-424) For example, in *Adam v Radio New Zealand*, the Broadcasting Standards Authority dismissed a complaint that an interview by Kim Hill with Dr Kathleen Stock (a scholar with gender-critical views) breached the denigration and discrimination standard in the relevant broadcasting code, saying:[[424]](#footnote-425)

… the free and frank exchange of opinions is an important aspect of the right to freedom of expression, and is fundamental to the operation of our democratic society. … The public interest is not served by having controversial perspectives aired only in online ‘echo chambers’ where they are able to propagate without any effective regulation or challenge.

* 1. In *Higgs v Farmor’s School* (a case holding that the dismissal of an employee who had expressed gender-critical views online was unlawful), the England and Wales Court of Appeal said the right to freedom of speech “necessarily entails the freedom to express opinions that may shock and offend”[[425]](#footnote-426) and that:[[426]](#footnote-427)

An employer does not have *carte blanche* to interfere with an employee's right to express their beliefs simply because third parties find those beliefs offensive and think the worse of it for employing them.

* 1. Although we have found examples in the United Kingdom of people experiencing employment sanctions (including dismissal) for having or expressing gender-critical views, people in this position have had a high rate of success in challenging their employer’s conduct.[[427]](#footnote-428) In cases such as *Higgs v Farmor’s School* (discussed above), United Kingdom tribunals and courts have consistently affirmed the employees’ right to freedom of speech and held there is a high threshold for interference.[[428]](#footnote-429)
  2. In only a few of these cases has a United Kingdom court or tribunal upheld employment sanctions resulting from an employee expressing gender-critical views.[[429]](#footnote-430) Those cases involved either significant reputational risks for the employer or unreasonable impacts on colleagues. Examples include:
     + 1. a local body employee who added “XYchromosomeGuy/AdultHumanMale” to his email footer to protest a policy permitting staff to state their preferred pronouns, and refused to remove it;[[430]](#footnote-431) and
       2. an employee whose extensive uninvited emails to colleagues about his gender-critical beliefs was making them feel harassed, intimidated and unsafe.[[431]](#footnote-432)
  3. In regulated professions such as medicine and teaching, members of a profession can be subject to regulatory sanctions if they express their views in a manner that is unprofessional or that is likely to bring the profession into disrepute. For example, in *Leger v Secretary of State for Education*, the England and Wales High Court dismissed a judicial review of a regulatory body’s decision that a teacher had engaged in unacceptable professional conduct. The teacher had refused to deliver aspects of the school’s curriculum and told pupils that being LGBTQI+ was a sin and that people who are transgender are “not in the right mindset”.[[432]](#footnote-433) Similarly, in *British Columbia College of Nurses and Midwives* *v Hamm*, derogatory statements about transgender people made by the defendant while identifying herself as a nurse or nurse educator on various online platforms were held to constitute unprofessional conduct.[[433]](#footnote-434)
  4. Decisions of this kind usefully illustrate the kinds of situations in which a limit on a person’s right to express gender-critical views might be justified from a free speech perspective. However, for the speech to be unlawful under the Human Rights Act, the tests in Part 1A or Part 2 would also need to be met. For example, the speech might have to give rise to a detriment to the transgender or non-binary person in an area of life regulated by Part 2, and to be “by reason of” the person’s gender identity. We have not found examples in overseas case law of complaints being upheld under anti-discrimination laws where someone has simply expressed a gender-critical opinion.[[434]](#footnote-435) This does not seem to us the most likely route by which behaviour of this kind would be challenged.
  5. Context is, however, everything. Employees do not have an unlimited right to express their opinions in any situation, and teachers do not have an unlimited right to share their views on politics, religion and social ordering with their pupils. If opinions about gender are being aired in contexts or ways that cause detriment to a particular individual, the fact they are expressions of opinion may not necessarily save them from being held to constitute discrimination in an appropriate case.

#### Insults and abuse

* 1. By contrast with gender-critical opinions or ideas, speech that is intended to insult, abuse or belittle someone is more likely to give rise to a finding of discrimination under the Human Rights Act.[[435]](#footnote-436) This is for two reasons.
  2. First, although the right to freedom of expression does not come with a requirement of civility,[[436]](#footnote-437) limits on this kind of speech may be easier to justify from a free speech perspective. On one side of the balancing exercise required by section 5 of the NZ Bill of Rights, abuse and insults that are delivered with the intent to wound and humiliate do not contribute significantly to the advancement of free speech rationales.[[437]](#footnote-438) Free speech theorist Kent Greenawalt said of speech of this kind:[[438]](#footnote-439)

In what they accomplish, insults of this sort are a form of psychic assault; they do not differ much from physical assaults, like slaps or pinches, that cause no real physical hurt. … [The speaker’s] aim diminishes the expressive importance of the words. He does not use words to inform, nor is he really attempting to indicate his feelings. His aim is to wound, and the congruence of what he says with his actual feelings is almost coincidental.

* 1. On the other side of the section 5 balancing exercise, the psychological harms that result from abusive speech may, depending on the circumstances, be sufficient to outweigh the right.[[439]](#footnote-440) These harms may include the way abusive speech limits the receiver’s ability to participate in society.
  2. Second, abusive and insulting speech is more likely than the expression of an opinion to meet a test for discrimination in Part 1A or Part 2 of the Human Rights Act. For example, it is more likely to give rise to a concrete detriment to a particular person, and it may be easier to prove that it is “by reason of” a prohibited ground.
  3. When submitters raised concerns with us about the harms to transgender people from the way people express themselves, it was often with hostile speech of this kind in mind. Submitters were concerned about experiencing verbal harassment, bullying and other forms of disparagement when going about their daily lives.
  4. Although abusive and belittling speech might constitute discrimination under the Human Rights Act in an appropriate case, even with speech in this category, the harm involved would need to meet a threshold sufficient to outweigh the right to freedom of expression in all the circumstances.

#### Misgendering

* 1. Misgendering is an informal term that encompasses a wide variety of speech and conduct that incorrectly genders a person. It might include using the wrong name, pronouns or honorifics to refer to someone (or refusing outright to use the right ones when asked), failing to change a person’s gender in official records when asked to do so or sending them official communications using the wrong gender.[[440]](#footnote-441)
  2. Misgendering can reflect a wide range of motivations. For example:
     + 1. Misgendering is sometimes intentional but not always. It might result from administrative oversight, a misunderstanding or a slip of the tongue.
       2. Although misgendering is not the express articulation of a viewpoint on a matter of public debate, it might be an action through which a person seeks to express their opinion or viewpoint.
       3. On the other hand, sometimes the primary motive of misgendering someone is to harass or belittle them or reveal private information about them.
       4. In some cases, a person may have asked to be misgendered, for example, because the person does not want to be publicly identified as transgender.

##### The rights that are engaged

* 1. Requiring a person to refer to someone, or refrain from referring to them, in a particular way engages the right to freedom of expression in section 14 of the NZ Bill of Rights and therefore must be justified under section 5. How much protection is accorded to misgendering in the section 5 weighing exercise might differ depending on the circumstances and the motivation. In some cases, misgendering is simply a form of insult or abuse. In others, it may be how a person is seeking to express an opinion or viewpoint, or be closely connected to issues of conscience and belief.
  2. If the misgendering arises from a refusal to say something, a legal requirement to do so could be categorised as ‘compelled speech’. Special care is needed in the regulation of compelled speech, especially if it implicates the speaker in a particular viewpoint.[[441]](#footnote-442) However, limits on compelled speech can be justified depending on the circumstances. For example, in workplaces and regulated professions, there are often workplace expectations about things that need to be communicated as part of a person’s job. In *New Zealand Health Professionals Alliance Inc v Attorney-General*, Te Kōti Matua | High Court held that a law requiring health practitioners who conscientiously object to abortion to tell patients how to access contact details of a provider did not impose a “relevant limit” on freedom of expression.[[442]](#footnote-443)
  3. It is possible that, as well as engaging freedom of expression, legal limits on misgendering might also engage section 15 (the right to manifest religion and belief). However, this is unclear. Section 15 only protects “worship, observance, practice or teaching” and, as noted earlier, is not always engaged if the conduct that is being restricted is merely motivated by or consistent with a person’s religion or belief.[[443]](#footnote-444)
  4. The European Court of Human Rights has said that, to engage the equivalent right in the European Convention, the conduct that was interfered with must be “intimately linked to the religion or belief”.[[444]](#footnote-445) In *New Zealand Health Professionals Alliance Inc v Attorney-General*, the High Court held that the law requiring health practitioners with a conscientious objection to abortion to tell patients how to access contact details of a provider did not engage section 15.[[445]](#footnote-446)

##### Circumstances in which misgendering could amount to discrimination

* 1. Regardless of whether legal limits on misgendering engage both sections 14 and 15, or section 14 alone, a finding that misgendering constitutes discrimination will likely be available (and justified in human rights terms) in some circumstances but not others.[[446]](#footnote-447) In the Issues Paper, we set out some preliminary analysis of what those circumstances might be. We explained that the successful cases we had identified overseas tended to involve persistent and intentional misgendering or deadnaming (often alongside other hostile or discriminatory treatment). We also explained that the cases generally arose in institutional settings that involved a power imbalance and in which there were professional obligations to moderate language and conduct towards others.[[447]](#footnote-448)
  2. Although we did not receive much feedback on this point of legal analysis, some legal experts who submitted to the review agreed (and none disagreed) that findings of discrimination in relation to misgendering were likely to have hallmarks of this kind. For example, Dr Eddie Clark suggested:[[448]](#footnote-449)

1. … there will be occasions where given context – repetition, as part of a broader pattern of bullying behaviour, or by a direct manager at work, for example – deadnaming and misgendering will be unlawful, and other occasions – a slip of the tongue by a colleagues, a one-off ill-considered joke, or a genuine mistake, for example – where it almost certainly would not be.
   1. We remain unaware of any decisions from the Human Rights Review Tribunal regarding misgendering although we are aware of one current complaint.[[449]](#footnote-450) The reforms we propose of the Human Rights Act may make it more likely this issue will be litigated in future. In other countries with similar anti-discrimination laws, most cases in which misgendering has been part of a successful complaint of discrimination have involved workplace settings.[[450]](#footnote-451) These cases have generally involved persistent and intentional conduct comprising other words and actions meant to belittle and harass a transgender person alongside the misgendering, and failures by management to foster a safe working environment.
   2. Outside the employment context, we are aware of very few cases in which misgendering has been part of a successful complaint of discrimination. Our research uncovered one such case in Australia and one in Canada but both ultimately involved a refusal of service to the transgender person.[[451]](#footnote-452)
   3. Misgendering also sometimes attracts legal or employment consequences under other legal regimes (although the likelihood of that occurring does not depend on reform of the Human Rights Act). Teachers’ disciplinary bodies in Aotearoa New Zealand, Canada and the United Kingdom have upheld professional misconduct complaints in cases involving misgendering.[[452]](#footnote-453) In one United Kingdom court decision, a teacher’s complaint to an employment tribunal about being fired for misgendering his students was similarly unsuccessful.[[453]](#footnote-454)
   4. Ultimately, misgendering could only be unlawful under the Human Rights Act if the tests in Part 1A or Part 2 are met and if the limit that a finding of unlawfulness would place on rights in the NZ Bill of Rights is justified in all the circumstances.

### Why we are satisfied the implications of reform are appropriate

* 1. We are satisfied that the likely impact of the reforms we propose on what people are entitled to say or refuse to say does not make the reforms inappropriate. This is for two reasons. First, we are satisfied the reforms would allow for a fair balance of competing rights. Second, speech that meets the legal tests for discrimination in the Human Rights Act could likely already be challenged under other laws.

#### The reforms would ensure the law fairly balances competing rights

* 1. For the reasons explained earlier, the reforms we propose of section 21 would not violate the NZ Bill of Rights. To the contrary, they would ensure that the law fairly balances rights related to expression and the manifestation of belief with the right to freedom from discrimination of people who are transgender or non-binary. This is exactly the kind of balancing exercise that the NZ Bill of Rights envisages and that can already be undertaken in respect of hostile or derogatory speech that is directed at people with other characteristics protected by section 21 of the Human Rights Act. We can see no reason why a similar approach is inappropriate in cases involving people who are transgender or non-binary.
  2. We acknowledge that the core values that underlie the Human Rights Act — equality/fair play; dignity/autonomy; and autonomy/privacy — also underlie sections 14 and 15 of the NZ Bill of Rights. These rights to express oneself and to manifest beliefs support the ability of people in Aotearoa New Zealand to lead dignified and autonomous lives, free from the coercion of the state, and to develop their own sense of personhood.
  3. Some people (including some people who submitted on this review) disagree strongly with the general direction of travel of New Zealand law and policy on issues relating to gender identity and believe that this is resulting, or may result, in serious ills. For some submitters, these views are connected to their religious beliefs. People are entitled to hold and express these opinions and beliefs.
  4. However, for reasons we explored in Chapter 4, there are significant impacts on the core values underlying the Human Rights Act (such as dignity and self-worth) when people suffer discrimination. Further, we heard from many submitters about the harms to people who are transgender or non-binary that result from hostile speech such as abuse, insults, disparagement and, in some cases, misgendering. These harms can limit the ability of people to participate in society on an equal basis with others.
  5. The high value that New Zealand society places on free speech is such that, up to a certain point, people are expected to bear speech-related harms. However, New Zealand law also recognises that, in certain situations, free speech and related rights can be limited to avoid harm to others, including to protect other rights. We are satisfied that, under the reforms we propose, New Zealand courts and tribunals will have the tools they need to achieve a fair balance between these competing rights and interests.

#### Parallel legal mechanisms are already available to challenge speech-related harms

* 1. It is also significant to our assessment of the appropriateness of this proposed reform that speech-related harms to people who are transgender or non-binary can already attract legal or employment consequences under other laws and regulations.
  2. Specifically in relation to misgendering, we suggested in the Issues Paper that adding new grounds to the Human Rights Act would not greatly supplement existing law. Only a few submitters expressed a view on this question of legal analysis. However, some legal experts agreed (and none disagreed) that misgendering of sufficient seriousness could already be caught by current laws.[[454]](#footnote-455)
  3. Adding new grounds of discrimination to section 21 would clarify that Te Kāhui Tika Tangata | Human Rights Commission and the Human Rights Review Tribunal are fora in which complaints about speech-related harms can be made. However, we consider the reforms we propose will expand very little (if at all) the circumstances in which certain forms of speech are unlawful. This issue is already arising in contexts outside of discrimination law. We earlier discussed some cases, mainly from overseas, in which:
     + 1. employment sanctions that arose from misgendering or from the way an employee expressed gender-critical views survived challenge in an employment tribunal;
       2. teachers and nurses were sanctioned by regulatory bodies for expressing gender-critical views in a manner that was considered unprofessional; and
       3. teachers were sanctioned by regulatory bodies for misgendering students.
  4. Some other avenues that might already be available for a person who is transgender or non-binary to complain about speech-related harms include:
     + 1. a personal grievance to Te Ratonga Ahumana Taimahi | Employment Relations Authority complaining of workplace bullying;[[455]](#footnote-456)
       2. a complaint to Te Toihau Hauora, Hauātanga | Health and Disability Commissioner if the concern relates to the behaviour of a healthcare provider;[[456]](#footnote-457)
       3. a complaint to a school board, Matatū Aotearoa | Teaching Council of Aotearoa New Zealand or Tari o Te Kaitiaki Mana Tangata | Office of the Ombudsman if the concern relates to harm experienced at school;[[457]](#footnote-458) or
       4. a complaint to Te Mana Mātāpono Matatapu | Privacy Commissioner if the concern relates to improper sharing of personal information by an agency.[[458]](#footnote-459)
  5. Given these complaints mechanisms are already potentially available, the suggestion of some submitters that people who are transgender or non-binary should not be given legal protection from discrimination in case that results in limits on free speech and related rights is not persuasive. The circumstances in which misgendering should result in legal, ethical or employment consequences are likely to be litigated regardless of Human Rights Act reform. A discrimination claim will not generally be the most obvious way to address such issues. In the United Kingdom, as noted earlier, most cases about gender-critical speech have arisen under employment law.
  6. We are therefore satisfied that the implications of the reforms we propose to section 21 of the Human Rights Act for what people are entitled to say or to refuse to say are appropriate.

### Why we do not recommend specific reform in relation to misgendering

* 1. In the Issues Paper, we consulted on whether any specific reform of Part 2 of the Human Rights Act would be desirable to regulate misgendering. Consistent with our approach to consulting on other issues, we presented a range of options:[[459]](#footnote-460)
     + 1. option 1: the Act should provide that misgendering is unlawful under Part 2;
       2. option 2: the Act should provide that misgendering is never unlawful under Part 2;
       3. option 3: the Act should specify the situations in which misgendering is unlawful under Part 2; and
       4. option 4: there is no need for reform.
  2. We identified problems with options 1 to 3, noting that option 4 may therefore be preferable.
  3. In the feedback we received on this issue, each of options 1 to 4 received significant levels of support from submitters. Option 1 was the most popular. However, many submitters who supported this option gave reasons that align more closely to option 3 (specify the situations in which misgendering and deadnaming are unlawful).
  4. Option 4 (no reform) was by far the most popular option with organisations. Of the 26 organisations that gave a clear indication of which option they supported, 16 supported option 4 (either alone or as one of two preferred options).[[460]](#footnote-461) However, again, it was not always clear what submitters thought the legal effect of this option would be. For example, some organisations that supported option 4 made comments indicating they opposed any legal restrictions on misgendering.
  5. Support from organisations for options 1 to 3 was more limited, with option 2 being the least popular. It was only supported by one organisation (Resist Gender Education, which said it supported either option 2 or option 4).
  6. We address each option in turn below and explain why we prefer option 4 (no reform).

#### Option 1 (a blanket rule that misgendering is unlawful under the Human Rights Act)

* 1. For three reasons, we do not support option 1. First, for reasons explained above, it would be an unjustified limit on section 14 (and possibly section 15) of the NZ Bill of Rights.
  2. Second, misgendering is not the only kind of speech that can be used to bully, harass and belittle people who are transgender or non-binary. There would be definitional challenges in drawing a hard line between these different kinds of speech, and no strong policy reason to do so.
  3. Third, a provision of this kind would raise other coherence issues. Verbal attacks can form part of a discrimination claim relating to any prohibited ground. We agree with some submitters who said there is no good reason to provide a higher level of protection for misgendering than is available in respect of other types of hostile speech.

#### Option 2 (a blanket rule that misgendering is never lawful under the Human Rights Act)

* 1. For reasons explained earlier in the chapter, we do not consider that option 2 would reflect a fair balance of competing rights and interests. It would comprehensively protect the free speech and related rights of some people but at the expense of the equality, dignity and autonomy of people who are transgender or non-binary. It would not reflect a justified limit on the right to freedom from discrimination.
  2. As under option 1, there is no good policy reason to draw a hard line between misgendering and other kinds of speech that belittle people who are transgender or non-binary, and there are definitional challenges in trying to do so. Likewise, there is no good reason to place speech that belittles people who are transgender or non-binary in a different category from speech relating to other groups. As noted earlier, complaints about misgendering can already be made in other fora and we can see no policy reason to exempt discrimination claims.

#### Option 3 (provision specifying the circumstances in which misgendering is unlawful)

* 1. As we explained earlier, although option 3 received the least explicit support, many submitters who said they preferred option 1 gave reasons that aligned more closely with option 3. Submitters who supported option 3 suggested various thresholds for when misgendering should be unlawful. Some common ones were if the behaviour is “persistent”, “deliberate” or “intended to cause harm”.
  2. The Wellington Community Justice Project — Law Reform Team suggested there should be a provision to cover misgendering or deadnaming that is intended to “hurt, harm or abuse transgender, non-binary or intersex people”. Gender Minorites Aotearoa suggested misgendering should be unlawful if it “breaches privacy, amounts to harassment, or compromises someone’s access to equitable levels of safety”.
  3. Several submitters suggested it might be possible to model a provision on sections 62 or 63 of the Human Rights Act, which are about sexual and racial harassment, or to incorporate misgendering into those existing harassment provisions.[[461]](#footnote-462) The thresholds in those provisions include that the behaviour is “either repeated, or of such a significant nature, that it has a detrimental effect on that person” in respect of certain areas of life.
  4. The harassment provisions in the Human Rights Act are in a subpart in Part 2 called “Other forms of discrimination”. In 1993, when the Act was passed, there was emerging case law here and overseas recognising sexual and racial harassment as forms of discrimination. The inclusion of specific harassment provisions was intended to settle doubt about whether harassment was discrimination and to clarify the boundaries of protection.[[462]](#footnote-463)
  5. We have considered whether a provision specifying the circumstances in which misgendering is unlawful might serve a similar function and might advance legal certainty. One reason some submitters gave for opposing reform of section 21 of the Human Rights Act was that the lack of clarity about when speech would constitute a “detriment” (or otherwise be unlawful under the Human Rights Act) would have a chilling effect. For example, some submissions (modelled on form text supplied by Voices for Freedom) stated: “There will be a clear chilling effect on society as people bite their tongues for fear of breaching ambiguous provisions as the scope of permissible speech narrows”. The Free Speech Union was concerned that reform would stifle debate in schools and workplaces. It was also concerned about the possibility of employers taking an overly careful approach to avoid repercussions.
  6. We acknowledge that vague laws can chill speech.[[463]](#footnote-464) However, having considered the issue carefully, for three main reasons, we do not recommend option 3.
  7. First, we do not consider the tests for discrimination in Part 1A and Part 2 of the Human Rights Act are overly vague. We consider they provide sufficient guidance as to the elements of a successful discrimination claim, even if additional consideration must be given to whether any limits on rights are demonstrably justified.
  8. Other New Zealand laws navigate the relationship between freedom from discrimination and free speech in a similar way. For example, as we explained earlier, the Broadcasting Standards Authority considers whether a finding of breach would constitute a reasonable limit on freedom of expression in deciding whether a broadcaster has contravened discrimination and denigration standards under the Broadcasting Act and associated codes. The District Court is charged with a similar exercise when considering when to make orders under the Harmful Digital Communications Act.
  9. As we explained in Chapter 3, a challenge for lawmakers is to provide adequate certainty while preserving flexibility for the law to respond to new situations as they arise. The Human Rights Act contains general rules that must be applied in specific contexts in the light of the facts and the evidence. Part 2 is drafted with a high degree of specificity to give as much certainty as possible to people in the private sector about their rights and obligations. However, anti-discrimination laws cannot anticipate every situation that may arise, and what constitutes discrimination will often involve judgment.
  10. Second, as with options 1 and 2, option 3 would single out a particular kind of harmful speech for different treatment under the Human Rights Act than other kinds. We consider that gives rise to issues of coherence.
  11. Third, many variables are relevant to whether a particular instance of misgendering is serious enough to attract legal consequences. These might include: the role of the speaker; the nature of the speaker’s relationship with the transgender person and any professional obligations they have towards them; their motivation; whether the misgendering was persistent or repeated; and the nature and extent of any accompanying conduct. It would be difficult to craft a test that enables all these variables to be assessed while adding much more specificity to the rule in section 5 of the NZ Bill of Rights that limits on rights must be demonstrably justified in a free and democratic society.
  12. Finally, given the relative novelty of these issues, there would be a significant risk of crafting a provision that was either too restrictive or too broad.

#### Option 4 (no reform)

* 1. We consider the most desirable option is no reform. This means that whether misgendering is unlawful under the Human Rights Act would be determined using the general tests for discrimination in Part 1A or Part 2, read in the light of the NZ Bill of Rights.
  2. As noted earlier, this is consistent with how the Human Rights Act regulates speech harms more generally[[464]](#footnote-465) as well as with how the balance between equality/fair play and free speech is navigated under other New Zealand legal regimes.
  3. It will ultimately be for New Zealand courts and tribunals to determine when misgendering, either on its own or in conjunction with other words or actions, constitutes discrimination under the Human Rights Act. This will allow for case law to emerge over time about how to achieve a fair balance between competing rights and interests.
  4. We acknowledge this may involve some burden on litigants as the line between protected speech and unacceptable harm is further clarified. This was a concern we heard from some submitters. However, this concern needs to be assessed in the light of the very small number of discrimination claims brought to the Human Rights Review Tribunal each year. As we explain in Chapters 9 and 20, there are many impediments to bringing a discrimination claim that cannot be addressed through this review.
  5. This concern also needs to be assessed in the light of the range of existing fora in which complaints can potentially be made about speech-related harms. As noted earlier, a discrimination claim will not generally be the most obvious way to address such issues. We consider that, even if the reforms we propose are enacted, Human Rights Act complaints are unlikely to be the main vehicle by which the line between free speech and acceptable professional conduct is clarified.

## Acts of conscience

* 1. Some submitters raised concerns about acts of conscience or said their freedoms or beliefs entitle them to refuse someone a service in certain circumstances.
  2. The rights we are considering in this chapter include a right to “manifest” belief. Further, as we explained earlier, the right to freedom of expression can sometimes protect expressive acts. For this reason, we have carefully evaluated submitters’ concerns about these issues, with a focus on three specific scenarios raised in feedback.
  3. We are satisfied that any potential for the reforms we propose to limit rights protected by the NZ Bill of Rights more than is justified can be managed through interpretation of the Human Rights Act in the manner discussed earlier in this chapter. We recommend no specific reform in respect of these issues.

### General entitlement to refuse to serve someone

* 1. A few submitters said their freedoms entitled them to refuse to serve someone, including to refuse to serve a person who is transgender or non-binary.
  2. The discrimination protections in the Human Rights Act relating to the provision of goods and services (which we discuss in Chapter 10) manifest a legislative intention that the autonomy of service providers should give way to the right not to be denied services based on a prohibited ground of discrimination. As the United Kingdom Supreme Court said in *Lee v Ashers Baking Company Ltd*, it is “deeply humiliating, and an affront to human dignity, to deny someone a service because of that person’s race, gender, disability, sexual orientation or any of the other protected personal characteristics”.[[465]](#footnote-466) Submitters did not identify reasons why any new grounds should be treated differently from existing ones in this respect, and we have not identified any either.

### Being co-opted into a message with which one disagrees

* 1. Some submitters raised the specific example of a baker not wishing to make a cake for a transgender person. Although they did not expand on their concerns, they may have had in mind a United Kingdom case about whether a baker could be required to bake a cake with the message “I support gay marriage” on it. The United Kingdom Supreme Court held that it would have been an unjustified interference with European Convention rights to freedom of expression and manifestation of belief if anti-discrimination law required the bakers to supply a cake displaying a message with which they disagreed.[[466]](#footnote-467)
  2. The Court in *Lee v Ashers Baking Company Ltd* did not consider that the bakers should be entitled to refuse to serve someone who is gay or provide a wedding cake for a gay marriage. Rather, the Court’s concern was that the bakers should not be co-opted into a message with which they disagreed.[[467]](#footnote-468) Whether being required to deliver a particular service involves being co-opted into a message and whether, if it does, it is unjustified depends on the circumstances. For example, in *Eweida v United Kingdom*, the European Court of Human Rights held that requiring a civil registrar to conduct civil partnerships for gay couples, in spite of the registrar’s religious objections, was not incompatible with the European Convention.[[468]](#footnote-469)
  3. Importantly, the United Kingdom Supreme Court in *Lee v Ashers* *Baking Company Ltd* had no difficulty interpreting and applying the anti-discrimination law in a way that resolved the incompatibility with Convention rights. It held that the baker’s refusal to supply the cake with the message on it was not by reason of a prohibited ground of discrimination. We can see no reason why a similar interpretive conclusion could not be reached by the Human Rights Review Tribunal if a similar issue arose in this country.

### Health care professionals and acts of conscience

* 1. Some submitters expressed particular concern about healthcare providers. Some were concerned about healthcare providers being held in breach of the Human Rights Act for discussing risks and benefits of treatment with a patient, or for expressing professional opinions or concerns on issues of sex and gender. Ethos raised the issue of healthcare professionals declining to provide or facilitate treatment because they consider it conflicts with medical and scientific evidence about the best course of action, or because they have a religious or conscientious objection. Ethos gave the examples of a doctor refusing to facilitate a referral for gender-affirming treatment or a pharmacist refusing to dispense hormones. Ethos suggested the Human Rights Act should have a specific exception to protect healthcare providers who decline to provide a treatment.
  2. Healthcare providers have many legal, professional and ethical obligations that govern their ability to discuss treatment options with their patients or to refuse treatment they consider inconsistent with medical and scientific evidence. For example, the Code of Health and Disability Services Consumers’ Rights states a right to services provided with appropriate care and skill, and in a manner consistent with the patient’s needs. It also states that healthcare providers must give patients the information they need to make an informed choice, including an explanation of the expected risks, side effects and benefits of the available options.[[469]](#footnote-470) Actions that are authorised or required by another law are not unlawful under Part 2 of the Human Rights Act.[[470]](#footnote-471)
  3. Adding new grounds to the Human Rights Act will have little or no impact on these issues. It might in some circumstances be possible to complain that a healthcare professional discriminated in their interactions with a patient. However, it is highly unlikely such a complaint would succeed if the provider has complied with their legal, professional and ethical obligations.
  4. Specifically in relation to conscientious objection, Te Kaunihera Rata o Aotearoa | Medical Council of New Zealand’s *Good Medical Practice* standard for registered doctors states that a doctor’s personal beliefs, including religious and moral beliefs, should not affect their advice or treatment.[[471]](#footnote-472) Where a doctor’s beliefs might affect their advice or treatment, they must explain this to the client and tell them about their right to see another doctor.
  5. There are two New Zealand laws that set out specific circumstances in which healthcare providers may decline to provide services based on a conscientious objection. These are in the areas of contraception, sterilisation or abortion services, and assisted dying.[[472]](#footnote-473) Notably, both these statutes implicate the sanctity of life. In both cases, the healthcare professional must tell the person how they can access contact details of another person who can provide the service.[[473]](#footnote-474)
  6. This review is not the appropriate vehicle to consider whether there is a need for additional legislative protections of healthcare providers’ rights to act on conscience. The impact of Human Rights Act reform on this issue is, at best, peripheral.
  7. It is far from clear that requiring a healthcare provider to facilitate gender-affirming health care in accordance with best medical practice would constitute an unjustified limit on the rights discussed in this chapter. For example, the European Court of Human Rights held in *Pichon and Sajous v France* that a pharmacist’s obligation to supply contraceptives did not engage the right to manifest religion or belief.[[474]](#footnote-475) The High Court held in *New Zealand Health Professionals Alliance v Attorney-General* that a doctor’s obligation to tell someone how to access contact details for an abortion provider was not inconsistent with the NZ Bill of Rights.[[475]](#footnote-476)
  8. If a court or tribunal considered that a finding of discrimination under the Human Rights Act would result in an unjustified limit on rights in the NZ Bill of Rights, it would be obliged to interpret and apply the relevant provisions to ensure consistency.

## Freedom of association

* 1. Anti-discrimination laws commonly place limits on the right to freedom of association. This reflects the fact that some kinds of associations are mechanisms by which power and privilege is exercised in society.
  2. One example relates to professional and business organisations. Part 2 of the Human Rights Act limits the right to freedom of association by prohibiting discrimination in relation to business partnerships, trade unions, employers’ organisations and other organisations that exist “for the purposes of members who carry on a particular profession, trade, or calling”.[[476]](#footnote-477) No submitter raised an issue with the impact of reform of section 21 on these provisions. There is no obvious basis to suggest that discrimination in these contexts would be more justified because of someone’s gender identity or sex characteristics than on existing grounds.[[477]](#footnote-478)
  3. We did, however, hear concerns about the ability of cisgender women to determine who can participate in women-only networks and associations (in person or online). Specifically, we heard concerns that reform of section 21 would not allow cisgender women to exclude people who were not assigned female at birth. We heard similar concerns about the ability to run events restricted to women assigned female at birth.
  4. Many submitters mentioned the decision of the Federal Court of Australia in *Tickle v Giggle for Girls Pty Ltd (No 2)*, which was delivered during our consultation period.[[478]](#footnote-479) The Court ruled that a mobile app designed as a woman-only social networking platform had discriminated against a transgender woman by excluding her from membership.
  5. Some submitters also raised concerns about the decision in *Lesbian Action Group v Australian Human Rights Commission*, in which the Administrative Review Tribunal of Australia declined the Lesbian Action Group a temporary exemption from Commonwealth anti-discrimination law to hold a public event for “lesbians born female”.[[479]](#footnote-480)
  6. Submitters with these concerns said women need to be able to define for themselves who can participate in women-only spaces and communities. Some mentioned the need for safe spaces for women who have experienced male violence. Some expressed a particular concern about being able to control who can attend lesbian-only events.
  7. For several reasons, we consider the impact of the proposed reforms of section 21 on the right to freedom of association in relation to these kinds of activities is slight.
  8. First, activities like these only fall within the scope of the Human Rights Act if they involve:
     + 1. denying someone access to or use of a place, vehicle or associated facilities that members of the public are entitled or allowed to access or use (section 42); or
       2. refusing to supply someone goods, facilities or services that are being supplied to the public or to any section of the public (or less favourable treatment in relation to those goods, facilities or services) (section 44).
  9. The Human Rights Act does not regulate private networks, associations, gatherings or events.
  10. Second, the goods and services discrimination protections in the Human Rights Act do not apply *at all* to access to membership of a club or to the provision of services or facilities to a club’s members.[[480]](#footnote-481) The term ‘club’ is not defined, and there is limited case law on it.[[481]](#footnote-482) However, on any reading of the term, this exception provides substantial latitude for people to meet in self-defined communities of interest without being subject to anti-discrimination law.
  11. Third, there are no other exceptions from sections 42 or 44 of the Human Rights Act that allow women-only groups to exclude men from their networks, associations, gatherings or events. This would only be lawful if the particular activity met the criteria for an affirmative action measure in section 73 of the Human Rights Act.[[482]](#footnote-483) It would be contrary to the anti-discrimination values underlying the Human Rights Act to craft a new exception to allow transgender women to be excluded from women-only events and organisations in circumstances in which discrimination against cisgender men is not permitted.
  12. Finally, not all networks, associations, gatherings or events are protected by section 17 of the NZ Bill of Rights. As noted earlier in the chapter, the purpose of the right to freedom of association is to enable people to form and participate in organisations to pursue a common aim. On that basis, in *Moncrief-Spittle v Regional Facilities Auckland*, the Court of Appeal held the right was not engaged by the cancellation of a public event involving overseas speakers. Although the event “might have involved the exchange of ideas between individuals”, there was “no indication of a common associational or organisational aim”.[[483]](#footnote-484)

CHAPTER 7

# Wording of new grounds

## Introduction

* 1. In this chapter, we make recommendations for the wording of new grounds to be added to section 21 of the Human Rights Act 1993. This builds on our recommendation in Chapter 4 that section 21 should be amended to clarify that it covers discrimination that is due to being transgender or non-binary or having an innate variation of sex characteristics.
  2. We recommend that two new grounds be added to section 21 of the Human Rights Act:
     + 1. gender identity or its equivalents in the cultures of the person; and
       2. having an innate variation of sex characteristics.
  3. We recommend the gender identity ground be defined to include both ‘gender expression’ and ‘the relationship between a person’s gender identity and their sex assigned at birth’.
  4. We also consider in this chapter whether the prohibited ground of sex in section 21 of the Human Rights Act should be further defined but do not recommend reform on this issue.

## Options on which we consulted

* 1. In the Issues Paper, we explained two broad approaches to wording new prohibited grounds of discrimination that we described as asymmetrical and symmetrical.[[484]](#footnote-485)
  2. A ground is asymmetrical if it limits protection to the group that is experiencing the disadvantage such as disabled people or people from a particular ethnic group. Only a few of the existing grounds in section 21 are asymmetrical — most clearly, disability and employment status.[[485]](#footnote-486)
  3. We identified two different ways to achieve asymmetrical protection, each of which would involve adding a new stand-alone ground or grounds to section 21. These are:[[486]](#footnote-487)
     + 1. using group descriptors to name the group being protected, for example, ‘people who are transgender or non-binary’ or ‘people who are intersex’; or
       2. spelling out who belongs in a protected category without using group descriptors, for example, ‘people whose gender identity is different to their sex assigned at birth’ or ‘people with innate variations of sex characteristics’.
  4. A ground is symmetrical if it covers characteristics held by everyone. Most of the current grounds in section 21 of the Human Rights Act are symmetrical. For example, everyone has a sex, race, colour, national origin, age and sexual orientation.
  5. In the Issues Paper, we identified two different ways to achieve symmetrical protection:[[487]](#footnote-488)
     + 1. Adding a new stand-alone ground or grounds to section 21 that lists characteristics that are held by everyone (such as gender, gender identity, gender expression or sex characteristics).
       2. Rewording the prohibited ground of sex to clarify that it covers all aspects of a person’s sex, gender and sex characteristics. We refer to this later in the chapter as a ‘combined sex or gender ground’.
  6. We sought separate feedback on which of these four options would be best to protect people who are transgender or non-binary and which would be best to protect people who have an innate variation of sex characteristics. We adopt this same approach to our analysis below.

## Some key considerations in developing new grounds

* 1. In developing our recommendations on the wording of new grounds, we took several considerations into account, including the key reform considerations that we discussed in Chapter 3 of this report. An important priority is to develop grounds that are as inclusive and future-proof as possible. However, we also sometimes need to accommodate more pragmatic considerations.
  2. For example, the grounds need to be worded in a way that is sufficiently clear and precise. Having clarity as to who is protected by a ground helps the public to understand their rights and obligations under the Human Rights Act.
  3. The way the grounds are worded also needs to allow for clarity in the intended scope and application of exceptions. The importance of providing that clarity is illustrated by the decision of the United Kingdom Supreme Court in *For Women Scotland Ltd v Scottish Ministers*.[[488]](#footnote-489) In that case, in the absence of clear specification in the United Kingdom’s anti-discrimination legislation of how the sex exceptions should apply to transgender people, the Court held that these provisions could only function coherently if a biological definition of sex was adopted throughout the Act.[[489]](#footnote-490)
  4. We do not think it is desirable for the way the sex exceptions apply to new grounds to be left to chance. In developing our proposals for new grounds, we have sometimes weighted this pragmatic consideration over other arguments about how different groups or different characteristics should be described.

## A ground for people who are transgender or non-binary

* 1. For the reasons we outline below, we recommend that section 21 of the Human Rights Act be amended to include a new ground of gender identity, which should be worded to also cover any equivalents to gender identity in a person’s cultures. We also recommend that this ground should be defined to include:
     + 1. gender expression; and
       2. the relationship between a person’s gender identity and their sex assigned at birth.

### Symmetrical protection is preferable

* 1. There are strong reasons to prefer a symmetrical approach to protecting people who are transgender or non-binary. In other words, there are strong reasons to formulate the new ground using general terms that apply to everyone (such as gender or gender identity) rather than specific terms applying to the particular groups that experience discrimination.
  2. One reason is that this approach is more future-proof. We heard in consultation that the specific terms people use to describe themselves are rapidly evolving. For example, the term ‘transsexual’ was often used in the past but is now regarded as outdated and offensive by some people.[[490]](#footnote-491)
  3. While the terms ‘transgender’ and ‘non-binary’ are in common use, many people use other terms to describe their gender. These include genderqueer, trans man, trans woman, gender fluid, agender, takatāpui, demiboy, demigirl, bi-gender, tāhine and whakawahine.[[491]](#footnote-492) This would make it difficult to select a single identity term that applies to everyone.
  4. One available approach would be to list in the ground all the groups that are covered. However, given the wide range of terms people use and the fact that language is developing, it would be difficult to avoid leaving people out.
  5. Because a symmetrical ground would refer to a general characteristic (such as gender identity) rather than to specific identity terms, it would allow for evolution in the way people describe themselves. This is consistent with Legislation Design and Advisory Committee advice that legislation should be flexible enough to properly address foreseeable developments in technology or society.[[492]](#footnote-493)
  6. A related issue is that phrases such as ‘being transgender or non-binary’ or ‘having a gender identity that is different to sex assigned at birth’ may not apply to everyone who experiences gender-related discrimination. For example, it is possible phrases like this would not protect cisgender people who are gender non-conforming, people who are gender questioning or people who are agender (without a gender).
  7. Some submitters were concerned that cases brought in reliance on an asymmetrical ground of this kind might get tied up in legal arguments because people would have to establish that they fell within the relevant description. Even if a ground of this kind ultimately received a broad interpretation, the uncertainty about who is covered could inhibit access to justice.
  8. Because a symmetrical ground (such as gender identity) would not refer specifically to the disadvantaged groups who need protection, some submitters were concerned that some people in these groups would not realise they were protected. We are not sure how great a risk this would be in practice as we think terms like gender identity are widely understood in the rainbow community.[[493]](#footnote-494) Further, naming specific identity terms could also have that effect for people who do not identify with the particular terms. For that reason, this concern is outweighed by the advantages of broad, inclusive wording.
  9. As noted earlier, a symmetrical ground would be consistent with most other grounds in section 21. It is also more consistent with the approach to protecting people who are transgender or non-binary in other jurisdictions we have examined. The United Kingdom has an asymmetrical ground of “gender reassignment”[[494]](#footnote-495) but all Canadian jurisdictions and most Australian jurisdictions have symmetrical grounds such as gender identity.[[495]](#footnote-496)
  10. Although the two asymmetrical options that we outlined above each attracted some support from submitters, the two symmetrical options were much more popular. For example, only two organisations preferred an asymmetrical approach compared to 27 organisations that preferred one of the two symmetrical options we outlined.
  11. Another possible advantage of a symmetrical approach is that, because it does not single out groups for what seems like special treatment, it may attract broader community support. Some submitters were concerned that an asymmetrical approach would ‘other’ people who are transgender or non-binary by setting them apart as different.
  12. Some submitters were concerned that people from advantaged groups might use a symmetrical ground to bring trivial claims that might, in some cases, further disadvantage minority groups. We identified this risk in the Issues Paper, referring to some Canadian discrimination claims brought by cisgender men with gender-conforming expression.[[496]](#footnote-497)
  13. In its submission, Te Kāhui Tika Tangata | Human Rights Commission noted this concern and explained that it continues to receive and respond to complaints from advantaged majority groups on existing grounds such as race, ethnicity and sex. Despite this concern, the Human Rights Commission supported a symmetrical approach.
  14. We consider this issue of a symmetrical ground being used to advance improper claims is unlikely to be significant in practice. The Human Rights Commission can decline to act on complaints that are trivial, frivolous or vexatious.[[497]](#footnote-498) To succeed in Te Taraipiunara Mana Tangata | Human Rights Review Tribunal, a claim must be substantiated with evidence. The Tribunal has powers to dismiss or strike out claims that are frivolous or vexatious or otherwise improperly brought.[[498]](#footnote-499) The risk of an adverse costs award if unsuccessful is a further deterrent.[[499]](#footnote-500)

### A stand-alone ground is preferable to a combined ‘sex or gender’ ground

* 1. Of the two symmetrical options that we identified, we consider that a stand-alone ground is preferable to a combined ‘sex or gender’ ground. Our key reason is the importance of being able to differentiate gender-related grounds when crafting exceptions. As we explain below, the extent to which sex exceptions in the Human Rights Act should allow for differences of treatment based on the fact someone is transgender or non-binary is best addressed on a case-by-case basis. Neither a blanket rule applying all sex exceptions nor a blanket rule applying no sex exceptions is desirable. Therefore, the Act needs to contain language to support this differentiation.
  2. It is technically possible to support this differentiation through a combined sex or gender ground that states inclusively some different components of sex and gender. For example, a ground might read:[[500]](#footnote-501)

1. Sex or gender, including:
2. (a) Pregnancy and childbirth.[[501]](#footnote-502)
3. (b) Gender identity.
4. (c) Gender expression.

(d) The relationship between gender identity or gender expression and sex assigned at birth.

* 1. However, this approach would result in significant challenges for drafting exceptions. Each exception would need to specify the individual elements from this definition that are engaged by that exception. For this to happen, the definition would also need to list the sex-related components of “sex or gender”. For example, the list would need to encapsulate discrimination that results from differences in treatment between men and women. This would raise a host of definitional issues.
  2. Because of this drafting complexity, a combined sex or gender ground would result in greater uncertainty, a heightened risk of unintended consequences and a heightened risk of cases being tied up in legal arguments. This could inhibit access to justice, which was a point made by some submitters. The Human Rights Commission commented that stand-alone (symmetrical) grounds “would help reduce the risk of potentially unconstructive engagement between parties regarding statutory interpretation”.
  3. A related advantage of stand-alone grounds is that many other jurisdictions we have considered take this approach, which may provide New Zealand courts and tribunals with overseas case law to draw on. By contrast, a combined sex or gender ground is comparatively novel.
  4. Of the four (symmetrical and asymmetrical) options presented in the Issues Paper, the option of stand-alone symmetrical grounds was the most popular with submitters by some margin.[[502]](#footnote-503) For example, 15 organisations preferred this option, including the Human Rights Commission, Te Kāhui Ture o Aotearoa | New Zealand Law Society,[[503]](#footnote-504) Community Law Centres o Aotearoa and eight rainbow organisations.[[504]](#footnote-505)
  5. A combined sex or gender ground was the next most popular among submitters. Although only five organisations preferred this option, this included some organisations that play leadership roles in policy and advocacy work on rainbow issues.[[505]](#footnote-506)
  6. A key reason why these submitters preferred a combined sex or gender ground was that they said it better reflected the relationship between sex and gender and the experiences of people who are transgender or non-binary. For example, Te Ngākau Kahukura commented:

1. Sex and gender are closely related concepts, which cannot be accurately defined as discrete features of a person, or as separate aspects of their experience. Everyday understandings of both concepts encompass aspects of people’s appearance, social roles and personal identity.
   1. Gender Minorities Aotearoa said sex and gender are synonymous in common language and in international law as well as being inseparable in relation to human rights violations. It said a combined ground “avoids singling out transgender people as exceptional cases, or creating the impression that gender is not inherently related to sex”.
   2. Some people told us that requiring people who are transgender to rely on the ground of gender identity rather than sex would be regressive and would bolster arguments in wider society that sex and gender are entirely separate.
   3. While a combined sex or gender ground might better reflect the complex relationship between sex and gender, ultimately, the role of the Human Rights Act is to outline the bases upon which is it is unlawful to treat people differently. It is not to clarify the meanings of terms such as ‘sex’ and ‘gender’ in law and society more generally. We have identified significant pragmatic difficulties and risks with a combined ground that we think outweigh the conceptual benefits.
   4. Further, we think this conceptual benefit would be negated by the need to specify the different components of sex and gender in an inclusive definition. This could lead to a sharper differentiation between the concepts of sex and gender than under a stand-alone gender-related ground.
   5. Some submitters identified a more pragmatic concern about overlap between stand-alone grounds, which would result in complainants having to rely on more than one ground. This is a disadvantage but not a significant one. There is already overlap between existing grounds in section 21 — most obviously, colour, race, and ethnic or national origins. Therefore, complainants already sometimes need to rely on multiple grounds of discrimination when bringing a claim.
   6. A more significant concern we heard from some submitters was that, if gender-related grounds are stated separately, the ground of sex might be interpreted narrowly and the sex exceptions used to exclude people who are transgender. The decision of the United Kingdom Supreme Court in *For Women Scotland Ltd v Scottish Ministers* illustrates that this is a real possibility. In that case, the Court used the fact that gender reassignment is stated as a distinct ground in the United Kingdom’s anti-discrimination statute to support its conclusion that the term sex in the Act means “biological sex”.[[506]](#footnote-507)
   7. This possibility will not, however, arise if each exception states clearly whether it permits distinctions to be drawn based on a person’s gender identity. Later in this report, we propose amendments to achieve this outcome.
   8. Although we can see the attraction of a combined sex or gender ground, we think that stand-alone grounds will be clearer and more straightforward and will provide better clarity with respect to exceptions. We think this will enhance access to justice for people who are transgender or non-binary. It will also provide greater clarity for people who have obligations under the Human Rights Act such as employers and service providers.

### Specific wording

* 1. There are several issues to work through in determining the wording of a stand-alone ground or grounds.

#### ‘Gender identity’ is preferable to ‘gender’

* 1. The first issue is whether the core protection should be of gender or gender identity.
  2. Broadly speaking, a person’s gender identity is their internal sense of identity as male, female or another gender or genders. The term ‘gender’ on its own has a variety of meanings. For example, it is sometimes used as a synonym for gender identity, sometimes as an umbrella term that includes gender identity and gender expression, sometimes as a synonym for sex and sometimes as a description of the behaviours and roles that a society associates with men, women and other genders.[[507]](#footnote-508)
  3. We think the new ground should be gender identity rather than gender. First, as just mentioned, the meaning of gender is more variable and unsettled. Until recently, it was most often used as a synonym for sex in ordinary usage and in law.
  4. Second, there are many more overseas precedents for a gender identity ground than a gender ground, so there is more likely to be case law to draw on. Where overseas statutes do have a ground of gender, it is generally in older provisions and as a synonym for sex.[[508]](#footnote-509)
  5. Third, the ground of gender had negative connotations for some submitters, for a range of different reasons. For example:
     + 1. a small number of submitters referred to gender as a social construct or as a means of oppressing women;[[509]](#footnote-510)
       2. ICONIQ Legal Advocates said gender “denotes binary conceptions of masculinity and femininity which excludes gender diverse”; and
       3. Intersex Aotearoa said “‘gender’ was invented specifically to pathologise and socially erase and/or assimilate Intersex”.
  6. Fourth, as gender is sometimes used as a synonym for sex or to refer to the socially constructed roles that attach to a person’s sex, there is a risk of a gender ground being used to avoid a sex exception. An example might be a cisgender man seeking to argue that he cannot be denied access to a single-sex facility for women because this would be gender discrimination.
  7. Finally, the vast majority of submitters who preferred stand-alone symmetrical grounds thought gender identity should be one of them. Relatively few submitters suggested a ground of gender. Of those that did, some suggested the ground should be defined to include gender identity and expression or to refer to specific gender identities.
  8. For submitters who preferred a gender ground, the main reasons were that they thought it was broader and because they thought it would avoid the implication that gender is something you ‘identify as’ rather than simply ‘are’. We think these arguments are outweighed by the disadvantages we have identified. We agree with those submitters who said that, while gender identity might not be a perfect term, it provides the best available option for extending protection.

#### A gender identity ground should also protect culturally specific identities

* 1. Different cultures have their own ways of conceptualising gender diversity and their own terms to describe people who are transgender, gender fluid or similar. These include te reo Māori and Pacific terms.[[510]](#footnote-511)
  2. From feedback, we identified two questions to consider in relation to how the Human Rights Act could best protect culturally specific identifies. The first is whether new grounds of discrimination should list specific cultural terms. A few submitters suggested this would be a good idea. Two submitters suggested that takatāpui could be included as a ground, while Community Law and one other submitter thought a gender ground could be defined to include culturally specific terms such as irawhiti and fa’afafine.
  3. Listing specific identity terms would be out of place in a symmetrical ground. We also think it would be unwise. There are many different terms that people use to describe themselves, and they are constantly evolving. It would be difficult even to capture all the reo Māori terms in circulation, let alone the terms used in other languages and cultures that are present in Aotearoa New Zealand. For example, each Pacific culture has its own terms. We heard in consultation that not everyone identifies by reference to these traditional terms and that language is evolving.
  4. Although it said it would defer to ao Māori experts, the Human Rights Commission suggested that avoiding kupu Māori in the Act could also “minimise state law’s imposition on the development of tikanga Māori”.
  5. The second issue is how to word a symmetrical ground to cover cultural identities. In our consultation, we heard that some Māori who are gender diverse do not see their identity as a gender identity. For example, we understand that some people see takatāpui as a composite identity in which sex, sexuality and gender are intertwined with Māoritanga. We heard a similar point about some Pacific identities such as fa’afafine.
  6. In its submission, Te Ngākau Kahukura referred to the need to protect the rights of people who “live outside of western dominant cisgender and endosex norms but do not define their experience in terms of concepts like ‘gender identity’”.[[511]](#footnote-512) It referred to a survey of Pacific rainbow people in which 20 per cent of respondents did not identity as cisgender, transgender or non-binary.[[512]](#footnote-513) Qtopia and the Rainbow Support Collective advocated for specific language to ensure culturally specific “gender modalities” are covered.
  7. We consider that a court or tribunal would extend protection to people with equivalent cultural identities (such as takatāpui or fa’afafine) under a gender identity ground even if the Human Rights Act said nothing specific about this. However, people should be able to see themselves reflected in the language of the Act if possible.[[513]](#footnote-514) Express legislative protection of culturally specific identities would also help to uphold the Crown’s obligations under article 3 of te Tiriti o Waitangi | Treaty of Waitangi to care for Māori and to ensure outcomes for Māori that are equivalent to those enjoyed by non-Māori.[[514]](#footnote-515)
  8. We therefore recommend the new prohibited ground of discrimination should be “gender identity or its equivalents in the cultures of the person”. This wording draws on language that is used in another statutory context. The Oranga Tamariki Act 1989 defines mana tamaiti (tamariki) as (emphasis added):[[515]](#footnote-516)

1. the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person.
   1. Based on feedback we received, we have suggested the plural “equivalents” and “cultures” to signal that people may have connections with more than one culture and that cultures may have more than one way of thinking about gender diversity. However, strictly speaking, this is not necessary given the presumption in section 19 of the Legislation Act 2019 that words in the singular include the plural and vice versa.
   2. We have considered and rejected an alternative drafting approach, which would be to list “culturally specific identities” (or similar) in an inclusive definition of gender identity. That approach would relegate cultural identities to a subset of gender identity and would not acknowledge that some people do not see their cultural identity in this way.
   3. We acknowledge our recommendation gives rise to a drafting challenge. It would be awkward for the full ground — “gender identity or its equivalents in the cultures of the person” — to be listed in multiple exceptions. To address this issue, the new ground may need to include an additional clause stipulating that: “References to gender identity elsewhere in this Act include its equivalents in the cultures of the person”.
   4. While we recommend the full phrase “gender identity or its equivalents in the cultures of the person” should be used in section 21, we generally use the term ‘gender identity’ in the remainder of this report for simplicity.

#### Gender expression should be protected within an inclusive definition of gender identity

* 1. Gender expression refers to a person’s presentation of gender through physical appearance, mannerisms, speech, behavioural patterns and names. A person’s gender expression may or may not conform with their gender identity.[[516]](#footnote-517)
  2. We think that a new prohibited ground should extend protection to discrimination that is due to a person’s gender expression. It is possible for a person to experience discrimination based on their gender presentation regardless of whether they are, or are perceived as being, transgender. For example, a person might discriminate against someone they perceive as being ‘a man in a dress’ without knowing or assuming anything about the person’s gender identity.
  3. Of those submitters who suggested wording for stand-alone symmetrical grounds, most thought gender expression should be protected in some form.[[517]](#footnote-518) Submitters gave examples of people who might benefit from express protection of gender expression, including people who are early in their transition, transfeminine individuals who present as butch and cisgender people who have non-conforming gender expression.
  4. As we discussed earlier, some submitters articulated a general concern about symmetrical grounds being used inappropriately by advantaged groups. We have considered whether including a gender expression ground could increase that risk by allowing claims based on gender conforming expression. We think this is unlikely to be a significant issue in practice. In comparable jurisdictions, the ability to bring gender expression claims has not led to a flood of claims about gender conforming expression.[[518]](#footnote-519)
  5. We acknowledge that some submitters had specific concerns about a gender expression ground. For example, Speak Up for Women commented: “For gender non-conforming individuals, we don’t believe it is practical or possible to legislate the area of hairstyles, clothes and mannerisms.” Speak Up for Women also thought that gender non-conforming presentation would often fall under other grounds. For example, it thought that discrimination against “butch lesbians” was likely to be based on their sexual orientation or sex rather than because they were wearing a suit and tie.
  6. Ethos thought that prohibited grounds of discrimination should be based on objective characteristics and was concerned that gender expression could be “as minimal (and as changeable) as variations in pronouns and clothing”.
  7. We do not consider these concerns outweigh the advantages of including a gender expression ground.
  8. We have considered three main options for how to structure a protection of gender expression:
     + 1. state it as a separate ground;
       2. have a composite ground (such as “gender identity and gender expression and their equivalents in the cultures of the person”); or
       3. define the gender identity ground to include gender expression.
  9. Each of these general approaches is used in some comparative jurisdictions,[[519]](#footnote-520) and each attracted support from some submitters. While each has advantages and disadvantages, our preference is for the third of these options.

##### Disadvantages of a separate gender expression ground

* 1. Our key reason for rejecting the first option (of a separate gender expression ground) is pragmatic and, again, concerns the implications for exceptions. If gender identity and gender expression are included in section 21 of the Human Rights Act as separate grounds, the Act will need to specify whether each exception applies to either of these grounds. To make recommendations on that, we would need to be certain of where the boundary between the concepts of gender identity and gender expression lies. We have found this challenging, in part, because we heard different views in consultation and in our research about what falls under each.
  2. Some people see these concepts as clearly delineated, with gender identity restricted to a person’s internal experience of gender and gender expression covering everything related to a person’s external presentation of gender. Others suggest the line between these two concepts is more “fuzzy”[[520]](#footnote-521) or point out that gender identity discrimination most often arises as a result of people’s gender expression.[[521]](#footnote-522) This makes the concepts hard to disentangle in practice.
  3. One point of uncertainty is whether changes a person makes to their body (such as changes in body shape from taking hormones) are part of their gender expression. While definitions of gender expression typically focus on more transient expressions of gender such as dress, hair, speech and mannerisms, it is possible that changes in appearance resulting from gender-affirming medical treatment are also covered.[[522]](#footnote-523) Our research on gender expression has not resolved this point, which may simply be a grey area.
  4. In Chapter 3, we explained the challenge of providing adequate certainty in the law while preserving flexibility. We think that an attempt to provide certainty (by specifying which exceptions apply to gender identity and which to gender expression) could instead lead to increased uncertainty or unanticipated outcomes. It is better in this instance to provide flexibility in the statutory language to allow the Human Rights Review Tribunal to determine the circumstances in which particular aspects of a person’s gender identity or expression are relevant to an exception.

##### Preference for defining a gender identity ground to include gender expression

* 1. Both the second option (a composite gender identity and expression ground) and the third option (defining a gender identity ground to include gender expression) would address the problem just identified. The main reason we prefer the third option again relates to the drafting of exceptions.
  2. Although we prefer not to specify which exceptions apply to gender identity and which to gender expression, there are nevertheless several exceptions where we think a person’s gender presentation should have little relevance. One example is an exception in Part 2 of the Human Rights Act that allows for distinctions to be drawn based on sex (and some other grounds) when employing someone to provide counselling on highly personal matters.[[523]](#footnote-524) We do not think characteristics such as a person’s hair, makeup and the way they dress are likely to be relevant to such a role.
  3. The concern we have with the second option is that, every time an exception is extended to gender identity, the words “and gender expression” would appear in the exception. By contrast, under option 3, gender expression would be part of the definition of gender identity but the phrase “gender expression” would not appear in each exception. That would give a clearer signal to those seeking to rely on the exception that it only allows different treatment based on gender expression where relevant to the rationales underlying the particular exception.
  4. An analogy can be drawn with the ground of sex, which “includes pregnancy and childbirth”.[[524]](#footnote-525) Although pregnancy is listed as a component of sex, it cannot be correct that all the sex exceptions in the Human Rights Act allow distinctions to be drawn based on the fact someone is pregnant. For example, we do not think a counselling exception would be interpreted as allowing an employer to refuse to hire someone to provide counselling on highly personal matters purely because they were pregnant.
  5. In short, we think defining gender identity to include gender expression is a better way to acknowledge the relationship between these characteristics and to ensure sufficient flexibility for employers, businesses, courts and tribunals to be able to apply each exception in a way that is consistent with its underlying rationale.
  6. We did not specifically seek feedback on the different options for how to structure a protection of gender expression. It is therefore hard to know the extent of support for this option, although a small number of submitters seemed to prefer this approach. For example, the Human Rights Commission commented:

1. We consider the Australian jurisdiction’s approach to gender identity being defined as including gender expression as a feasible approach as the two are often interconnected. This approach also balances the protection of people who experience discrimination related to their outward appearance and presentation, while mitigating the risk of frivolous claims that may fall in scope.
   1. The Yogyakarta Principles define gender identity in this way,[[525]](#footnote-526) and this approach is also taken in anti-discrimination statutes in several comparative jurisdictions.[[526]](#footnote-527)
   2. We acknowledge there are some potential disadvantages of including gender expression in the definition of gender identity, for example, it may be less obvious to members of the public that gender expression is a protected characteristic. However, these potential downsides are outweighed by the advantages of this option.
   3. Accordingly, we recommend that the new ground of “gender identity or its equivalents in the cultures of the person” should be defined to include gender expression.

#### Relationship between a person’s gender identity and sex assigned at birth

* 1. We suggested in the Issues Paper that a definition of gender identity might need to encompass discrimination that occurs because a person’s gender identity is perceived as being different to their sex assigned at birth. This is because many people who are transgender would describe their gender identity as male or female rather than as transgender.[[527]](#footnote-528)
  2. Some submitters, including the Rainbow Support Collective and Qtopia, suggested that “gender modality” be included within a ground. This refers to “how a person’s gender identity relates to the gender they were assigned at birth”.[[528]](#footnote-529) On the other hand, the New Zealand Law Society was not sure that gender identity would need to be defined to include having a gender identity that is different to sex assigned at birth, as it considered it likely that a court would interpret it in this way.
  3. Some submitters were concerned about protections for people who detransition or retransition.[[529]](#footnote-530) For example, Speak Up for Women was concerned that people who detransition may experience discrimination but not be protected by a gender identity ground. The Women’s Rights Party also referred to discrimination experienced by people who detransition. One submitter commented that the right to detransition should be respected as much as the right to transition and was concerned about the free speech rights of those who detransition. Qtopia and the Rainbow Support Collective both thought a ground of discrimination should cover people who have retransitioned.
  4. It is essential that the ground of gender identity covers a person having a different gender identity to their sex assigned at birth because this is often the basis on which discrimination occurs. Although it is possible that a court or tribunal would interpret a gender identity ground in this way, as suggested by the New Zealand Law Society, we cannot see any disadvantage to specifying it in a definition. This would put the matter beyond doubt and avoid unnecessary litigation.
  5. Defining a gender identity ground in this way will also clarify that exceptions that have been extended to gender identity allow for differences of treatment that are based on a person having a different gender identity to their sex assigned at birth.
  6. All the Australian jurisdictions with a ground of gender identity in their anti-discrimination laws define the term to include the relationship between gender identity and sex assigned at birth.[[530]](#footnote-531) For example, the definition of gender identity in Australian Capital Territory legislation reads:[[531]](#footnote-532)

1. ***gender identity***means the gender expression or gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person’s designated sex at birth.
   1. In terms of how such a clause should be worded, Qtopia commented:
2. Increasingly, people identify less with the traditional definition of “gender different from the sex assigned at birth”, including people who have retransitioned or people who were brought up in a gender neutral manner. Both these groups experience discrimination based on their gender modality, but may not identify with “transgender” or “gender identity”.
   1. We consider the definition of gender identity should refer to the “relationship” between (rather than a “difference between”) a person’s gender identity and sex assigned at birth. This broader language could include someone who has detransitioned or retransitioned as well as someone whose gender identity has always been the same as their sex assigned at birth.
   2. We do not favour using the term ‘gender modality’ as it is not currently in common usage.

### Other suggestions for grounds

* 1. During our consultation, we heard several alternative suggestions for grounds of discrimination to protect people who are transgender or non-binary. We discuss some of these below.
  2. Speak Up for Women proposed the ground of “variation of sex characteristics”, which it said would apply to transgender people who have taken material steps to alter their sex characteristics (such as undergoing surgery or hormone therapy). Ethos said any new prohibited grounds should be “objective” and said a concept such as gender assignment might be preferable as it would manifest in a way that could be apparent to others.
  3. We do not favour approaches that limit protection to people who have undergone gender-affirming medical treatment. The rationales for extending protection to new grounds that we identified in Chapter 3 do not apply more strongly to people who have sought gender-affirming medical treatment than to other people who are transgender or non-binary. Further, we do not think people should be required to undertake medical treatment to be protected from discrimination.
  4. Ethos also raised the possibility of a ground based on gender dysphoria or gender incongruence, although it thought people with these diagnoses would already be covered by the ground of disability. We do not favour this approach as a person does not need to be diagnosed as having gender dysphoria or gender incongruence to be transgender (as we explained in Chapter 2).[[532]](#footnote-533)
  5. Dr Hera Cook (who submitted on behalf of herself and an anonymous group) proposed a ground of “third gender”, while another submitter suggested a ground that protected those who “sit alongside” men and women. We do not favour these approaches either because many transgender people do not consider they belong to a “third gender”.[[533]](#footnote-534)
  6. During consultation, another issue raised with us was discrimination against sex workers.[[534]](#footnote-535) According to the 2022 Counting Ourselves survey, 16 per cent of transgender and non-binary respondents had engaged in sex work or worked in the sex industry.[[535]](#footnote-536) Some Australian jurisdictions have a prohibited ground of discrimination that covers sex work,[[536]](#footnote-537) and we have heard suggestions that Aotearoa New Zealand should have a similar ground.[[537]](#footnote-538) Although this may be a reform option that deserves further policy attention, we do not think this review is the appropriate vehicle.
  7. Some submitters suggested the Human Rights Act should be amended to address intersectional discrimination, which is discrimination that occurs because of the interaction of multiple characteristics. This may be an issue that is appropriate to consider on a wider review of the Human Rights Act but is outside the scope of this review.

### Recommendation and wording

1. Section 21 of the Human Rights Act 1993 should be amended to add a new ground of ‘gender identity or its equivalents in the cultures of the person’. The ground should be defined to include:
   1. gender expression; and
   2. the relationship between a person’s gender identity and their sex assigned at birth.
   3. For the reasons outlined above, we recommend that section 21 of the Human Rights Act be amended to add a new ground of ‘gender identity or its equivalents in the cultures of the person’. As we explained above, we think it would be awkward if each exception had to refer to this full phrase. Therefore, we suggest that section 21 clarify that references to gender identity elsewhere in the Act include its equivalents in the cultures of the person.
   4. We recommend the ground of gender identity be defined, at minimum, to include two specific components: gender expression; and the relationship between a person’s gender identity and their sex assigned at birth.
   5. As long as these two matters are covered, we see the precise wording of the new ground to be a matter of detail that could be worked through in drafting, taking into consideration any recent developments in practice.
   6. For example, it would be possible for the Act to include a more comprehensive definition of the term gender identity itself. All the Australian jurisdictions with a gender identity ground define the term. Some refer to “gender-related identity”,[[538]](#footnote-539) while others refer to “the person’s internal and individual experience of gender”[[539]](#footnote-540) or the “personal sense of the body”.[[540]](#footnote-541) None of the Canadian jurisdictions provide a definition of gender identity. We have not identified strong policy reasons for or against including such a definition.
   7. Similarly, there are a range of options available for how to word the gender expression limb of the new ground. While some Australian anti-discrimination laws use the phrase “gender expression” itself,[[541]](#footnote-542) others prefer descriptive language such as “gender-related appearance or mannerisms”[[542]](#footnote-543) or “expressions of gender such as dress, speech, mannerisms, names and personal references”.[[543]](#footnote-544) We have not identified strong policy reasons for or against these approaches and consider it to be another matter of detail that can be worked through at the drafting stage.

## A ground for people who have an innate variation of sex characteristics

* 1. For the reasons we outline below, we recommend that section 21 of the Human Rights Act should be amended to include a new ground of “having an innate variation of sex characteristics”.

### Asymmetrical protection is preferable

* 1. As we explained earlier, we consulted on both asymmetrical options for reform (which focus on the group that is experiencing the disadvantage) and symmetrical options (which identify a characteristic held by everyone). In this instance, an asymmetrical ground could be “being intersex” or “having an innate variation of sex characteristics”, and a symmetrical ground would likely be “sex characteristics”.
  2. When analysing possibilities for a gender-related ground earlier in this chapter, we identified several advantages of a symmetrical approach. A symmetrical ground of “sex characteristics” would share many of these advantages. It would be inclusive and recognise that no one should be subject to discrimination due to their sex characteristics. It would be consistent with the approach taken to most other grounds in section 21. It would also be consistent with the approach taken in most Australian jurisdictions.[[544]](#footnote-545)
  3. A symmetrical ground was more popular among submitters overall, although people who identified as intersex or as having an innate variation of sex characteristics preferred a range of different approaches.[[545]](#footnote-546)
  4. Despite these advantages, we have concluded that an asymmetrical ground would provide better protection for people with innate variations of sex characteristics.

#### Asymmetrical protection will support more targeted exceptions

* 1. A key reason for our recommendation relates, again, to the scope of the Part 2 exceptions. In many cases, discrimination by reason of gender identity can also be characterised as discrimination by reason of a person’s sex characteristics. For example, if a transgender woman is refused entry to a facility for women, this may be because of her sex characteristics or because of assumptions about her sex characteristics.[[546]](#footnote-547)
  2. Because of this overlap, if a ground of sex characteristics is added to the Human Rights Act, any exception that is being extended to allow differences in treatment based on gender identity would also need to be extended to allow differences based on sex characteristics. Otherwise, a plaintiff could rely on the ground of sex characteristics to circumvent an exception for gender identity discrimination.
  3. The problem with taking this uniform approach to exceptions is it would enable differences in treatment based on having an innate variation of sex characteristics in all the same circumstances as differences in treatment based on gender identity. We do not think that is a desirable policy outcome. This is not because people who are transgender are less deserving of protection than people who have an innate variation of sex characteristics. Rather, it is because some exceptions are grounded in social norms that do not apply identically to these two groups.
  4. An example is a current sex exception in Part 2 of the Human Rights Act that enables employers to treat an employee or applicant differently on the basis of sex where the position needs to be held by one sex to preserve reasonable standards of privacy.[[547]](#footnote-548) In Chapter 9, we recommend that this exception be amended to allow employers some flexibility to make distinctions based on a person’s gender identity. Our reason is that this exception is grounded in social norms about bodily privacy and the way these social norms apply to matters of gender identity is in a state of transition.[[548]](#footnote-549) Therefore, we think it is appropriate, for now, to leave discretion to employers with expertise in particular industries to decide how to negotiate these norms.
  5. By contrast, we have not identified anything in research or heard anything in consultation to suggest that social norms about bodily privacy are engaged differently because a person has an innate variation of sex characteristics. We therefore do not think that extending this exception to allow differences of treatment on the basis that a person has an innate variation of sex characteristics is warranted.
  6. An asymmetrical ground will enable the Human Rights Act to specify more precisely which exceptions should apply to people who have an innate variation of sex characteristics.

#### Asymmetrical ground avoids overlap with the ground of sex

* 1. An asymmetrical ground that does not extend to all sex characteristics would also avoid overlap with the ground of sex. When people experience sex discrimination, it is often because of perceptions about their sex characteristics. An example is a woman missing out on a job because she is perceived as being less physically able than a man (due to secondary sex characteristics such as height and muscle mass).
  2. The rationale for some of the exceptions in the Human Rights Act that allow for people to be treated differently based on their sex also seems to be primarily about sex characteristics. For example, the rationale for having an exception to allow for single-sex competitive sporting activities relates to biological differences between men and women that are primarily due to sex characteristics (exposure to testosterone at puberty).
  3. As we noted earlier, there is no inherent problem with having overlapping grounds. However, the degree of overlap between sex and sex characteristics may make it harder to distinguish when and how the existing sex exceptions should apply to new grounds.

#### Asymmetrical ground focuses on people with innate variations of sex characteristics

* 1. An asymmetrical ground would focus the protection on people who have an innate variation of sex characteristics, which is a group whose experience is distinct from that of people who are transgender or non-binary. In the Issues Paper, we discussed the history of stigma, silence and invisibility experienced by people who have innate variations of sex characteristics.[[549]](#footnote-550) While, in the 2023 Census, 15,039 people reported “that they know they were born with a variation of sex characteristics”,[[550]](#footnote-551) we were told during consultation that very few people are open about having such a variation. It was also apparent from our research and consultation that, while public knowledge about gender diversity is increasing, many New Zealanders still have little understanding about innate variations of sex characteristics.
  2. Some submitters thought it was important for a ground to reflect people with innate variations of sex characteristics as a distinct group. For example, Intersex Aotearoa said intersex people were the most vulnerable group considered in our review and thought this vulnerability would increase unless they had explicit protections. The Wellington Community Justice Project — Law Reform Team commented:

1. The descriptor of a “person who has an innate variation of sex characteristics” serves as a clear indicator of a protection specifically given to intersex people and a distinction from other members of the community. This option best protects the unique experience of being intersex in Aotearoa and these people can be protected from discrimination through this language.
   1. Given the more limited public knowledge on this topic, a symmetrical ground of sex characteristics would not make it sufficiently apparent that the purpose of this ground is to protect people who have an innate variation of sex characteristics from discrimination. By contrast, we think the symmetrical ground of gender identity will be readily understood as intended to protect people who are transgender or non-binary (although it will not be limited to these groups).
   2. Some people with innate variations of sex characteristics were concerned that a symmetrical ground of sex characteristics could be used by advantaged groups in a way that trivialises the protection or harms people with innate variations of sex characteristics. An asymmetrical ground would avoid this risk.[[551]](#footnote-552)
   3. Some submitters suggested a ground of “sex characteristics, including innate variations of sex characteristics”. This would provide symmetrical protection while highlighting the group that is the particular focus of protection. While this language could be used in section 21, it would not address the issue we identified earlier of having to extend more exceptions than is desirable to people in this group.

#### We do not recommend combining sex characteristics with the sex ground

* 1. As we explained earlier, one of the two symmetrical options on which we consulted was rewording the existing prohibited ground of sex to clarify that it covers all aspects of a person’s sex, gender or sex characteristics. Some people with whom we consulted preferred either a combined ground of this kind or a combined ground of “sex and sex characteristics” without including gender.[[552]](#footnote-553)
  2. The reasons we discussed for not favouring a combined symmetrical ground for people who are transgender or non-binary apply here too. As we explained, we think a stand-alone asymmetrical ground will be clearer and more straightforward and will provide better clarity with respect to exceptions.
  3. We also note that Intersex Aotearoa was particularly opposed to any approach that would combine protections for intersex people with protections referring to gender. It commented that “for some Intersex individuals the historic role of gender in the attempted social ‘erasure’ of the Intersex minority from the collective human story renders it offensive”.

#### The disadvantages are not sufficient to overcome the advantages

* 1. As some submitters observed, an asymmetrical ground has some disadvantages. Ultimately, however, we do not think they are sufficient to overcome the advantages of this approach.

##### Risk of standing out

* 1. Some people with innate variations of sex characteristics said they liked asymmetrical protection but were concerned it would put them at risk of further discrimination by singling them out for “special treatment”. Although we understand this concern, we do not think it is significant enough to outweigh the advantages of asymmetrical protection, and we think it is unlikely to be a significant issue in practice.

##### Any discrimination based on sex characteristics should be prohibited

* 1. Some submitters commented that people with innate variations of sex characteristics are not the only ones who experience discrimination because of their sex characteristics. Examples given by submitters included cisgender women with masculinised features, people who have had surgery on sex characteristics (including women who have had hysterectomies or mastectomies) and people who have experienced changes in sex characteristics due to other medical treatments.
  2. We agree that a disadvantage of asymmetrical protection is that it does not signal clearly that all discrimination that is based on a person’s sex characteristics is unlawful. However, as we discussed earlier, there is very significant overlap between a sex characteristics ground and the grounds of sex and gender identity. There is also overlap with the ground of disability. Most discrimination that is based on a person’s sex characteristics will be covered by one or more of these grounds.

##### Issues of proof

* 1. Some submitters expressed concern that an asymmetrical ground might require people to prove they have an innate variation of sex characteristics. For example, the Professional Association for Transgender Health Aotearoa was concerned people might not receive protection if they do not have medical records or evidence proving their variation is innate or if there is legal or medical ambiguity about whether their specific variation qualifies. Te Ngākau Kahukura thought asymmetrical protection could lead to legal arguments about who counts as having an innate variation and was concerned this could privilege dominant worldviews such as medical diagnostic criteria.
  2. By contrast, Intersex Aotearoa suggested it may be appropriate for medical certification to be required to support a claim.
  3. We agree that a disadvantage of asymmetrical protection is the possibility of definitional debates about who is covered. However, as we explain further below, this prospect can be minimised by the choice of wording of an asymmetrical ground.
  4. Although each case depends on its facts, we do not think a person would often have to provide medical evidence to establish they have experienced discrimination based on having an innate variation of sex characteristics. To prove discrimination under the Human Rights Act, it is necessary to establish that the discrimination occurred “by reason of” a prohibited ground. This means the question for the tribunal or court will often be whether the defendant thought the plaintiff had an innate variation, not whether the plaintiff actually has one. Although issues of proof may be more relevant to exceptions, we are recommending very few exceptions to allow differences of treatment that are based on having an innate variation of sex characteristics.

### Specific wording

* 1. We considered two options for an asymmetrical ground for protecting people with an innate variation of sex characteristics:
     + 1. a ground of ‘having an innate variation of sex characteristics’; and
       2. a ground of ‘being intersex’ or ‘intersex status’.
  2. We prefer the first option.
  3. We acknowledge that some people strongly identify with the term ‘intersex’ and want this included in legislation. For example, Intersex Aotearoa commented that: “Intersex is an authentic, *normal* biological category, with discrete, unique interests requiring protection under the law.” Intersex Aotearoa objected to the term ‘variation of sex characteristics’ as being discriminatory and offensive, pointing out that no other social group is defined by reference to intimate physical characteristics. Some other submitters also preferred the term ‘intersex’, saying it was short, clear, well recognised, generally accepted and able to capture a variety of innate variations.
  4. However, overall, having an intersex ground was the least popular option among those submitters who expressed a view on this question.[[553]](#footnote-554) Some submitters referred to the term ‘intersex’ as outdated, polarising or pejorative. Further, we understand that not all people who have an innate variation of sex characteristics consider themselves intersex, and some see the term as problematic.[[554]](#footnote-555)
  5. We also think a ground of discrimination that relies on an identity term such as intersex could quickly become outdated as terminology evolves. Two Australian jurisdictions that initially had an intersex ground of discrimination later changed this to sex characteristics.[[555]](#footnote-556)
  6. There is also a risk that an intersex ground would generate definitional disputes about which variations are included. There is not a consensus about which innate variations are considered an intersex variation.[[556]](#footnote-557) For example, we understand the medical profession typically only considers severe forms of hypospadias to be intersex variations,[[557]](#footnote-558) while intersex organisations do not make such a distinction.[[558]](#footnote-559)
  7. The term ‘innate variations of sex characteristics’ is broader and more inclusive than intersex, covering any variation in sex characteristics that is present at birth or develops spontaneously later in life. We also understand that this term arose out of a community (rather than a medical) context, which lessens the risk of it being interpreted according to medical criteria.

### Other suggestions for grounds

* 1. Some submitters suggested other options for how an (asymmetrical) ground could be worded.
  2. A few submitters suggested the ground of “variation of sex characteristics”. This included Speak Up for Women, which proposed the ground would apply to both people with innate variations of sex characteristics and transgender people who have taken steps to alter their sex characteristics.
  3. For reasons given above, we prefer a ground aimed specifically at protecting people who have an innate variation of sex characteristics. In consultation, some people told us that it is important to include the word “innate” to distinguish (for example) variations to sex characteristics that are the result of surgery. This is consistent with definitions we have seen that use the adjectives ‘innate’ or ‘congenital’.[[559]](#footnote-560)
  4. Some submitters suggested the ground of disability could be amended to clarify that it covers innate variations of sex characteristics. Relying on a disability ground does not sit well with how some people with innate variations see themselves. None of the people with whom we consulted who identified as intersex or as having an innate variation of sex characteristics indicated they would like to rely on the ground of disability.

### Recommendation and wording

1. Section 21 of the Human Rights Act 1993 should be amended to add a new ground of ‘having an innate variation of sex characteristics’.
   1. For the reasons outlined above, we recommend that a new ground of ‘having an innate variation of sex characteristics’ be added to section 21 of the Human Rights Act.
   2. For clarity and to minimise the risk of definitional debates, we suggest the Act should also provide a definition of ‘innate variation of sex characteristics’. We consider the precise wording of the definition to be a matter of drafting detail. There are, however, some definitions used by organisations in Aotearoa New Zealand and overseas that may provide useful models. For example, a resolution adopted by the United Nations Human Rights Council refers to people with innate variations of sex characteristics as:[[560]](#footnote-561)
2. … persons who are born with sex characteristics that do not fit typical definitions for male or female bodies, including sexual anatomy, reproductive organs and hormonal or chromosome patterns …
   1. Tatauranga Aotearoa | Stats NZ defines “variations of sex characteristics” as “people born with innate genetic, hormonal, or physical sex characteristics that do not conform to medical norms for female or male bodies”.[[561]](#footnote-562)

## Should the ground of sex be further defined?

* 1. The prohibited ground of sex in section 21(1)(a) of the Human Rights Act is not defined except to specify that it “includes pregnancy and childbirth”. In the Issues Paper, we sought feedback on whether the ground of sex should be defined to clarify the circumstances in which it would continue to apply alongside new stand-alone grounds of discrimination. We identified three possible options:[[562]](#footnote-563)
     + 1. define the ground to mean the sex listed on a person’s birth certificate;
       2. define the ground to mean biological sex; or
       3. leave the ground undefined, which would allow a court or tribunal to consider whether the ground was engaged in the circumstances of a particular case.
  2. There was no support from submitters for defining the ground of sex by reference to a person’s birth certificate. Some submitters did not favour this option because they were worried about people missing out on protection. Others opposed it because they thought it would result in a definition of sex that was too wide.
  3. Feedback on defining the ground of sex to mean biological sex was very divided. A number of submitters strongly supported defining the ground of sex to mean biological sex.[[563]](#footnote-564) Submitters who held this view told us that sex is binary, biological and immutable and that the Human Rights Act should reflect this. Some submitters gave suggestions for how a biological definition of sex could be worded such as by referring to gametes or sex characteristics. A number of submitters thought defining the ground of sex to mean biological sex would protect the rights of cisgender women by clarifying who can access single-sex services and facilities.
  4. Many other submitters were opposed to the ground of sex being defined to mean biological sex or being defined at all.[[564]](#footnote-565) A key concern we heard from these submitters was that defining sex as biological would make any gender identity protections ineffective because sex exceptions in the Act could be applied in a way that allows for the exclusion of transgender people. Some submitters said the meaning of sex was contested and there was debate about which biological markers were relevant. Submitters also commented that sex was cultural as well as biological and that courts had recognised that sex was not limited to biological sex. Some submitters pointed to practical issues with defining the ground of sex in biological terms as well as potential privacy implications.
  5. As we discussed earlier, some submitters expressed similar concerns when explaining why they preferred a combined sex or gender ground. For example, Te Ngākau Kahukura described sex and gender as closely related concepts that cannot be entirely separated. Gender Minorities Aotearoa said sex and gender are synonymous in common language and in international law as well as being inseparable in relation to human rights violations.

### Meaning of sex is an unsettled and polarised issue

* 1. The polarised nature of the feedback we received on this issue reflects wider societal controversy over the meaning of sex. It is clear this is a highly divisive and unsettled issue, both here and overseas.[[565]](#footnote-566) In the case that determined the meaning of “sex” and “women” in United Kingdom anti-discrimination law, the United Kingdom Supreme Court commented:[[566]](#footnote-567)

1. We are aware of the strength of feeling which has been generated by the disagreements between campaigners seeking to represent the interests of each of these groups and that taxonomy itself can generate controversy.
   1. The lower court made a similar acknowledgement, commenting: “This is an area on which individuals and organisations hold firm, even entrenched views, where there is intense public debate.”[[567]](#footnote-568)
   2. As we explained in Chapter 3, ‘sex’ is a functional term that serves different purposes depending on the context. We think the word ‘sex’ currently serves a range of functions in the Human Rights Act. Specifically in the context of the Part 2 sex exceptions, different considerations are relevant depending on the rationale underlying the particular exception. We discuss these rationales in detail in Chapters 9 to 15.

### Approaches taken in New Zealand and overseas

* 1. There are limited legislative precedents for a statutory definition of sex. As we explained in Chapter 3, of the more than 100 New Zealand statutes or regulations that contain a reference to ‘sex’, none define the term. The term ‘sex’ is not defined in any anti-discrimination statutes in the United Kingdom, Australia or Canada,[[568]](#footnote-569) whether at the federal or sub-national level.[[569]](#footnote-570) The United Kingdom Supreme Court has interpreted the word ‘sex’ in United Kingdom anti-discrimination law to mean “biological sex”, saying this means “the sex of a person at birth”.[[570]](#footnote-571) The interpretation of ‘sex’ adopted by the Court was largely based on statutory indicators that are not present in the New Zealand legislation.[[571]](#footnote-572) The Court was at pains to stress that its decision was one of interpretation, not of policy:[[572]](#footnote-573)

1. It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word “woman” other than when it is used in the provisions of [the relevant United Kingdom statute].
   1. In reaching a different conclusion about the meaning of sex in Australian anti-discrimination law, the Federal Court of Australia in *Tickle v Giggle for Girls Pty Ltd (No 2)* similarly saw the issue before it as one of statutory interpretation and noted that it did not “need to determine the metes and bounds of the meaning of sex”.[[573]](#footnote-574)

### Our conclusion

* 1. Given the different functions the term ‘sex’ performs and the evolving debate on this issue, we do not think it is desirable or appropriate to recommend a statutory definition unless that is needed to support clear legislative design and good policy outcomes. Some submitters who supported a biological definition of sex said it was needed for these purposes, for example, because it was needed to clarify who is entitled to access single-sex spaces.
  2. We agree it is important for the Human Rights Act to clarify the extent to which the various exceptions in Part 2 of the Human Rights Act that permit distinctions to be drawn based on a person’s sex allow for people to be excluded from sex-differentiated facilities, services and employment based on their sex assigned at birth. Otherwise, it will be left to courts and tribunals to decide when and to whom sex exceptions should apply (based on considerations of statutory interpretation rather than good policy).[[574]](#footnote-575) We think this would be undesirable.
  3. One possible advantage of a statutory definition of sex is that it might clearly communicate the circumstances in which differences in treatment based on a person’s sex assigned at birth are permitted and when they are not. However, our research and analysis has shown that a fixed definition of sex would not inevitably provide clarity in all cases. For example, a definition based on someone’s sex assigned at birth or on particular sex characteristics may be inappropriate when applied to some people with innate variations of sex characteristics.
  4. We also consider that a single approach to all the sex exceptions in the Human Rights Act is not desirable. Rather, as we explain further in Chapter 8, we think the question needs to be addressed on an exception-by-exception basis, taking into account the rationales that underlie each exception as well as our other key policy considerations.
  5. Therefore, we do not think there is a compelling policy reason to provide a definition of sex in the Human Rights Act. Given the case-specific approach we have taken to each exception, a single definition of sex is not necessary to support clear legislative design and good policy outcomes.
  6. We do not recommend reform on this issue.

## Table of grounds in other jurisdictions

|  |  |  |  |
| --- | --- | --- | --- |
| **Jurisdiction** | **Statute** | **Grounds** | **Year of commencement** |
| Australian Commonwealth | Sex Discrimination Act 1984   * + - * 1. Fai | “Gender identity” (defined to include gender expression) | 2013 |
| “Intersex status” | 2013 |
| Australian Capital Territory | Discrimination Act 1991 | “Gender identity” (defined to include gender expression) | 2010 (updated definition commenced in 2017 and then another updated definition commenced in 2020) |
| “Alteration of register” | 2017 |
| “Sex characteristics” | 2020 (prior ground of “intersex status” commenced in 2016) |
| New South Wales | Anti-Discrimination Act 1977 | “Transgender grounds” | 1996 |
| Northern Territory | Anti-Discrimination Act 1992 | “Gender identity” (defined to include gender expression) | 2023 (prior ground of “sexuality” defined to include  “transsexuality” commenced when the Act was enacted in 1992) |
| “Sex characteristics” | 2023 |
| Queensland | Anti-Discrimination Act 1991 | “Gender identity” (defined to include gender expression) | 2002 (updated definition commenced in 2024) |
| “Sex characteristics” | 2024 |
| South Australia | Equal Opportunity Act 1984[[575]](#footnote-576) | “Gender identity” (defined to include gender expression) | 2016 (prior ground of “chosen gender” commenced in 2009) |
| “Intersex status” | 2016 |
| Tasmania | Anti-Discrimination Act 1998 | “Gender identity” (defined to include gender expression) | 2013 (updated definition commenced in 2019) |
| “Sex characteristics” | 2019 (prior ground of “intersex” commenced in 2013) |
| Victoria | Equal Opportunity Act 2010 | “Gender identity” (defined to include gender expression) | 2010 (updated definition commenced in 2021)[[576]](#footnote-577) |
| “Sex characteristics” | 2021 |
| Western Australia | Equal Opportunity Act 1984 | “Gender history” | 2001 |
| Canada (federal) | Canadian Human Rights Act RSC 1985 | “Gender identity or expression” | 2017 |
| Alberta | Alberta Human Rights Act RSA 2000 | “Gender identity” | 2015 |
| “Gender expression” | 2015 |
| British Columbia | Human Rights Code RSBC 1996 | “Gender identity or expression” | 2016[[577]](#footnote-578) |
| Manitoba | Human Rights Code CCSM 1987 | “Gender identity” | 2012 |
| “Gender expression” | 2025 |
| New Brunswick | Human Rights Act RSNB 2011 | “Gender identity or expression” | 2017 |
| Newfoundland and Labrador | Human Rights Act SNL 2010 | “Gender identity” | 2013 |
| “Gender expression” | 2013 |
| Northwest Territories | Human Rights Act SNWT 2002 | “Gender identity or expression” | 2004 (“gender expression” added to the “gender identity” ground and commenced in 2019) |
| Nova Scotia | Human Rights Act RSNS 1989 | “Gender identity” | 2012 |
| “Gender expression” | 2012 |
| Nunavut | Human Rights Act CSNu 2003 | “Gender identity” | 2017 |
| “Gender expression” | 2017 |
| Ontario | Human Rights Code RSO 1990 | “Gender identity” | 2012 |
| “Gender expression” | 2012 |
| Prince Edward Island | Human Rights Act RSPEI 1988 | “Gender identity” | 2013 |
| “Gender expression” | 2013 |
| Quebec | Charter of Human Rights and Freedoms CQLR | “Gender identity or expression” | 2016 |
| Saskatchewan | The Saskatchewan Human Rights Code SS 2018 | “Gender identity” | 2014 |
| The Yukon | Human Rights Act RSY 2002 | “Gender identity or gender expression” | 2017 |
| United Kingdom | Equality Act 2010 | “Gender reassignment” | 2010 (“gender reassignment” first protected in 1999)[[578]](#footnote-579) |

CHAPTER 8

# Introduction to Part 2 of the Human Rights Act

## Introduction

* 1. This chapter provides an introduction to Part 2 of the Human Rights Act 1993 to support the more detailed analysis of the Part 2 provisions we examine in Chapters 9 to 17.
  2. Part 2 of the Human Rights Act sets out the anti-discrimination obligations that apply to the private sector. It is a detailed scheme that identifies areas of life in which it is appropriate to regulate the behaviour of private individuals and organisations, prohibits certain forms of conduct in those areas of life and contains specific exceptions to balance a range of relevant rights and interests.
  3. Adding the two new prohibited grounds of discrimination that we have proposed will have implications for Part 2. Over the next nine chapters, we explain those implications. We also recommend specific amendments to some provisions to ensure clarity and coherence and to ensure the Act reflects a proper balance of rights and interests.
  4. In this introduction to Part 2, we:
     + 1. explain how Part 2 works;
       2. explain some general implications for Part 2 of adding new grounds of discrimination;
       3. explain our general approach to reviewing Part 2; and
       4. explain our general approach to reviewing the exceptions in Part 2 that allow for differences of treatment based on the prohibited ground of sex.
  5. This chapter provides important context to the analysis in later Part 2 chapters and should be read alongside them.[[579]](#footnote-580)

## Who Part 2 regulates

* 1. The Human Rights Act contains two sets of rules. The first, in Part 1A, regulates the public sector. More precisely, it applies to acts done by the three branches of government (legislature, executive and judiciary) as well to acts done by a person or body who is exercising a public function, power or duty that has been conferred or imposed by law.[[580]](#footnote-581)
  2. The second, in Part 2, regulates the private sector. More precisely, it applies to people or organisations that are not covered by Part 1A. This means that it applies to members of the public, and private organisations (such as businesses) as long as they are not discharging a public function, power or duty.[[581]](#footnote-582)
  3. There are some limited exceptions to the general rule that Part 1A regulates the public sector and Part 2 regulates the private sector.[[582]](#footnote-583) The most relevant for this review is that employers must comply with the employment provisions in Part 2 of the Human Rights Act even if the employer is part of the public sector.
  4. One challenge for us in this review is that the line between Part 1A and Part 2 is grey. The term “public function” is not defined in the Human Rights Act. There is limited case law about what amounts to a public function, and commentators do not always agree on the correct position. Therefore, the situations in which the Part 2 provisions we are reviewing over the next nine chapters will apply are not always clear.
  5. To understand the limited scope of Part 2 in respect of some issues, it is helpful to appreciate that Part 1A was not in the Human Rights Act when it was enacted in 1993. At that time, it was assumed that Part 2 would apply to public as well as private conduct although its application to many public sector issues was delayed.[[583]](#footnote-584)
  6. When Part 1A entered into force in 2002, the role of Part 2 became residual — it applies when Part 1A does not.[[584]](#footnote-585) This means the reach of Part 2 is not as extensive as appears on the face of some of its provisions. Two examples illustrate the significance of this point for this review.
  7. First, as we explain further below, Part 2 contains anti-discrimination obligations that apply to educational establishments. It was originally intended that these obligations would apply to all educational establishments, public and private, including schools and universities. With the enactment of Part 1A, however, the reach of these Part 2 obligations is likely quite limited. This is because providing education is, in many circumstances, properly categorised as a public function. This does not mean that discrimination by educational establishments when they are exercising public functions is unregulated. Rather, it means that what amounts to unlawful discrimination in those circumstances is determined by the rather different rules in Part 1A. We discuss Part 1A in Chapter 18.
  8. Another example that is significant for this review is access to single-sex facilities such as bathrooms and changing rooms. This was an issue of particular interest to many submitters to this review. In Chapter 14, we recommend amendments to two exceptions in Part 2 of the Human Rights Act that relate to single-sex facilities. The reach of these exceptions is, however, again more limited than appears on their face. For example, we do not think these exceptions apply to council-run facilities such as swimming pools, bathrooms and libraries, as making such facilities available to the public is likely a public function (regulated by Part 1A).[[585]](#footnote-586)

## Scope of protection under Part 2

* 1. Part 2 seeks to regulate the conduct of private people and organisations when they engage in certain public-facing activities listed in the Human Rights Act. The assumption underlying Part 2 is that, unless a person or organisation is engaging in one of these public-facing roles, their behaviour should not be regulated by the Human Rights Act.[[586]](#footnote-587) Many areas of private life fall completely outside the scope of the Act.
  2. The types of discrimination regulated by Part 2 are organised into seven main subparts, each regulating an area of life identified as sufficiently public to warrant the attention of anti-discrimination law. These are:
     + 1. employment matters;
       2. partnerships;
       3. industrial and professional associations, qualifying bodies and vocational training bodies;
       4. access to places, vehicles and facilities;
       5. provision of goods and services;
       6. provision of land, housing and other accommodation; and
       7. access to educational establishments.
  3. An eighth subpart (called “Other forms of discrimination”) regulates some additional situations not falling neatly into this scheme.[[587]](#footnote-588)

### The seven ‘area of life’ subparts — discrimination protections

* 1. Each of the seven area of life subparts in Part 2 contains one or more sections setting out a list of specific acts that are unlawful if done “by reason of” a prohibited ground of discrimination. We call these the ‘discrimination protections’.
  2. The exact wording of each discrimination protection reflects the specific area of life being regulated. For example, the main employment discrimination protection (section 22) regulates decisions such as hiring, conditions of employment and termination of employment. The accommodation discrimination protection (section 53) regulates decisions such as who has the right to occupy land or accommodation.
  3. While the discrimination protections cover different areas of life, their general tenor is similar. In general terms, they make it unlawful for a person or organisation that is engaging in one of these public-facing activities to treat their prospective or actual employees, students, tenants, customers (and so on) differently and worse than others for a reason prohibited by section 21.
  4. The Part 2 areas of life are not discrete categories. There can be overlap between them. For example, in some circumstances, a person who is providing accommodation is also supplying goods, facilities or services to the public.[[588]](#footnote-589)

### Exceptions

* 1. The discrimination protections in each area of life apply without distinction to all the prohibited grounds in section 21 of the Human Rights Act. They also apply without distinction to a wide range of different occupations, services and facilities falling into the respective area of life. For example, the goods and services discrimination protections apply to all types of goods and services offered to the public by private sector people and organisations, and the employment protections apply to all employers.
  2. Because universal rules of this kind could lead to injustice, Part 2 of the Human Rights Act also states exceptions. These are situations in which Parliament has judged it “right and proper” for private people and organisations who would otherwise be caught by these discrimination protections to treat people differently based on the prohibited grounds.[[589]](#footnote-590)
  3. There are two kinds of exceptions in Part 2 — exceptions that are specific to a particular area of life and exceptions that apply generally to all Part 2 areas of life.[[590]](#footnote-591)

#### Exceptions specific to each area of life

* 1. Most of the exceptions in Part 2 are located within one of the seven area of life subparts. There are over 40 exceptions of this kind. Each one identifies a limited circumstance in which the general discrimination protections for that area of life do not apply.
  2. A few of these exceptions exempt differences of treatment (in specified circumstances) based on any of the prohibited grounds. For example, section 44(4) of the Human Rights Act is an exception from the discrimination protections relating to the provision of goods and services that permits distinctions to be drawn on any prohibited ground in relation to membership of a club or the provision of services or facilities to members of a club.
  3. More commonly, these exceptions apply to just one prohibited ground or a few of them. For example, section 31 makes it lawful to discriminate in employment if the difference of treatment is based on a person’s political opinion and the role is a political advisor or working for a political party.
  4. Not counting the exceptions that apply to all prohibited grounds, there are 19 exceptions in Part 2 that permit differences of treatment based on a person’s sex. For the reasons we explain further below, these sex exceptions are a particular focus of this review.

#### General exceptions and qualifications

* 1. Part 2 of the Human Rights Act also lists some general exceptions or qualifications that apply to all the regulated areas of life.
  2. First, section 21B states that an act or omission is not unlawful under Part 2 if it is authorised or required by law. If the rules in Part 2 come into direct conflict with another law, the other law will prevail.
  3. Second, a subpart in Part 2 called “other matters” contains two provisions aimed at protecting certain types of measures designed to secure equality. The first, section 73(1), is a general exception for differences in treatment:[[591]](#footnote-592)
     + 1. that are done in good faith;
       2. that are to help someone against whom discrimination is unlawful under the Act; and
       3. if it is reasonable to think that person needs help to achieve equality.
  4. Provisions of this kind are common in anti-discrimination laws worldwide and are sometimes called ‘positive discrimination’ or ‘affirmative action’ provisions.
  5. The second provision in this subpart, section 74, clarifies for the avoidance of doubt that preferential treatment because of “a woman’s” pregnancy or childbirth or “a person’s” family responsibilities is not unlawful under Part 2.
  6. Finally, although not located in Part 2, section 97 of the Human Rights Act is also relevant. It allows Te Taraipiunara Mana Tangata | Human Rights Review Tribunal to declare that a particular act, omission, practice, requirement or condition is not unlawful because it is one of the following:
     + 1. A genuine occupational qualification. This declaration can be made in respect of discrimination in employment and other employment-related contexts.
       2. A genuine justification. This declaration can be made in respect of the other areas of life regulated by Part 2.

### ‘Other forms of discrimination’

* 1. Another subpart in Part 2 identifies some specific types of conduct as unlawful discrimination. The provisions in this subpart serve different purposes.
  2. First, section 65 of the Human Rights Act is an important provision that states that the Part 2 discrimination protections apply to indirect as well as direct discrimination. Indirect discrimination is when the treatment was not *because of* a prohibited ground but its effect was to disadvantage people who have that characteristic.[[592]](#footnote-593) An example is a job advertisement that requires a New Zealand qualification when the role could equally be performed by someone with an overseas qualification. This would discriminate indirectly on the ground of national origin.
  3. Second, some other provisions in Part 2 contain incidental protections that are needed to ensure the main discrimination protections in Part 2 are not undermined. These include:
     + 1. section 66, which makes it unlawful to victimise a person who is making use of the Human Rights Act complaints mechanisms;
       2. section 67, which prohibits advertisements that indicate an intention to commit a breach of Part 2 (an example might be a job advertisement stating that only men should apply); and
       3. section 68, which clarifies that people are responsible (and can be liable) in certain circumstances for the actions of their agents and their employees.[[593]](#footnote-594)
  4. The remainder of the provisions in this subpart make unlawful some additional forms of conduct that do not fit neatly into an area of life subpart and that follow different rules from the main Part 2 protections.[[594]](#footnote-595) These include provisions about racial disharmony, sexual and racial harassment, adverse treatment in employment of victims of family violence, conversion practices, and the victimisation of whistleblowers and complainants under certain other legislation.

## General implications for Part 2 of adding new prohibited grounds

* 1. Over the next nine chapters, we work systematically through the implications of adding new grounds to section 21 for specific provisions in Part 2. Here, we discuss some general implications.

### Implications of reform for complaints

* 1. Adding the new prohibited grounds will clarify that differences in treatment that are due to a person’s gender identity or their innate variation of sex characteristics fall within the scope of the Part 2 discrimination protections. As we explained in Chapter 4, that may already be the case. However, express grounds will put the matter beyond doubt.
  2. This will make it easier for people and organisations in the private sector to understand the obligations that are imposed on them by the Human Rights Act. It may also make it easier for monitoring and oversight bodies with functions in relation to areas of life regulated by Part 2 to provide guidance and assistance to private sector businesses and organisations about their rights and obligations. It may promote changes to business practices in some cases.
  3. Amendment to section 21 will also make it easier for people who are transgender or non-binary or who have an innate variation of sex characteristics to understand their rights and, where relevant, to complain about them being breached. However, this does not mean all matters of concern to people in these groups could give rise to a complaint of discrimination. To constitute discrimination, adverse treatment must be by reason of a prohibited ground and must meet all other applicable tests.
  4. It is possible that there may be an increase in complaints — whether directly to the person or organisation that is being accused of discriminating, to Te Kāhui Tika Tangata | Human Rights Commission or to other bodies that have a complaints function. As we noted in Chapter 4, overall, the number of complaints made to the Human Rights Commission by people who are transgender or non-binary or who have an innate variation of sex characteristics is currently low.
  5. It is also possible more discrimination cases will be taken to the Human Rights Review Tribunal. However, few discrimination complaints proceed to the Tribunal at present, and we doubt there will be a significant increase.[[595]](#footnote-596) Since the Tribunal was established in 2002, it has issued few decisions on Part 2 of the Human Rights Act.[[596]](#footnote-597) On many of the provisions we discuss in later chapters, we found either no or very little case law to guide us.
  6. Discussing the “extremely low” number of employment discrimination claims pursued in Aotearoa New Zealand, the Chief Judge of Te Kōti Take Mahi | Employment Court suggested that reasons may include the perception that claims are difficult to prove, the cost and complexity of the justice system, fear of publicity and the power imbalance between employers and employees.[[597]](#footnote-598) Most of these reasons are not exclusive to the employment context and will apply equally to discrimination based on the two new grounds of discrimination we propose.
  7. To the extent there is a slight increase in the number of cases being litigated, we think this would be a positive development as it will assist in clarifying the scope of protection on some issues.

### Implications of reform for Part 2 exceptions

* 1. The reforms we propose of section 21 of the Human Rights Act need to be accompanied by amendments to the Part 2 sex exceptions. As explained above, 19 exceptions in Part 2 state circumstances in which it is lawful to treat people differently from others by reason of the prohibited ground of sex (when engaging in an activity that is otherwise regulated by Part 2).[[598]](#footnote-599) Some of these exceptions apply only to sex and some apply to sex alongside one or more other prohibited grounds.
  2. We explained in Chapter 4 that how the sex exceptions apply in cases involving discrimination against someone who is transgender or non-binary is already uncertain.[[599]](#footnote-600) Adding a new ground of gender identity will not, on its own, resolve that uncertainty. Specifically, it would remain unclear whether the sex exceptions authorise differences of treatment based on a person’s sex assigned at birth, thereby enabling people who are transgender to be excluded from single-sex spaces and services that accord with their gender identity. We explain this issue further below.
  3. A second and related issue is that, as we explained earlier, Part 2 is a complex scheme of rules designed to protect anti-discrimination goals while also accommodating other rights, interests and concerns that Parliament has deemed important. This balance is principally achieved through broadly stated discrimination protections, qualified by exceptions for situations in which treating people differently based on a particular ground is considered justifiable. Notably, of the 13 prohibited grounds of discrimination in section 21 of the Human Rights Act, all except one attracts at least one exception.[[600]](#footnote-601)
  4. It would not be desirable to add new prohibited grounds of discrimination to section 21 without also considering whether new Part 2 exceptions, or amendments to existing exceptions, are desirable for clarity and coherence and to ensure the Act continues to strike an appropriate balance between the rights, interests and concerns of all people in Aotearoa New Zealand. We discuss our approach to reviewing the Part 2 sex exceptions in more detail later in the chapter.

## General approach to reviewing Part 2

* 1. This section explains the broad approach we have taken to reviewing Part 2 of the Human Rights Act.

### How we address the area of life discrimination protections

* 1. In the Issues Paper, we discussed the discrimination protections for each area of life subpart in the following thematic groupings:
     + 1. employment (in which we included the discrimination protections for employment matters and those for the closely related contexts of business partnerships, industrial and professional associations, and qualifying bodies);
       2. goods, services, facilities and places (in which we included the discrimination protections for two subparts: access to places, vehicles and facilities; and provision of goods and services);
       3. land, housing and accommodation; and
       4. education (in which we included the discrimination protections for educational establishments and those for vocational training bodies).
  2. We asked questions in the Issues Paper about the implications of reform for each of these Part 2 areas of life.
  3. In Chapters 9 to 12 of this report, we discuss the Part 2 area of life discrimination protections under similar groupings. However, there are some Part 2 discrimination protections that we do not discuss at all. These are the protections that relate to: partnerships, industrial and professional associations and qualifying bodies;[[601]](#footnote-602) and to vocational training bodies. No submitter identified specific issues in relation to these discrimination protections, and we did not identify any ourselves.
  4. We discuss the remaining area of life discrimination protections in the following chapters:
     + 1. Chapter 9: employment;
       2. Chapter 10: goods, services, facilities, places and vehicles;
       3. Chapter 11: land, housing and accommodation; and
       4. Chapter 12: education.
  5. In these chapters, we explore the implications of reform of section 21 of the Human Rights Act for these discrimination protections. For two key reasons, we do not propose additional reform of these provisions. First, as we explain in the respective chapters, we are satisfied the implications of reform are broadly appropriate. Second, as these protections apply uniformly to all prohibited grounds of discrimination, it would introduce incoherence into the scheme of Part 2 to amend them to respond to issues that arise solely in respect of new prohibited grounds.
  6. The Act has other mechanisms to address issues that arise solely in respect of one or some prohibited grounds, notably, the Part 2 exceptions, to which we now turn.

### How we address the exceptions specific to each area of life

* 1. As we have explained, the Human Rights Act states exceptions to each of the Part 2 area of life discrimination protections. These exceptions are a key mechanism by which the Act gives effect to a substantive conception of equality and balances equality rights with other rights, interests and concerns that Parliament deemed to be important.
  2. Over the course of the review, we examined each exception in the Human Rights Act to understand how it would be affected by reform of section 21. However, we did not consult on all of them. For reasons we now explain, it became quickly apparent that some categories of exception do not raise policy issues that fall within the scope of this review.

#### Exceptions that permit different treatment based on any prohibited ground

* 1. Several exceptions in Part 2 of the Human Rights Act outline circumstances in which it is legally permissible to treat people differently from others by reason of *any* prohibited ground of discrimination.[[602]](#footnote-603) Because these provisions do not list the individual grounds, no reform would be needed to ensure these exceptions also apply to the two new grounds we propose.
  2. We acknowledge that some of these exceptions relate to issues of deep concern to some people who are transgender or non-binary or who have an innate variation of sex characteristics.[[603]](#footnote-604) However, we can see no possible policy basis to recommend exempting the new grounds from the application of these exceptions. It would be inconsistent and incoherent for the new grounds we propose to receive different treatment from all other grounds. Further, more general reform of these exceptions (for example, repealing an exception entirely, as some submitters suggested) are beyond the scope of this review.
  3. For that reason, we did not consult on reform of these exceptions although, for transparency, we explained our approach to these exceptions in the Issues Paper.
  4. We do not comment in this report on whether the breadth of these exceptions is justified. Nor do we address whether there is any specific rationale for applying these exceptions to people who are transgender or non-binary or who have an innate variation of sex characteristics. These are issues that would need to await a general review of the Human Rights Act.

#### Exceptions that do not allow for differences of treatment by reason of a person’s sex

* 1. Some of the exceptions in Part 2 apply to one or more specific grounds but do not apply to the ground of sex. They apply, for example, to the grounds of disability or political opinion or religious belief. In our preliminary research, we reviewed all these exceptions to assess their relevance. We concluded that the policy rationales that underlie them were not relevant to any new grounds we might propose as part of this review.
  2. For example, one exception makes it lawful to treat a person’s political opinion as relevant if the role is as a political advisor or working for a political party.[[604]](#footnote-605) Another allows qualifying bodies to impose a reasonable and appropriate minimum age for conferring a qualification.[[605]](#footnote-606) We cannot think of any policy reason for these provisions to permit differences of treatment based on a person’s gender identity or sex characteristics.
  3. In the Issues Paper, we did not ask specific consultation questions about these exceptions but, for transparency, explained our general approach. We received little feedback on such exceptions and do not discuss them further in this report.

#### Exceptions that allow for differences of treatment by reason of a person’s sex

* 1. By contrast, the 19 exceptions in Part 2 of the Human Rights Act that allow for differences in treatment based on the prohibited ground of sex are a key focus of this review. We discuss our approach to reviewing them at length later in this chapter.

### How we address general exceptions and qualifications

* 1. As mentioned above, there are four general exceptions and qualifications that apply across all the areas of life regulated by Part 2 of the Human Rights Act.

#### Section 21B (specifying that the rules in Part 2 give way to other laws)

* 1. In the chapters that follow on Part 2, we discuss the significance of section 21B of the Human Rights Act at various parts of our analysis. We do not propose reform of section 21B. It would not be appropriate for us to make amendments to a provision of general application of this kind in this review, with its limited focus, and there was no call from submitters for us to do so.

#### Section 73(1) (permitting measures done to secure equality if certain conditions are met)

* 1. For similar reasons, we did not consider reform of section 73(1) of the Human Rights Act. It is a provision of general application, and there was no call from submitters to amend it as part of this review.
  2. A number of submitters referred to section 73(1) in their feedback on specific exceptions. Generally, this was to suggest that it would be possible for employers and businesses to give preferential treatment to people who are transgender or non-binary or who have an innate variation of sex characteristics even if a particular sex exception was not expressly extended to new grounds.
  3. That may well be true in some cases. However, where there is already a sex exception in the Human Rights Act specifying the circumstances in which different treatment is unlawful, we consider it is generally preferable to state clearly whether that exception applies to gender identity. Section 73(1) is designed to support temporary measures to secure equality rather than to support more permanent measures. It is subject to strict statutory criteria that a person seeking to rely on the exception must establish are met.
  4. We think employers and businesses should have a clear basis for action rather than being expected to fall back on a general protection of this kind. That said, where there is not a strong case for extending an exception, we have sometimes noted the possibility that section 73(1) may be able to be relied on.
  5. If the new ground we propose of having an innate variation of sex characteristics is added to section 21, reliance on section 73(1) will never be needed to permit preferential treatment of people who fall into this group. That is because this proposed ground is asymmetrical. The absence of an innate variation of sex characteristics would not be a protected characteristic and therefore different treatment on that basis would not be discrimination under the Human Rights Act.

#### Section 97 (power to declare a genuine occupational qualification or genuine justification)

* 1. Some submitters suggested similarly that section 97 could provide a basis for certain differences of treatment even in the absence of a specific exception. While this may be true, again, we generally prefer not to rely on it. Despite its apparent breadth, section 97 has been invoked infrequently and there is little case law on it.[[606]](#footnote-607) Further, we agree with Professor Paul Rishworth KC who said in his submission that the fact section 97 is dependent on a declaration from the Human Rights Review Tribunal means it is expensive and time-consuming to rely on it.
  2. Save Women’s Sport Australasia said section 97 should be extended to apply more broadly and at all stages of a Human Rights Act complaint. A reform of that kind would fall outside the scope of this review.
  3. In the Issues Paper, we raised the possibility of amendments to section 97 as one way to address tensions between the Human Rights Act and tikanga. However, we also explained that it would be difficult to reform a general provision of this kind in this review. For the reasons we discussed in Chapter 5 of this report, we do not recommend any reforms in relation to tikanga. Nor do we recommend any other reforms of section 97 elsewhere in this report.

#### Section 74 (preferential treatment for pregnancy, childbirth and family responsibilities)

* 1. Section 74 is a more specific provision, focused on issues more closely connected to this review. It contains one of only two references in the Human Rights Act to the words “woman” or “women”.[[607]](#footnote-608) We propose a minor amendment to the language of this provision in Chapter 20 to ensure it confers broad protection.

### ‘Other forms of discrimination’

* 1. We discuss the ‘Other forms of discrimination’ subpart in Chapters 16 and 17. For the reasons we explain there, we only address one current provision in this subpart in any depth: section 62, which relates to sexual harassment.
  2. We also consider in Chapters 16 and 17 whether it is necessary and desirable to add any additional matters as other forms of discrimination.

### Implications for other laws

* 1. Unlike in the Issues Paper, the Part 2 chapters in this report do not include any discussion of the implications of reform for other laws. All discussion of the implications of the review for other laws is grouped together in a later chapter (Chapter 19).

## General approach to reviewing the sex exceptions

* 1. The 19 sex exceptions in Part 2 of the Human Rights Act are a key focus of the review. Over the next seven chapters, we review each of these exceptions to consider how it would be affected by reform of section 21. We recommend reforms to clarify how each exception should apply to people who are transgender or non-binary or who have an innate variation of sex characteristics.[[608]](#footnote-609)
  2. In this section, we explain our general approach to reviewing these sex exceptions. Our recommendations for reform in relation to each exception need to be understood in the light of the general information provided in this section.

### Where in this report we discuss each exception

* 1. We discuss most of these exceptions alongside the area of life to which they relate.[[609]](#footnote-610) However, that is not always the case:
     + 1. In Chapter 10 (the chapter about goods, services, facilities, places and vehicles), we discuss an exception for superannuation.[[610]](#footnote-611) Unusually, this exception sits in its own subpart and does not state explicitly the areas of life to which it applies. We discuss it in Chapter 10 because we think provision of goods and services is the area of life to which it is most applicable[[611]](#footnote-612) and because it has a similar underlying rationale to an insurance exception that sits in that subpart.
       2. We discuss two employment exceptions in Chapter 11 (the chapter about accommodation) because they relate to accommodation provided by employers.
       3. In Chapter 13, we discuss three exceptions that relate to courses and counselling. These exceptions apply in the areas of life of employment matters, provision of goods and services, and educational establishments, respectively.
       4. We devote a separate chapter (Chapter 14) to the two exceptions in Part 2 that allow for separate facilities for each sex on the ground of public decency or public safety (as well as some related issues on which we consulted).
       5. We devote a separate chapter (Chapter 15) to the exception in Part 2 that allows for persons of one sex to be excluded from participating in certain competitive sporting activities.

### Rationales underlying the sex exceptions

* 1. The starting point for our consideration of each exception was the policy reasons why Parliament chose to permit differences of treatment based on a person’s sex in the particular circumstances. These exceptions exist for a variety of purposes.
  2. For example, some sex exceptions seek to advance a substantive view of equality by permitting sex-separated facilities and services that may be needed for women to flourish. As we explained in Chapter 3, a substantive view of equality is one that acknowledges that treating everyone the same does not always lead to equality of outcome. An example of a sex exception that serves this substantive equality rationale is section 49(1), which allows for competitive sporting activities to be limited to people of one sex where the strength, stamina or physique of competitors is relevant.
  3. Some sex exceptions, to the contrary, protect competing rights and interests that Parliament considered more important than equal treatment of women in the particular circumstances. For example, an exception that enables New Zealand employers to discriminate based on sex in certain circumstances when employing someone to work overseas recognises the practical difficulties employers can face in complying with both the Human Rights Act and the laws, customs and practices of a host country.[[612]](#footnote-613)
  4. Some exceptions seek, as one of their objectives, to advance safety — in one case, public safety in facilities such as bathrooms and changing rooms and, in the other, the safety of athletes when participating in competitive sport.
  5. An exception for domestic employment in a private household (discussed in Chapter 9) reflects a view that certain activities ought to be treated as private and therefore outside of the legitimate scope of anti-discrimination law.[[613]](#footnote-614) This exception applies broadly to sex, religious belief, ethical belief, disability, age, political opinion and sexual orientation. The exception does not seek to morally condone decisions to refuse someone employment based on, say, their sexual orientation. Rather, it reflects a view underlying the Human Rights Act that anti-discrimination law should not regulate people’s private lives.
  6. The policy rationales underlying the sex exceptions sometimes overlap and are not always clear. They are also sometimes quite dated. As the Human Rights Act drew heavily on earlier anti-discrimination laws from the 1970s, many of the sex exceptions reflect attitudes and compromises made in the context of 1970s Aotearoa New Zealand.
  7. Nevertheless, these policy rationales are important to this review because we have not been requested to conduct a general review of the Human Rights Act. As we explained in Chapter 3, retaining the coherence of the law is one of our key reform considerations.
  8. It is not, however, our only key reform consideration. When reviewing the exceptions, we have also weighed other key reform considerations such as the implications of reform for core values that underlie the Human Rights Act and for constitutional fundamentals such as the rights and freedoms protected by the New Zealand Bill of Rights Act 1990.

### Bodily privacy

* 1. Some exceptions in Part 2 protect privacy in intimate situations. This is the rationale underlying an exception in section 27(3)(a) of the Human Rights Act that allows certain jobs to be limited to one sex “to preserve reasonable standards of privacy”. It is one of two key rationales underlying exceptions for single-sex facilities such as bathrooms and changing rooms (although, reflecting the language of the 1970s, the relevant phrase used in these exceptions is “public decency”).[[614]](#footnote-615) It is also one of the rationales underlying three exceptions in the Act that relate to single-sex accommodation.[[615]](#footnote-616)
  2. These privacy-related exceptions are grounded in social and cultural assumptions about nudity and whether it is acceptable to expose your body to people who are a different sex in public situations.[[616]](#footnote-617)
  3. Because this rationale is important to so many exceptions we are reviewing, it is helpful to address in this chapter some common themes from the feedback we received. Many submitters expressed views on bodily privacy and on the social and cultural norms about men and women being separate when unclothed in public situations.
  4. A small number of submitters told us these norms no longer exist in contemporary Aotearoa New Zealand. We do not think this is correct. We accept that social and cultural norms about bodily privacy are evolving, and that mixed-sex facilities are more common than they were in the 1970s when these exceptions were first enacted. Nevertheless, taboos about being seen naked by people of a different sex in public settings are still widely held and were reflected in many of the submissions we received.
  5. Social and cultural assumptions of this kind may have different significance for different people. They may also vary depending on factors such as culture, religion and age. Some submitters said privacy (and having control over who sees your body in intimate situations) may be especially important for people who are vulnerable, have a history of trauma or have specific safety concerns.
  6. Control over access to one’s naked body is a core aspect of the right of privacy.[[617]](#footnote-618) The protection of personal privacy in intimate situations is underpinned by ideas of autonomy and dignity that we explored in Chapter 3.
  7. Working out the significance of this underlying privacy rationale for the new ground of gender identity is not straightforward as the way social norms around nudity apply to matters of gender identity is unclear. In consultation, we heard from some people that these norms are about “biological” sex 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.
  8. Where privacy issues of this kind have arisen in this review, we have weighed them carefully when evaluating potential reform options alongside all other considerations that we have identified as relevant to the specific exception. These include other rationales underlying the exception and other core values underlying the Human Rights Act. The extent of protection that we recommend should be extended to privacy interests differs for each exception, depending on the nature of the privacy interest we have identified and the weight we think needs to be attached to any competing considerations. For example, as we discuss in Chapter 11, we consider that privacy expectations are particularly high when someone is sleeping.
  9. Working out the significance of this underlying privacy rationale for the new ground of having an innate variation of sex characteristics has been more straightforward. Submitters did not suggest to us that social norms about keeping men and women separate when unclothed are engaged differently when a person has an innate variation of sex characteristics. Nor have we found research to suggest that may be the case. Therefore, we do not consider that social norms about privacy between the sexes provide a basis for extending any exceptions to allow for differences of treatment based on having an innate variation of sex characteristics.[[618]](#footnote-619)

### Case-by-case approach

* 1. 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. In some cases, our key reform considerations are best advanced by extending the relevant exception to the ground of gender identity or the ground of having an innate variation of sex characteristics. In others, they are best advanced by either not extending the exception or extending it in a limited way.
  2. The recommendations we make in relation to the sex exceptions can be grouped into three categories.[[619]](#footnote-620)
  3. First, we recommend amendments to some sex exceptions in Part 2 to allow for people to be treated differently based on their gender identity or having an innate variation of sex characteristics as long as existing criteria in 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.
  4. Second, in some cases, we recommend new tests to define the circumstances in which people can be treated differently on the basis of their gender identity or having an innate variation of sex characteristics. 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.
  5. Third, we recommend the Human Rights Act should clarify that some sex exceptions in Part 2 do not allow people to be excluded from single-sex spaces or facilities that align with their gender identity. We take this approach in relation to exceptions applying to single-sex schools and to 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 these exceptions.

### Options for reform

* 1. Although the reform options we considered were different for each exception, the approach we took to identifying and evaluating options for reform had some common features.

#### The option of making no reform of specific exceptions

* 1. One possibility would be to make no amendment to some or all the sex exceptions. No amendment would mean that an exception would allow explicitly for differences of treatment based on a person’s sex but would be silent as to the implications of that exception for differences of treatment by reason of the new grounds.
  2. The option of leaving certain exceptions unamended was often popular with submitters. However, submitters made different assumptions or expressed different preferences about what that would mean for the scope of protection. Some submitters thought that no reform of a sex exception would mean, or should mean, that people who are transgender cannot be treated differently based on their sex assigned at birth. Others said the opposite: that no reform would mean, or should mean, that differences of treatment would be lawful based on a person’s ‘biological sex’. Some submitters clarified that they favoured a no reform option *alongside* adding a definition of ‘sex’ to the Human Rights Act to state that it always means biological sex. Many submitters who favoured no reform of exceptions did not explain why, making it difficult to know what policy outcome they preferred.
  3. In the Issues Paper, we identified the potential for there to be uncertainty as to the scope of sex exceptions if they were left unamended and asked submitters if they had any feedback on this issue.[[620]](#footnote-621) Some legal experts with whom we spoke during our consultation period thought courts and tribunals would be unlikely to interpret sex exceptions in a way that allows gender identity discrimination in circumstances where Parliament had decided against having a gender identity exception. However other submitters, including Community Law Centres o Aotearoa, DLA Piper New Zealand, Te Kāhui Ture o Aotearoa | New Zealand Law Society and the Wellington Pride Festival, were concerned this would not be the case. For example, Community Law commented:

1. … given the way gender, gender identity and sex overlap and interact as concepts, realistically the “sex” ground is currently used to discriminate against transgender people and people who are non-binary (ie on the basis of “sex assigned at birth”). It is likely therefore that the “sex exceptions” would be used to discriminate against trans people and non-binary people on the ground of “sex” if the exceptions are not amended to include a new ground. We think that the wording of exceptions may need to be tightened so that this work-around is avoided.
   1. Some of the submitters who preferred a combined sex or gender ground were motivated by a concern that exceptions applying to a stand-alone ground of sex could be interpreted to exclude people who are transgender or non-binary or who have an innate variation of sex characteristics.
   2. Based on our analysis of recent case law, we think the likely impact of not amending a sex exception is different for each of the two new grounds we propose.

##### Impact of no reform of a sex exception on the ground of gender identity

* 1. There is considerable uncertainty about how an unamended sex exception would operate with regards to people who are transgender. One possibility is that a court or tribunal might consider that a decision not to extend a particular exception to gender identity signals a legislative intention not to authorise differences in treatment on this basis. For example, the court or tribunal might consider that a sex exception that has not been extended to gender identity cannot be applied in a way that excludes a transgender person from a sex-separated service or facility if their gender identity aligns with the designated sex. This approach is broadly consistent with the decision of the Federal Court of Australia in *Tickle v Giggle for Girls Pty Ltd (No 2)*.[[621]](#footnote-622)
  2. A second possibility is reflected in the decision of the United Kingdom Supreme Court in *For Women Scotland Ltd v Scottish Ministers*. Even though the legislature had extended some sex exceptions to a “gender reassignment” ground and not others, the Court held that all the sex exceptions in the United Kingdom’s anti-discrimination statute permit differences of treatment based on a person’s “biological sex” (and, therefore, allow a person to be treated differently based on their sex assigned at birth).[[622]](#footnote-623)
  3. The legislative contexts in which these cases were decided are different from those of Aotearoa New Zealand in several relevant respects. Nevertheless, these decisions reinforce the uncertainty that would accompany a reform that left one or more of the sex exceptions unamended.
  4. For that reason, in this report, we propose specific reform of each sex exception to clarify its implications for discrimination that is based on a person’s gender identity. As we have explained the difficulties with not reforming a sex exception here, we do not generally discuss the option of not reforming an exception in later chapters.

##### Impact of no reform of a sex exception on the ground of having an innate variation of sex characteristics

* 1. Neither *Tickle v Giggl*e *for Girls Pty Ltd (No 2)* nor *For Women Scotland Ltd v Scottish Ministers* discussed the application of sex exceptions to a person who has an innate variation of sex characteristics. We do not think the logic of the United Kingdom Supreme Court’s decision extends to this ground. The fact that someone’s sex characteristics differ from medical or social norms for male or female bodies does not mean they are of a different sex.[[623]](#footnote-624) In consultation, we heard almost no concerns from submitters about people with innate variations of sex characteristics accessing single-sex services or facilities. As we discussed above, we have found nothing to suggest that social norms about keeping men and women separate in intimate situations apply differently to people who have an innate variation of sex characteristics.
  2. Therefore, although we think it is necessary for the Human Rights Act to specify when an exception *should* allow for different treatment based on a person having an innate variation of sex characteristics, we do not think it is necessary to specify when it should not. In the absence of a relevant exception, no such discrimination would be permitted.[[624]](#footnote-625)

#### Which reform options we considered for each exception

* 1. In the Issues Paper, we sometimes identified and sought feedback on specific options for reform of a particular exception. Where we did that in the Issues Paper, we present those options in this report and explain which we prefer and why.
  2. For most exceptions, however, we instead asked a broad question in the Issues Paper about whether amendments to the exception are required to reflect any new prohibited grounds of discrimination that are added to section 21 of the Human Rights Act as a result of the review. For those exceptions, our starting point in evaluating options for reform was to consider two possibilities: extending the respective exception to one or both new grounds; or adding words to clarify that the exception does not permit differences of treatment that are based on one or both the new grounds. Sometimes, where neither of these options seemed desirable, we identified and analysed a third intermediate reform option.

#### Repeal of sex exceptions and the challenges posed by the gender binary

* 1. One option that we do not address in respect of each exception is repeal of the exception. Some submitters told us this should happen. We were told, for example, that sex-separated categories are outdated and that the Human Rights Act should no longer provide for them.
  2. It would be outside the scope of this review for us to recommend repeal of the sex exceptions. Therefore, we do not discuss this option in later chapters.
  3. We acknowledge that this entails significant limitations on how we can address the issues and concerns of people who identify outside the gender binary in this review. Some submitters told us about the challenges faced by people who identify outside the gender binary in accessing facilities where the only options are male and female, including when using bathrooms or playing sport.
  4. A binary conception of sex and gender is deeply embedded in New Zealand law and in legal and social practice. This binary approach pervades the Human Rights Act. It is implicit in all the sex-based exceptions that we discuss in this report.
  5. Given that sex exceptions are inherently binary, the reform options we identify do not respond very effectively to issues faced by people who identify outside the gender binary. A comprehensive approach to addressing those issues would require change that is more fundamental than what we can achieve within the scope of this review.

### Some common issues about information privacy

* 1. In their feedback on exceptions, many submitters raised issues about information privacy. Such issues may arise if exceptions are tied to a person’s sex assigned at birth, the fact they are transgender or non-binary or their sex characteristics. This is because it may result in a person who is transgender or non-binary or who has an innate variation of sex characteristics being expected to disclose this information to another person such as to an employer or service provider. It might also result in that person disclosing the information to a third party such as a customer.
  2. In the Issues Paper, we said we were interested to understand better whether these concerns were significant and how they might be resolved. We received feedback directly on this question, and submitters also raised concerns about information privacy in their feedback on some specific Part 2 exceptions.
  3. Many submitters said requiring a person to disclose their sex assigned at birth, the fact of being transgender or non-binary or information about sex characteristics could be invasive and humiliating. Some submitters said it would harm people’s dignity and could have negative impacts on mental health. Many commented that this information is health information and that no one should be expected to provide this.
  4. We also heard that having exceptions tied to a person’s sex assigned at birth would forcibly ‘out’ people as transgender, which could be very harmful and increase discrimination. Some submitters had concerns about how sensitive information regarding an employee’s gender identity or sex characteristics may be handled by employers, including that it may be disclosed to others. Some submitters commented that people who are transgender or non-binary or who have an innate variation of sex characteristics should be able to decide when they share information about their gender identity or sex characteristics.
  5. Other submitters thought that any implications for information privacy were reasonable or were justified by other considerations. Some submitters also suggested that individuals could maintain their privacy by avoiding situations that would require them to disclose their sex assigned at birth.
  6. The New Zealand Law Society said it hoped that questions about a person’s sex assigned at birth (or gender identity or sex characteristics) would not often arise in day-to-day settings such as using public bathrooms. However, it thought such questions may be less problematic in other settings, commenting:

1. To the extent that those questions may need to arise in other settings, such as employment, the privacy expectations are somewhat lower. A person entering employment where sex or gender is relevant does so willingly: they would likely have a reasonable expectation that their details of their sex or gender identity would need to be disclosed to their employer and, on occasion, a customer or client.
   1. We agree that extending exceptions in the Human Rights Act to allow differences of treatment by reason of a person’s gender identity or having an innate variation of sex characteristics has implications for information privacy. That is because those exceptions may provide a legitimate basis upon which individuals and organisations subject to the Act can seek information about a person’s gender identity or whether they have an innate variation of sex characteristics. Where these issues arise, we have weighed them alongside other considerations in formulating our advice on reform options.
   2. We note, however, that there are important constraints and safeguards related to the handling of personal information in the Privacy Act 2020. The Act has 13 information privacy principles (IPPs) that govern how agencies should collect, handle and use personal information.
   3. According to IPP 1, agencies must only collect personal information if it is for a lawful purpose connected with their functions or activities and the information is necessary for that purpose. While having an exception in the Human Rights Act may provide a “lawful purpose”, the specific information sought still needs to be necessary for that purpose. According to the Human Rights Review Tribunal, this means “needed or required in the circumstances, rather than merely desirable or expedient”.[[625]](#footnote-626)
   4. Agencies are generally required to collect personal information directly from the person it is about (IPP2) and in a way that is lawful and fair and reasonable in the circumstances (IPP4). A person should be told of the consequences of failing to provide information that is requested (IPP3). Agencies also have obligations to keep information safe. IPP5 requires agencies to ensure there are safeguards in place that are reasonable in the circumstances to prevent loss, misuse or disclosure of personal information.
   5. Where an agency holds personal information, it generally can only use it for the purpose for which it was collected (IPP10) and may generally only disclose it to others for the purpose for which it was collected (IPP11).
   6. Te Mana Mātāpono Matatapu | Privacy Commissioner has a role in promoting public understanding of privacy issues and sometimes publishes guidance on specific privacy issues.[[626]](#footnote-627) If new prohibited grounds of discrimination are added to the Human Rights Act, it is possible that the Privacy Commissioner would consider it was appropriate to provide some guidance on managing information about a person’s gender identity or innate variation of sex characteristics in particular settings.
   7. We discuss some specific privacy issues raised by submitters in later chapters.

### Wording to give effect to our recommendations

* 1. Alongside our recommendations for reform of each exception, we present in each chapter some possible wording for a reformed provision. We do that to further clarify our policy intent.
  2. The language we propose may not be the only way of giving effect to that intent, nor even the best way. Te Tari Tohutohu Pāremata | Parliamentary Counsel Office will be able to advise on the most appropriate way to amend each provision. However, the following advice about wording of exceptions may be useful.

#### Wording to extend exceptions

* 1. Extending the exceptions to allow for differences of treatment based on one or both new grounds should generally be quite straightforward. Many exceptions contain a list of grounds to which the exception applies, in which case, the new grounds can simply be added alongside the existing ones.
  2. If our recommendations for wording of new grounds are accepted, extending an exception to gender identity will allow for differences in treatment based, among other things, on the fact someone is transgender or cisgender. This is because we have recommended that the definition of gender identity should include the relationship between a person’s gender identity and sex assigned at birth.

#### Wording to ensure exceptions do not permit gender identity discrimination

* 1. Where the policy intent is that a sex exception should not allow for a transgender person to be treated differently based on their sex assigned at birth, or only in limited circumstances, careful wording of the provision will be important. As we explained earlier, the United Kingdom Supreme Court held in *For Women Scotland Ltd v Scottish Ministers* that the sex exceptions in the United Kingdom’s anti-discrimination statute relate to “biological sex”, therefore permitting the different treatment of a person who is transgender based on their sex assigned at birth.[[627]](#footnote-628) The Court held this was so even where the law stated different criteria for when gender reassignment discrimination could occur.[[628]](#footnote-629)
  2. Therefore, if the policy intent is to ensure that a transgender person has access to a single-sex facility if their gender identity aligns with the designated sex of that facility or service, the statutory language needs to state that very explicitly. It may not be sufficient, for example, simply to state that the exception does not permit discrimination “by reason of gender identity”. Instead, it may be necessary to state very clearly that the sex exception cannot be relied on to exclude a person whose gender identity aligns with the designated sex.

### Approach to exceptions in other jurisdictions

* 1. As part of our research into each sex exception, we looked to anti-discrimination laws in other jurisdictions with similar legal systems for guidance. However, for reasons we explain below, we found that the approaches taken by other jurisdictions to exceptions for sex or gender identity discrimination seldom provided useful precedents. Therefore, we refer to overseas approaches only occasionally in the chapters that follow.

#### Canada

* 1. Canadian anti-discrimination statutes have fewer exceptions than New Zealand’s Human Rights Act. Further, the only exceptions that apply to gender identity discrimination are those that apply to all grounds. However, many Canadian anti-discrimination statutes contain general exceptions that permit discrimination on any ground if it is “bona fide”, “bona fide and reasonable” or “reasonable and justified”.[[629]](#footnote-630) The existence of these general exceptions means there is less need in Canada for specific exceptions. Therefore, it is often difficult to know what significance to attach to the absence of specific exceptions for gender identity.

#### United Kingdom

* 1. The United Kingdom’s anti-discrimination statute has sex exceptions that cover many of the same situations as the exceptions in the Human Rights Act. It also has specific exceptions that apply to the ground of “gender reassignment”. However, many of the United Kingdom exceptions contain higher threshold tests than the equivalent New Zealand provision such as requiring the different treatment on a prohibited ground to be a “proportionate means of achieving a legitimate aim”.[[630]](#footnote-631)
  2. A further complicating factor is that, in its decision in *For Women Scotland Ltd v Scottish Ministers*,the United Kingdom Supreme Courtheld that the sex exceptions in the United Kingdom anti-discrimination legislation all permit differences of treatment based on a person’s “biological sex”. Following that decision, the gender reassignment exceptions in the United Kingdom legislation apply in very limited circumstances (because, for example, a transgender person can be excluded from a single-sex service or facility based on a sex exception).

#### Ireland

* 1. Ireland’s anti-discrimination statutes list, as one of their “discriminatory grounds”, that “one [person] is male and the other is female”.[[631]](#footnote-632) This is called the “gender ground”. Although this ground is not primarily aimed at protecting people who are transgender or non-binary or who have an innate variation of sex characteristics, the Irish Human Rights and Equality Commission and the Irish Equality Tribunal (now the Workplace Relations Commission) have interpreted the gender ground as protecting transgender people.[[632]](#footnote-633)
  2. As Ireland does not have a separate ground to protect gender identity, none of the exceptions in the legislation have been extended expressly to gender identity either.

#### United States

* 1. As we discussed in Chapter 4, anti-discrimination protection in the United States varies across states. The proliferation of provisions and the variety of different approaches taken in them make them of limited assistance. At the federal level, the United States has different statutes for different areas of life and varying approaches to prohibited grounds and exceptions.[[633]](#footnote-634) None of these statutes expressly protect gender identity, although the United States Supreme Court has said sex discrimination in employment includes discrimination against transgender employees.[[634]](#footnote-635)

#### Australia

* 1. Of the jurisdictions we have looked at, the anti-discrimination laws that are the most similarly structured to the Human Rights Act in terms of exceptions are those in Australia. These Australian statutes (at both the federal and sub-national level) state exceptions at similar levels of detail and some use similar tests.[[635]](#footnote-636)
  2. However, even here, there are some significant differences in context that mean it is difficult to place too much emphasis on the approach that is taken in Australia. A key difference is that each of Australia’s anti-discrimination statutes provides a power for the relevant human rights body to give exemptions from the statute in appropriate cases.[[636]](#footnote-637) This is a specific approval granted to an applicant to do something that would otherwise be unlawful discrimination.[[637]](#footnote-638) These exemption powers appear to be used relatively frequently, although this may depend on the particular jurisdiction.[[638]](#footnote-639)
  3. Another key difference is that some of the Australian exceptions, while similar in level of detail, are different in scope to the New Zealand exceptions. For example, while Aotearoa New Zealand has one very broad exception for shared accommodation,[[639]](#footnote-640) the Australian Commonwealth anti-discrimination statute has three comparable exceptions that apply to accommodation provided by a charity or not-for-profit entity, by a religious body and to students, respectively.[[640]](#footnote-641)

CHAPTER 9

# Employment

## Introduction

* 1. In this chapter, we consider the provisions in Part 2 of the Human Rights Act 1993 that relate to employment.
  2. We start by addressing the protections from discrimination in the subpart about employment. We explain the implications of reform of section 21 of the Human Rights Act for these employment protections and why we are satisfied those implications are appropriate.
  3. We then address a number of exceptions in Part 2 that allow distinctions to be drawn based on a person’s sex in employment and related contexts.[[641]](#footnote-642) These exceptions relate to:
     + 1. work performed outside New Zealand;
       2. situations where a person’s sex is a genuine occupational qualification for reasons of authenticity;
       3. domestic employment in a private household;
       4. positions limited to one sex for privacy reasons; and
       5. appointment to religious office.
  4. We recommend that all these exceptions are amended to allow for differences of treatment based on the new ground of gender identity. We also recommend that the exceptions listed above at (b), (c) and (e) are amended to allow for differences of treatment based on having an innate variation of sex characteristics.
  5. This chapter should be read alongside Chapter 8, which set out our general approach to reviewing Part 2 of the Human Rights Act and analysed some common issues that arise across more than one area of life.

## Discrimination protections for employment

* 1. Sections 22 and 23 of the Human Rights Act set out the discrimination protections that relate to employment. As well as employees, these sections protect independent contractors, volunteers and contract workers.[[642]](#footnote-643) They are among the handful of provisions in Part 2 that apply to the government alongside the private sector.[[643]](#footnote-644)
  2. Section 22 states that, if an employee or job applicant is “qualified for work of any description”, it is unlawful for an employer to do any of the following “by reason of” a prohibited ground of discrimination:
     + 1. refuse or omit to employ them;
       2. offer them less favourable terms of employment, conditions of work, benefits or opportunities than other employees who have similar capabilities and are doing similar work;
       3. terminate their employment or subject them to a “detriment” in circumstances when another employee would not have been treated this way; or
       4. cause them to retire or resign.
  3. If an employee discriminates against a co-worker, the employer can be liable unless they can prove they took “such steps as were reasonably practicable” to prevent employees from doing such acts.[[644]](#footnote-645)
  4. Section 22 only applies where a person is “qualified” for a role. Te Kōti Matua | High Court has said being “qualified” is not just about having a formal qualification.[[645]](#footnote-646) It includes “any personal qualities needed to perform the functions of the position successfully”.[[646]](#footnote-647)
  5. Section 23 relates to application forms, inquiries made to applicants and inquiries made to others about the applicant (such as referees). It states these must not indicate an intention to discriminate against someone in a manner prohibited by section 22 or be capable of being reasonably understood in this way.
  6. For reasons we explained in Chapter 8, it would be difficult for us to propose amendments to the discrimination protections in sections 22 and 23 of the Human Rights Act as part of this review because they apply uniformly to all prohibited grounds of discrimination. We nevertheless need to be satisfied that the implications of reform for these provisions are broadly appropriate. For that reason, we asked some questions in the Issues Paper about the implications of reform for these discrimination protections.[[647]](#footnote-648)

### Issues of concern to people in these three groups

* 1. If the two new grounds of discrimination that we propose are added to section 21 of the Human Rights Act, it will clarify that people who are transgender or non-binary or who have an innate variation of sex characteristics can complain under the Human Rights Act about discrimination in employment. In the Issues Paper, we explained that people in these groups can face discrimination in employment and we discussed some data about relevant experiences.[[648]](#footnote-649) More recent data from the 2022 Counting Ourselves survey of people who are transgender or non-binary (published in 2025) confirm that employment discrimination continues to be an issue of concern.[[649]](#footnote-650)
  2. We asked in the Issues Paper whether the protections that are available under sections 22 and 23 capture employment issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics.
  3. Te Kāhui Ture o Aotearoa | New Zealand Law Society, Community Law Centres o Aotearoa and the Rainbow Support Collective told us in their submissions that, as long as section 21 is amended, sections 22 and 23 should cover most employment issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics.
  4. Some people told us in consultation about some specific employment issues of concern to them. These included:
     + 1. missing out on jobs, having employment terminated or receiving worse pay or conditions than others;
       2. being removed from customer-facing roles;
       3. being bullied or harassed;
       4. being made to wear a male or female uniform that does not correspond with their gender identity;
       5. being told by an employer they cannot affirm their gender at work such as by changing names or pronouns;
       6. having to share personal information about gender identity or sex characteristics with employers, with prospective employers or with co-workers; and
       7. application forms not having gender-neutral options for gender or titles (such as being restricted to Mr/Mrs/Ms/Miss).
  5. If the new grounds are added to section 21 of the Human Rights Act, we think section 22 would provide a basis for complaining about many, if not all, of the issues submitters mentioned. For example:
     + 1. Section 22 obviously covers issues relating to hiring,[[650]](#footnote-651) termination of employment[[651]](#footnote-652) and unfavourable work conditions.[[652]](#footnote-653)
       2. Being removed from a customer-facing role could, depending on the circumstances, amount to terms or conditions of work that are “less favourable” than those of other employees with similar capabilities and who are doing similar work.[[653]](#footnote-654)
       3. Bullying and harassment at work may also amount to less favourable conditions of work[[654]](#footnote-655) or to a “detriment”.[[655]](#footnote-656)
       4. Making a transgender employee wear a male or female uniform that does not align with their gender identity might also amount to a detriment.[[656]](#footnote-657)
       5. If an employer treated an employee’s personal information less carefully than others by reason of their gender identity or having an innate variation of sex characteristics, this might constitute less favourable treatment or a detriment.
       6. If an application form did not provide suitable options for people who are transgender or non-binary, it is possible this could amount to treating a job applicant differently from cisgender applicants.[[657]](#footnote-658)
  6. Whether a particular claim of discrimination will be successful depends on the facts and the evidence. To succeed under section 22, for example, a plaintiff must prove that they were qualified for work of the particular description and that the treatment they suffered was “by reason of” a prohibited ground of discrimination.
  7. Some of the concerns submitters mentioned may be easier to frame as discrimination claims than others. In some cases, concerns of the kind submitters raised might be more appropriately addressed through other complaints mechanisms. Unfair treatment of a transgender employee might, for example, give rise to a personal grievance or other claim under the Employment Relations Act 2000.[[658]](#footnote-659) Unauthorised disclosure of personal information might fall within the jurisdiction of Te Mana Mātāpono Matatapu | Privacy Commissioner if it breaches the information privacy principles in the Privacy Act 2020. Overall, however, we are satisfied that, if new grounds are added to section 21 of the Human Rights Act, sections 22 and 23 of the Human Rights Act 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 in employment situations.

### Other implications

* 1. In the Issues Paper, we asked whether submitters had practical concerns about the impact for sections 22 and 23 of adding new grounds to section 21. We also asked whether new employment exceptions might be desirable to accommodate any new grounds.
  2. We discuss below several issues raised by submitters. We are satisfied none of them make reform of section 21 undesirable or raise issues that cannot be adequately addressed through the exceptions we discuss later in the chapter.

#### **Difficulties of proof**

* 1. Some submitters were concerned that, if an employee alleges discrimination, it may be difficult for the employer to rebut it. For example, a submitter said an employer may feel they have to hire a transgender person who does not have the most suitable experience for the role due to fear of court proceedings.
  2. Other submitters were concerned, to the contrary, that it can be difficult for an employee to prove that adverse treatment in an employment context was motivated by discrimination.
  3. Assuming a complaint is not resolved in the workplace, the first step in pursuing a complaint under the Human Rights Act is to complain to Te Kāhui Tika Tangata | Human Rights Commission.[[659]](#footnote-660) The Human Rights Commission facilitates informal dispute resolution. It does not have decision-making powers.
  4. It is only if informal dispute resolution fails and a complaint is filed with Te Taraipiunara Mana Tangata | Human Rights Review Tribunal that issues of proof become relevant. At that point, it is for the complainant (the employee) to prove that the elements of sections 22 or 23 are made out. The onus of proof only shifts to the defendant (employer) if it wishes to rely on an exception**.**[[660]](#footnote-661) For this reason, we do not share submitters’ concerns about the difficulties employers will face in rebutting discrimination claims.
  5. **We agree, to the contrary, that i**t can sometimes be difficult for plaintiffs to prove why they missed out on a job or work opportunity. According to the Chief Judge of Te Kōti Take Mahi | Employment Court, the number of discrimination claims pursued in Te Ratonga Ahumana Taimahi | Employment Relations Authority, Employment Court or Human Rights Review Tribunal are extremely low and do not correlate to the extent of legal need.[[661]](#footnote-662) Her Honour suggested that the perception that such claims are difficult to prove may be one reason why few cases are taken. Other reasons she identified were the cost and complexity of the justice system, fear of publicity and the power imbalance between employers and employees.
  6. These difficulties are, however, faced by all those seeking to rely on the Human Rights Act’s employment protections and are **not specific to the new prohibited grounds we propose. Addressing these concerns is outside the scope of our review and would need to be dealt with through a general review of the Act.**

#### **Expense and burden of supporting transitioning employees**

* 1. Some submitters said it would be expensive and onerous for an employer to support an employee who is transitioning as they would have to allow the employee leave and find other staff to cover duties.
  2. Sections 22 and 23 do not, on their own, give certain employees special entitlements over and above others.[[662]](#footnote-663) It is only if an employer treats a transitioning employee less favourably than others who are in a comparable situation that the employee might have a potential claim in relation to leave entitlements.

#### **Concerns about client comfort**

* 1. **Some submitters expressed concern that employers would be forced to employ people who may make their customers feel uncomfortable through their gender presentation.**
  2. Some of the employment exceptions that we discuss later in this chapter (and in Chapter 13 relating to courses and counselling) anticipate situations in which customer comfort might be a legitimate reason to treat employees differently from others by reason of a prohibited ground. An example is the exception designed to preserve reasonable standards of privacy.[[663]](#footnote-664) Below, we recommend amendments to this exception to allow for differences in treatment based on the new ground we propose of gender identity.
  3. Submitters did not identify specific situations (outside those captured by relevant exceptions) in which there is good reason to treat customer comfort as relevant. We have identified none ourselves and therefore do not propose reform on this issue.

#### Teacher roles requiring supervision of students

* 1. Two submitters thought schools should be able to assign cisgender female teachers to supervise female students in appropriate circumstances.[[664]](#footnote-665) Resist Gender Education said schools routinely ensure there is a female staff member on trips in case girls have menstruation difficulties or need first aid. It was concerned that, if new grounds are added to section 21, this could mean a transgender woman might be assigned to fulfil this supervision role. It was concerned this could compromise the comfort and safety of female students. Speak Up for Women submitted that, when a female teacher is required to supervise female students, the teacher should not be a transgender woman.
  2. Schools will generally have a range of adults to supervise on school trips and camps, including teachers and parents. It seems unlikely to us that a situation would arise where a female student required highly personal assistance and the only person available to assist was a transgender female teacher.
  3. In this chapter, we recommend extending a number of employment exceptions to permit differences of treatment based on the ground of gender identity. It may be that, in some circumstances, a school could rely on the exception we discuss below relating to reasonable expectations of privacy to assign particular duties to a teacher of a particular sex or gender identity. An example might be where a teacher was assisting young children with dressing after a swimming lesson or where a disabled student required assistance with toileting.

## Employment exceptions

* 1. The subpart in Part 2 of the Human Rights Act that relates to employment matters contains eight exceptions that allow specifically for differences of treatment based on the prohibited ground of sex. We discuss five of those eight exceptions below as well as one other matching exception that relates to discrimination by qualifying bodies.
  2. There are three other exceptions in the employment matters subpart, which we discuss in other chapters. In Chapter 11, we discuss two exceptions relating to accommodation in employer-provided accommodation. In Chapter 13, we discuss an employment exception for counsellors on highly personal matters.
  3. A further exception relating to superannuation is in its own subpart but has some potential application to employment discrimination. We address that exception in Chapter 10.
  4. For reasons discussed in Chapter 8, this report does not include substantive discussion of exceptions that apply to all prohibited grounds. In the employment context, these are section 24 (which applies to crews of ships and aircraft) and section 34 (which applies to the armed forces).
  5. In the Issues Paper, we sought feedback on whether any of the sex exceptions we discuss in this chapter should be amended to reflect any new prohibited grounds of discrimination that are added to section 21 of the Human Rights Act as a result of this review. We explain the feedback we received and our recommendations for reform of each exception below.
  6. Two background matters provide relevant context for our analysis of employment exceptions below. First, the recommendations for reform set out in this chapter need to be understood against the backdrop of Chapter 8. It explained some significant issues that arise in relation to the wording of exceptions.
  7. Second, the Part 2 employment exceptions are all subject to section 35 of the Human Rights Act. The effect of section 35 is that an employer cannot rely on an exception if, without unreasonable disruption, they can address an issue by reassigning certain duties to another employee.[[665]](#footnote-666)

### Work performed outside New Zealand — section 26

* 1. Section 26 of the Human Rights Act states:

1. Nothing in section 22 shall prevent different treatment based on sex, religious or ethical belief, or age if the duties of the position in respect of which that treatment is accorded—
2. (a) are to be performed wholly or mainly outside New Zealand; and
   1. (b) are such that, because of the laws, customs, or practices of the country in which those duties are to be performed, they are ordinarily carried out only by a person who is of a particular sex or religious or ethical belief, or who is in a particular age group.
   2. We recommend that section 26 be extended to allow for differences of treatment based on gender identity. We do not recommend this exception allow for differences of treatment based on having an innate variation of sex characteristics.

#### History, scope and rationale

* 1. The purpose of this exception is to ensure that New Zealand businesses that operate overseas do not face contradictory legal or practical requirements. A New Zealand employer who is operating overseas is required to comply with all the host state’s laws. As a matter of practicality, it may also need to comply with some other local customs and practices. Section 26 ensures that employers in this situation can recruit staff in Aotearoa New Zealand without breaching New Zealand laws. It applies to four prohibited grounds of discrimination: sex, religious belief, ethical belief and age.[[666]](#footnote-667)
  2. Section 26 was modelled on two similar exceptions in the Human Rights Commission Act 1977 (1977 Act).[[667]](#footnote-668) In its submission on the Bill that became the Human Rights Act, the Ministry of External Relations and Trade recommended an exception for work performed overseas should not be retained, saying it could not “be justified in terms of our international obligations”.[[668]](#footnote-669)
  3. This advice was not followed. The Department of Justice’s report on the Bill noted: “while not wishing to expand the exception, we would be reluctant to see something that seems to be a matter of commonsense disappear entirely”.[[669]](#footnote-670) The new Act therefore included the exception but did not extend it to any new prohibited grounds.
  4. The wording of the 1993 exception is, however, slightly broader than its precursors. First, the 1993 exception applies in relation to the “laws, customs, or practices” of the other country. By contrast, one of the exceptions in the 1977 Act applied only in relation to “customs”[[670]](#footnote-671) and the other only in relation to “law”.[[671]](#footnote-672)
  5. Second, the 1993 exception requires duties to be “ordinarily carried out” by a person with a particular characteristic (because of laws, customs or practices). By contrast, the earlier exceptions required an employer to show that the duties could only “be carried out effectively” by a person with particular characteristics.[[672]](#footnote-673)
  6. We have not found any explanation in the legislative history for these wording changes. Given the Department of Justice’s stated intention not to expand the exception, it is possible the effect of these language changes was not appreciated.

#### Options for reform

* 1. In relation to each of the two proposed new grounds, we considered two main options for reform of section 26. The first is to extend the exception to permit employers to treat employees and prospective employees differently by reason of that ground if other requirements of the section are met. This would clarify, for example, that it is not in breach of section 22 to refuse to assign an employee to a role that is to be performed wholly or mainly overseas based on their gender identity or having an innate variation of sex characteristics. It would also be lawful to do other acts prohibited by section 22 such as refusing to hire someone altogether (although an employer could only do that if it would cause unreasonable disruption to reassign the affected duties to another employee).[[673]](#footnote-674)
  2. For section 26 to apply, the employer must be able to point to a law, custom or practice of the host country that means the position would ordinarily only be carried out by someone with a particular gender identity or with particular sex characteristics. Hypothetically, this might include laws, customs or practices that require that a person:
     + 1. be cisgender or be a cisgender male or be a cisgender female;
       2. be transgender or be a transgender male or be a transgender female;
       3. be male or female rather than a non-binary gender; or
       4. not have an innate variation of sex characteristics.[[674]](#footnote-675)
  3. The alternative option is to ensure that section 26 does not allow for differences of treatment by reason of either or both new grounds. This would involve an amendment to clarify that a person needs to be treated in accordance with their gender identity for the purposes of the sex exception in section 26.[[675]](#footnote-676) As we explained in Chapter 8, no amendment is required to ensure that section 26 does not permit differences of treatment based on having an innate variation of sex characteristics. This is an issue that is separate and distinct from a person’s sex.

#### Analysis and conclusions

* 1. We did not receive many submissions on this exception, and many of those who gave feedback were unsure about whether it should be extended. Of those that did express a view, most supported extending the exception to new grounds.
  2. Speak Up for Women, Te Pūkenga Here Tikanga Mahi | Public Service Association and the New Zealand Law Society supported extending this exception to new grounds.[[676]](#footnote-677) The Rainbow Support Collective and OutLine Aotearoa also supported extending the exception but suggested that a reasonableness requirement should be added.

##### The exception should be extended to gender identity

* 1. While we recommend extending this exception to the new ground we propose of gender identity, we see the arguments as quite finely balanced.
  2. Some reasons why we considered not recommending this exception be extended to the ground of gender identity are as follows. First, section 26 sets a low threshold. As we explained above, it allows different treatment where, because of “practices” (as well as “laws” and “customs”), duties are “ordinarily carried out” by a person with a particular characteristic. This wording arguably goes well beyond what is needed to ensure that New Zealand employers can operate effectively in overseas jurisdictions and comply with foreign laws.
  3. Some submitters expressed concern about how this broad wording might apply to people who are transgender or non-binary or who have an innate variation of sex characteristics. In practice, most jobs are likely to be “ordinarily carried out” by people outside of these groups, simply because these are small minorities.
  4. Second, we have not identified any overseas laws, customs or practices that restrict jobs based on gender identity or gender expression other than a 2025 ban that prevents people with gender dysphoria or “shifting pronoun usage” from serving in the United States military.[[677]](#footnote-678) That ban will not engage the exception as positions in the United States military are only open to United States citizens and permanent residents.
  5. Although we sought feedback on overseas laws, customs or practices in the Issues Paper, we did not receive any relevant responses from submitters. Nor did we receive other feedback from submitters with experience in employing people to work overseas.
  6. Third, when sexual orientation was added as a ground of discrimination in 1993, the exception was not extended to this ground even though many overseas countries had laws criminalising sex acts between men at the time. In the years since, New Zealand employers have continued to operate in overseas jurisdictions without an exception of this kind for sexual orientation.
  7. Fourth, the exception has such limited application that, as noted above, the Ministry of External Relations and Trade recommended in 1993 that it be removed altogether.
  8. Although we consider it finely balanced, we have concluded the reasons for extending this exception to a new ground of gender identity are stronger. First, as several submitters mentioned, extending the exception to gender identity is consistent with the underlying rationale of allowing New Zealand businesses to operate overseas without being caught by contradictory legal requirements.
  9. While we do not know of any overseas laws that restrict jobs based on a person’s gender identity or gender expression, we are aware of many countries that have roles limited to a particular sex.[[678]](#footnote-679) We think that it is likely that laws that restrict roles to a particular sex might, in many jurisdictions, be applied in practice to restrict people who are transgender from filling a role that aligns with their gender identity.
  10. We also know of overseas laws that criminalise gender identity or gender expression more generally. For example, some countries have laws that make it illegal for men to “pose” as women and vice versa.[[679]](#footnote-680) We understand laws like this are used in practice to criminalise the gender expression of transgender and gender-diverse people.[[680]](#footnote-681) We are also aware that some countries will not allow people to enter if their passport has an X in its gender field (which indicates “gender diverse”).[[681]](#footnote-682) While these laws apply in daily life rather than being related to specific jobs, it is possible that, because of such laws, duties of particular jobs are ordinarily carried out by a person who is of a particular gender identity.
  11. While not directly relevant, the 2025 ban on people who have gender dysphoria from serving in the United States military also suggests the possibility of further laws banning people who are transgender from certain overseas roles in the future.
  12. Second, some submitters suggested that different treatment based on gender identity could be justified by potential risks to an employee’s safety if they were deployed to a country where local laws or customs would put them in danger. Submitters said it could be dangerous for people who are transgender or non-binary to travel to some countries.
  13. Employee safety is not the primary objective of section 26. However, we think that it is a supporting reason to extend the exception. Although it is possible that employers could rely on their obligations under the Health and Safety at Work Act 2015 to justify differences of treatment that are motivated by safety concerns of this kind,[[682]](#footnote-683) the question of whether these obligations apply to work carried out overseas is largely untested.[[683]](#footnote-684) Even if they do, we cannot be confident that an employer could rely on their obligations under this legislation to decline to deploy an employee to a country where the risks to their safety arise in daily life rather than in the workplace.
  14. Third, although there are some parallels with the ground of sexual orientation (which is not covered by the exception), in some cases a person’s sexual orientation will be largely internal to them and not necessarily evident to others. While not always evident, a person’s gender identity (and, particularly, their gender expression) may more often be apparent.[[684]](#footnote-685)
  15. Finally, we agree that the wording of this exception appears broader than necessary to support the ability of New Zealand employers to work overseas. However, the circumstances in which the exception applies are nevertheless very confined. Extending the exception is unlikely to have a significant impact in practice on the equality, dignity and autonomy of people who are transgender or non-binary.

##### The exception should not be extended to having an innate variation of sex characteristics

* 1. We do not recommend extending the exception in section 26 to the new ground we propose of having an innate variation of sex characteristics.
  2. Although some submitters also raised safety concerns in relation to people with innate variations of sex characteristics, we have not identified any laws, practices or customs overseas that could conceivably restrict the ability of New Zealand businesses to recruit a person who has an innate variation of sex characteristics (unless that person is also transgender or non-binary). We do not think that there is an evidential basis to extend the exception to this proposed new ground.

#### Recommendation and wording

1. Section 26 of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new ground of gender identity.
   1. For reasons we outlined above, we recommend that section 26 of the Human Rights Act be amended to allow differences of treatment based on the new ground of gender identity. One way to achieve the policy intent outlined in this recommendation would be simply to add the following (underlined) words:

Nothing in section 22 shall prevent different treatment based on sex, gender identity, religious or ethical belief, or age if the duties of the position in respect of which that treatment is accorded—

* 1. (a) are to be performed wholly or mainly outside New Zealand; and
  2. (b) are such that, because of the laws, customs, or practices of the country in which those duties are to be performed, they are ordinarily carried out only by a person who is of a particular sex, gender identity or religious or ethical belief, or who is in a particular age group.
  3. Because we have proposed the definition of gender identity include the relationship between a person’s gender identity and sex assigned at birth,[[685]](#footnote-686) this will allow for situations in which the laws, customs or practices of the country require a person to be cisgender.
  4. No amendment is required to ensure that section 26 does not permit differences of treatment based on having an innate variation of sex characteristics.

### Authenticity/genuine occupational qualification — section 27(1)

* 1. Section 27(1) of the Human Rights Act states:

1. Nothing in section 22 shall prevent 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 position or employment.
   1. We recommend that section 27(1) be extended to allow for differences of treatment based on both the new prohibited grounds of discrimination we propose.

#### History, scope and rationale

* 1. Section 27(1) is modelled on a provision in the 1977 Act, which allowed preferential treatment where:[[686]](#footnote-687)

1. For reasons of authenticity, as in theatrical performances, posing for artists, or being a model for the display of clothes, sex is a bona fide occupational qualification for the position or employment.
   1. The current exception contains two elements. Sex must be a “genuine occupational qualification” and that must be for reasons of “authenticity”. Neither of these terms are defined.
   2. Case law provides some assistance on the meaning of “genuine occupational qualification” (though not in relation to section 27(1) itself). In *Air New Zealand Ltd v McAlister*,Te Kōti Mana Nui | Supreme Court said an international rule about the retirement age for airline pilots was a genuine occupational qualification because it “very substantially affected” the plaintiff’s ability to perform his duties.[[687]](#footnote-688) In *Greenslade v Commissioner of Police*,the Human Rights Review Tribunal equated “qualified” (in section 22 of the Human Rights Act) with having a genuine occupational qualification and then said this meant a qualification or capability that is “reasonably necessary for the particular job, given the environment in which that job is to be performed”.[[688]](#footnote-689)
   3. The term ‘authenticity’ is not used elsewhere in the Human Rights Act, and we have found no case law to assist. However, the exception in the 1977 Act listed examples of relevant roles: “in theatrical performances, posing for artists, or being a model for the display of clothes”. Although the 1993 provision omits this language, the legislative history indicates that it, too, was intended to apply to roles such as acting and modelling.[[689]](#footnote-690) Jobs of this kind engage issues of authenticity because a person may need to look and sound a certain way to fulfil the vision of the director or casting agent. For example, they may have a particular character in mind or want to convey a particular message.
   4. We are aware of two occasions on which the Human Rights Commission expressed the view that complaints about massage parlours advertising for “ladies” for positions that involved performing nude, erotic massage would not be in breach of the 1977 Act.[[690]](#footnote-691) The Advertising Standards Complaints Board similarly refused to uphold a complaint about an advertisement seeking a “model – female (mature)” to model a bikini.[[691]](#footnote-692)
   5. In the Issues Paper, we considered whether the issue of authenticity is broader than how someone looks and sounds. For example, we considered whether the exception might be engaged if an actor or model is well known, making it harder for them to pass to a public audience as having particular attributes. An even broader approach to authenticity might see it as relating to a person’s life experiences. An example might be an organisation that advocates for women in medicine and wants to have a female doctor as its director so that their advocacy is seen as coming from authentic life experience.
   6. We do not think that these broader meanings of authenticity are within the intended scope of section 27(1). They would go beyond what was indicated in the legislative history. Further, we think it is significant that the exception only applies to two prohibited grounds: sex and age. It does not apply to characteristics that do not have a direct connection with visual appearance such as political opinion and sexual orientation.

#### Options for reform

* 1. In relation to each of the two proposed new grounds, we considered two main options for reform of section 27(1). The first is to extend the exception to permit employers to treat employees and prospective employees differently by reason of that ground if other requirements of the section are met. This would clarify, for example, that it is not in breach of section 22 to refuse to assign an employee to a particular role if they do not look or sound right for the role by reason of their gender identity or having an innate variation of sex characteristics. It would also be lawful to do other acts prohibited by section 22 such as refusing to hire someone altogether if it would cause unreasonable disruption to reassign the particular duties to another employee.[[692]](#footnote-693)
  2. The alternative is to ensure that section 27(1) does not allow for differences of treatment by reason of either or both new grounds. This would involve an amendment to clarify that a person needs to be treated in accordance with their gender identity for the purposes of the sex exception in section 27(1).[[693]](#footnote-694) For the reasons we discussed in Chapter 8, no amendment is required to ensure that section 27(1) does not permit differences of treatment based on having an innate variation of sex characteristics. This is an issue that is separate and distinct from a person’s sex.

#### Analysis and conclusions

* 1. We recommend extending section 27(1) to the grounds of gender identity and having an innate variation of sex characteristics.
  2. As we have already explained, this exception is engaged where a person needs to look or sound a certain way for a role (for example, in acting or modelling). The assumption underlying section 27(1) is that sometimes the way a person of a particular sex or age looks or sounds may not meet the vision of a director, casting agent or similar.
  3. Because the exception is about how a person looks or sounds, a person’s physical characteristics are relevant. These include those characteristics typically associated with male and female bodies such as body composition, facial structure and voice pitch. Indeed, we think the main purpose of the current sex exception is to allow distinctions to be drawn based on physical characteristics of this kind.
  4. For this reason, we think this exception needs to be extended to both new grounds. A person’s gender identity (which includes their gender expression) and their sex characteristics can be relevant, in certain circumstances, to whether a person looks and sounds right for a particular role.
  5. Some submitters were concerned that, if this exception is extended, transgender actors might be pigeonholed into playing transgender characters or that people could claim that being cisgender is a requirement for a role without a good reason. Some submitters also told us that the concept of authenticity is problematic in its application to people who are transgender or non-binary. For example, one submitter questioned why a transgender woman or non-binary person is not “authentic” for a female modelling role provided they have the relevant physical characteristics. Another said the concept of authenticity suggests that people who are transgender are not authentic men or women.
  6. We think these concerns are mitigated by the limiting language of section 27(1). The exception would only apply when needed for reasons of “authenticity” and where a person’s gender identity, gender expression or sex characteristics are a genuine occupational qualification. Taking guidance from *McAlister* (discussed above), the exception will only apply if these characteristics very substantially affect the person’s ability to fulfil the role (in terms of the way they look and sound).[[694]](#footnote-695)
  7. If a person looks and sounds right for a role, the fact they are transgender or non-binary or have an innate variation of sex characteristics is not relevant. Physical characteristics that are not visible when the person is performing the role are irrelevant. We imagine, for example, that a person’s genitalia would only rarely be relevant.

#### Some other feedback we received

* 1. Some submitters said transgender actors should be prioritised for roles portraying transgender characters as they can portray these characters authentically. Some thought that extending the exception to new grounds would allow this.
  2. For reasons explained above, we do not think that section 27(1) allows for distinctions to be drawn based on authenticity of experience (as opposed to how someone looks and sounds). Whether this is an appropriate rationale for a further Part 2 exception is better considered as part of a broader review of the Human Rights Act.
  3. Many submitters raised concerns about section 27(1) more generally, including about lack of clarity as to its scope. Some specific concerns we heard were as follows:
     + 1. The concept of authenticity should not be relevant to acting roles given acting involves pretending to be someone you are not.
       2. The terms ‘authenticity’ and ‘genuine occupational qualification’ should be defined. For example, the New Zealand Law Society said the section could be amended to clarify that it applies in respect of “authenticity (such as in acting or modelling roles)”.
       3. The exception should only allow distinctions to be drawn on the basis of specific physical traits such as “tall build” or “masculine facial structure”.
  4. These are issues that are more appropriately considered as part of a wider review of the Human Rights Act.

#### Recommendation and wording

1. Section 27(1) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.

* 1. For reasons we outlined above, we recommend that section 27(1) of the Human Rights Act be amended to allow differences of treatment based on the two new grounds of gender identity and having an innate variation of sex characteristics. One way to achieve the policy intent outlined in our recommendation would be add the following (underlined) words:

1. Nothing in section 22 shall prevent different treatment based on sex, gender identity, having an innate variation of sex characteristics, or age where, for reasons of authenticity, being of a particular sex or gender identity, having particular sex characteristics, or being of a particular age is a genuine occupational qualification for the position or employment.

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

* 1. Section 27(2) of the Human Rights Act states:

1. Nothing in section 22 shall prevent different treatment based on sex, religious or ethical belief, disability, age, political opinion, or sexual orientation where the position is one of domestic employment in a private household.
   1. We recommend that section 27(2) be extended to allow for differences of treatment based on each of the two new prohibited grounds of discrimination we propose.

#### History, scope and rationale

* 1. Section 27(2) is modelled on similar exceptions in the 1977 Act that applied to the prohibited grounds of sex and age.[[695]](#footnote-696) It applies in the narrow circumstance of “domestic employment in a private household”. The term ‘domestic’ is not defined in the Human Rights Act but dictionary definitions suggest it relates to the home, house or family. Domestic employment in a private household could include work as a nanny, a cleaner or a caregiver for a disabled person. Work that takes place physically in the home but is not domestic (for example, employment in a home office) would likely be out of scope of section 27(2).[[696]](#footnote-697)
  2. As long as the work qualifies as “domestic employment in a private household”, the exception in section 27(2) is unqualified. The person’s sex does not need to be relevant to the role, nor does the employer need to have a good reason for refusing to employ a person on that basis. Further, section 27(2) applies to several other prohibited grounds: religious belief, ethical belief, disability, age, political opinion and sexual orientation.
  3. We think the rationale for section 27(2) is to designate a private sphere in which the Human Rights Act does not apply. As we discussed in Chapter 8, private people and organisations generally only have obligations under the Human Rights Act when they take part in public-facing activities (such as selling or renting out a house or supplying goods, services or facilities to the public). This reflects a principle underlying the Act that anti-discrimination law should not, in general, regulate people’s private lives.
  4. Acting as an employer is one of the public-facing activities regulated by the Human Rights Act. However, a person hired for a domestic role in a private household might be required to enter the employer’s bedroom, wash the employer’s clothes, help with their personal care or look after their children. Perhaps for reasons of this kind, section 27(2) embodies a policy choice to treat domestic employment in a private household as falling on the private side of the public/private divide.[[697]](#footnote-698)

#### Options for reform

* 1. In relation to each of the two proposed new grounds, we considered two main options for reform of section 27(2). The first is to extend the exception to permit employers to treat employees and prospective employees differently by reason of that ground if other requirements of the section are met. This would clarify, for example, that it is not in breach of section 22 to refuse to hire someone for domestic employment in a private household by reason of their gender identity or having an innate variation of sex characteristics. It would also be lawful to do other acts prohibited by section 22 on this basis such as terminating a person’s employment or offering them less favourable terms than other employees who have similar capabilities and are doing similar work.[[698]](#footnote-699)
  2. The alternative is to ensure that section 27(2) does not allow for differences of treatment by reason of either or both new grounds. This would involve an amendment to clarify that a person needs to be treated in accordance with their gender identity for the purposes of the sex exception in section 27(2).[[699]](#footnote-700) For the reasons we discussed in Chapter 8, no amendment is required to ensure that section 27(2) does not permit differences of treatment based on having an innate variation of sex characteristics. This is an issue that is separate and distinct from a person’s sex.

#### Analysis and conclusions

* 1. We recommend extending section 27(2) to both gender identity and having an innate variation of sex characteristics.
  2. This is consistent with the rationale for section 27(2) set out above. To engage this exception, a trait does not need to be relevant to a person’s ability to perform the work. Rather, this exception prioritises a resident’s freedom of choice. That explains why this exception allows different treatment on a wide range of grounds, including grounds such as sexual orientation and political opinion that are highly unlikely to be relevant to a person’s ability to perform a domestic role. When the Department of Justice reported on the Human Rights Bill in 1993, its response to a submission that the exception should not apply to the prohibited ground of disability was: “This is not practical. The idea behind [the clause] is that some preference should be given to the privacy of a person’s home.”[[700]](#footnote-701)
  3. Section 27(2) represents a conscious policy decision about how to balance the core values underlying the Human Rights Act. It prioritises the autonomy of domestic employers over the equality rights of prospective employees. We acknowledge that, if a person misses out on a job because of personal traits that are irrelevant to their ability to perform the role, that has a negative impact on their autonomy, dignity and feelings of self-worth. However, in relation to the very specific type of employment governed by this exception, Parliament has decided to prioritise the freedom of choice of individuals in their own homes. It would not be appropriate for us to reconsider that decision in this review.
  4. Many submitters supported extending this exception to new grounds. Most of the organisations who submitted on this question agreed it would be appropriate to extend the exception to new grounds.[[701]](#footnote-702)
  5. Some submitters thought extending this exception to new grounds would uphold the freedom of choice, privacy and comfort of householders and would be consistent with the purpose of the exception. Some submitters thought the exception might be particularly important for people who are vulnerable, including those who are elderly or disabled.[[702]](#footnote-703)
  6. A small number of submitters who favoured extending the exception mentioned safety concerns. Some were concerned about the safety of residents, and others were concerned about the safety of prospective transgender employees who might end up in hostile work situations. A small number of submitters thought extending this exception would support freedom of religion and belief.
  7. Some submitters thought a reason to extend this exception was that it would allow people who are transgender or non-binary or who have an innate variation of sex characteristics to employ others with shared lived experience in their home.[[703]](#footnote-704)

#### Some other feedback we received

* 1. Although most submitters supported extending this exception to new grounds, some did not.[[704]](#footnote-705) A key theme we heard from those submitters was that characteristics such as sex, sex assigned at birth, gender identity and variations of sex characteristics are not generally relevant to a person’s ability to perform domestic work in a private household.
  2. We agree. However, the purpose of this exception is not to endorse the moral legitimacy of discrimination on these grounds. Rather, it is to prioritise the resident’s freedom of choice in this situation. Liberal democracies generally recognise an area of liberty within which people are entitled to act on their individual preferences in relation to matters of concern to them, even including “a moral right to do what is morally wrong”.[[705]](#footnote-706)
  3. Some submitters were concerned that extending section 27(2) to new grounds would result in people having to disclose highly personal information during job interviews. We agree that extending this exception has privacy implications. It would provide a legitimate reason for a domestic employer to ask applicants or employees questions relating to their gender identity or sex characteristics. However, as we discussed in Chapter 8, personal information can only be collected by an employer if it is both collected for a lawful purpose and necessary for that purpose.[[706]](#footnote-707)
  4. In the specific context of section 27(2), we do not think the privacy implications of reform overcome our reasons for recommending this exception be extended. The impact of section 27(2) on prospective employees is limited as the exception only applies to a very specific type of employment. Further, on its current wording, section 27(2) already allows people employing others in their home to question applicants and employees about quite personal matters such as their sex, religious beliefs, health status, sexual orientation and political opinions. An applicant or employee asked a personal question can always refuse to answer, although we acknowledge this might result in the loss of an employment opportunity.[[707]](#footnote-708)
  5. One submitter thought that section 27(2) should be extended to gender expression but not to any other new grounds. This would mean that an employer could discriminate based on a person’s visible expression but could not ask intrusive questions about a person’s gender identity or whether they have an innate variation of sex characteristics.
  6. Although this would be a neat way around privacy concerns, it is not consistent with the current scope of section 27(2). The exception already applies to characteristics that are not visible to employers, including sexual orientation and political opinion. Further, we have recommended protecting gender expression as a component of gender identity rather than as a freestanding ground. This is, in part, because the boundary between gender identity discrimination and gender expression discrimination is unclear.
  7. The Public Service Association was concerned that, as the government funds some home support services, extending this exception would license the state to fund discriminatory employment practices. A decision by the government to fund a third-party service provider would fall under Part 1A of the Human Rights Act, not Part 2. It is possible, in some circumstances, that a third-party service provider might also be covered by Part 1A. As we explained in Chapter 8, this would be the case if it is exercising a public function.
  8. Assuming the third-party service provider was covered by Part 2 of the Human Rights Act rather than Part 1A, it is not clear to us whether it would be able to rely on the exception in section 27(2). Given the underlying intent of the exception is to protect the autonomy of residents, it might be possible to argue that the exception does not apply in these circumstances. However, there is no case law on this point.[[708]](#footnote-709)
  9. Whatever the correct legal position, there seems no reason to treat the new grounds of discrimination any differently in this respect than the current ones.
  10. Some submitters thought that section 27(2) should be reconsidered entirely, that it is too broad, that the meaning of “domestic employment” should be clarified or that the exception should be extended to all prohibited grounds of discrimination. Reforms of this kind fall outside the scope of this review although it would be open to the government to address these issues on a broader review of the Human Rights Act.

#### Recommendation and wording

1. Section 27(2) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.

* 1. For reasons we outlined above, we recommend that section 27(2) of the Human Rights Act be amended to allow differences of treatment based on both the new grounds we have proposed. One way to achieve the policy intent outlined in our recommendation would be to add the following (underlined) words:

Nothing in section 22 shall prevent different treatment based on sex, gender identity, having an innate variation of sex characteristics, religious or ethical belief, disability, age, political opinion, or sexual orientation where the position is one of domestic employment in a private household.

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

* 1. Section 27(3)(a) of the Human Rights Act states:

1. (3) Nothing in section 22 shall prevent different treatment based on sex where—
   * 1. (a) the position needs to be held by one sex to preserve reasonable standards of privacy …
   1. We recommend that section 27(3)(a) should be amended to provide an exception where a position needs to be held by a person of a particular gender identity to preserve reasonable standards of privacy. We do not recommend this exception allow for differences of treatment based on having an innate variation of sex characteristics.

#### History, scope and rationale

* 1. Section 27(3)(a) is based on an exception in the 1977 Act that provided:[[709]](#footnote-710)

1. In the case of a position such as that of attendant in a public lavatory or as a person responsible for the fitting of clothes to customers or others, the position needs to be held by one sex to preserve reasonable standards of privacy.
   1. The exception 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.[[710]](#footnote-711) It is confined to situations where a position “needs to be held” by one sex to preserve “reasonable standards of privacy”. Therefore, it likely only applies where an employee would be interacting with someone who is only partially clothed or would need to touch private areas of the person’s body. Examples we have thought of include:
      * 1. intimate searches such as those performed by a prison guard or Customs agent;[[711]](#footnote-712)
        2. beauty therapy services such as massage or intimate waxing;
        3. supervision of a women-only swimming session;
        4. a sonographer carrying out internal pelvic scans;
        5. personal care of a disabled or elderly person such as helping with showering and dressing; and
        6. fitting bras to customers in a lingerie store.
   2. In circumstances of this kind, the exception allows employers to draw distinctions based on an employee or prospective employee’s sex to cater to the need and comfort of consumers or service users.

#### Options for reform

* 1. In relation to each of the two proposed new grounds, we considered two main options for reform of section 27(3)(a). The first is to extend the exception to clarify that it would not breach the employment protections in section 22 for an employer to refuse to assign one of their employees to a particular role if the position needs to be held by a person of a particular gender identity, or by a person who does not have an innate variation of sex characteristics, to preserve reasonable standards of privacy. This could include, for example, an employer specifying that a person needs to be male, needs to be female, needs to be transgender or needs to be cisgender.
  2. In relation to either ground, an employer would only be permitted to refuse to hire someone altogether if it would cause the employer unreasonable disruption for them to reassign the particular duties to another employee.[[712]](#footnote-713) For example, the (now disbanded) complaints division of the Human Rights Commission upheld a complaint under the comparable provision in the 1977 Act involving a male nurse who had been told he was unsuitable for a position in an aged care facility. The employer told the Human Rights Commission that the residents would not accept a male caregiver and that many of the duties such as toileting were of a private nature. The Human Rights Commission accepted that the owner of the aged care facility needed to be aware of residents’ sensitivities but, on the facts of the case, did not consider this was a good enough reason. The Human Rights Commission observed that most of the duties did not raise privacy issues and the rest could be managed through rostering.[[713]](#footnote-714)
  3. The alternative reform option is to clarify that section 27(3)(a) does not apply to one or both new grounds. This would mean an employer who was relying on section 27(3)(a) to limit a position to men or to women could not rely on the exception to exclude a person who is transgender from a position that aligns with their gender identity, or exclude a person because they have an innate variation of sex characteristics.[[714]](#footnote-715)

#### Analysis and conclusions

* 1. The feedback we received on this exception was fairly evenly divided between those who supported extending the exception to new grounds and those who opposed extending it.

##### The exception should be extended to gender identity

* 1. We recommend that section 27 should provide an exception where a position needs to be held by a person of a particular gender identity to preserve reasonable standards of privacy. We think this is consistent with the underlying rationale of section 27(3)(a) which, as noted above, relates to social norms about bodily privacy and whether it is acceptable to expose your body to people of a different sex.
  2. As we explained in Chapter 8, control over access to one’s naked body is a core aspect of the right to privacy. Many submitters referred to privacy and autonomy of customers or service users as important considerations for this exception. These included the New Zealand Law Society, the Public Service Association and Save Women’s Sports Australasia. Some submitters said privacy and autonomy may be especially important for people who are vulnerable, have a history of trauma or have safety concerns.
  3. As we also explained in Chapter 8, working out the significance of this underlying rationale for the new ground of gender identity is not straightforward as the way social norms around nudity apply to matters of gender identity is in a state of transition. However, some submitters considered that consumers may be more comfortable interacting with a person of the same ‘biological sex’ as them when they are unclothed or otherwise vulnerable. For example, Feminist Older Women Lobbyists submitted that there is a biological basis for women’s right to single-sex spaces and services for reasons of privacy, including in places where women undress. Some submitters were particularly concerned about female patients being able to require a provider of the same biological sex as them where intimate procedures are being performed.
  4. We also heard from some submitters that having a service provider who is transgender may be important to some clients or service users. This included the Public Service Association, which said some positions may require lived experience, including transgender experience. One submitter who described themselves as a “non-binary trans person” said they would be more comfortable with a non-binary person (first choice) or a transgender person of any gender in a sensitive medical or personal situation. However, we also heard during consultation that funding constraints mean it is unrealistic for transgender people to have dedicated services provided for them.
  5. A small number of submitters told us that social norms about covering your body around people of another sex no longer exist in contemporary Aotearoa New Zealand. As we explained in Chapter 8, we do not think this is correct, although, we accept some people feel less concerned about bodily privacy than others.
  6. Some submitters considered that, while clients and service users should be able to choose who they want to provide them with private services, this should not justify discrimination by an employer. This included Community Law, which was concerned that, in using such an exception, an employer would be making assumptions about customer levels of comfort with gender diversity.
  7. Some submitters were concerned that extending this exception to new grounds would perpetuate discriminatory attitudes towards people who are transgender or non-binary. Rainbow Wellington said extending this exception would play into the belief that transgender women are just men who change their sex marker on their birth certificate so they can legally enter female spaces. The Rotorua Chamber of Pride said it is inherently problematic to imply that people who are transgender or non-binary are unsafe or will make other people feel uncomfortable.
  8. We acknowledge that providing an exception of this kind for gender identity may have significant implications for some people who are transgender or non-binary. It may mean being unable to carry out some duties that fall within the exception or even missing out on an employment position.[[715]](#footnote-716) These consequences may cause distress, embarrassment or loss of job satisfaction.
  9. Nevertheless, on balance, we have concluded that an exception of this kind should be provided. Given the importance of bodily privacy and the range of views about how social norms around nudity relate to gender, we think that it is appropriate for the Human Rights Act to leave discretion to employers, as experts in a particular field, to invoke an exception of this kind in relation to gender identity.
  10. To do so, employers would need to comply with the limiting language in section 27(3)(a). The exception would only apply if the position *needs* to be held by a person of a particular gender identity to preserve reasonable standards of privacy. What is necessary and reasonable is context-specific and may change over time. We doubt, however, that a broad and unjustified assumption about client comfort would suffice. We also think a person’s gender expression, such as the way they dress, would not generally be relevant.
  11. An employer would also need to comply with section 35. As noted earlier, it provides, in effect, that an employer cannot rely on an employment exception if, without unreasonable disruption, it could address the situation by reassigning certain duties to another employee.
  12. Some submitters (including the Professional Association for Transgender Health Aotearoa) raised concerns about people having to disclose their sex or gender to employers or clients. We agree that, if the exception is extended, it may allow an employer to ask about an applicant or employee’s gender identity. However, this would only be the case where the position involves duties that engage reasonable standards of privacy and where the position needs to be held by a person of a particular gender identity. Where that information is genuinely relevant to a position, we do not think the privacy concerns outweigh the reasons we have set out for extending the exception.[[716]](#footnote-717)
  13. Even if an employer is entitled to ask about an applicant or employee’s gender identity, this would not oblige the applicant or employee to disclose the information. We acknowledge, however, that declining to provide the information, if relevant, could mean they miss out on a job opportunity.[[717]](#footnote-718)

##### The exception should not be extended to having an innate variation of sex characteristics

* 1. We do not think this exception should allow for differences of treatment based on the new prohibited ground of having an innate variation of sex characteristics. We think it is unlikely (and no submitter suggested) that refusing to employ a person because they have an innate variation of sex characteristics could ever be necessary to preserve reasonable standards of privacy. We have not heard anything to suggest that social norms about keeping men and women separate when unclothed are engaged differently when a person has an innate variation of sex characteristics.

#### Recommendation and wording

1. Section 27(3)(a) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new ground of gender identity.
   1. For reasons outlined above, we recommend that section 27(3)(a) of the Human Rights Act should be amended to allow differences of treatment based on the new ground of gender identity.
   2. As the introductory text in section 27(3) applies to two exceptions (in section 27(3)(a) and (b)), it may be necessary to separate them out into their own subsections (say, subsections (3) and (3A)).
   3. One way to achieve the policy intent outlined in our recommendation above might be for the new subsection replacing section 27(3)(a) to add to the current wording of section 27(3)(a) the following (underlined) words:
2. Nothing in section 22 shall prevent different treatment based on sex or gender identity where the position needs to be held by a person of one sex or a person of a particular gender identity to preserve reasonable standards of privacy.
   1. No amendment is required to ensure that the ‘reasonable standards of privacy’ exception does not permit differences of treatment based on having an innate variation of sex characteristics.

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

* 1. Section 28(1) of the Human Rights Act states:

1. Nothing in section 22 shall prevent different treatment based on sex where the position is for the purposes of an organised religion and is limited to one sex to comply with the doctrines or rules or established customs of the religion.
   1. There is a related exception in section 39(1) that applies to qualifying bodies.[[718]](#footnote-719) It states:
2. Nothing in section 38 shall apply where the authorisation or qualification is needed for, or facilitates engagement in, a profession or calling for the purposes of an organised religion and is limited to one sex or to persons of that religious belief so as to comply with doctrines or rules or established customs of that religion.
   1. In the Issues Paper, we said we would like to understand better whether there are organised religions in Aotearoa New Zealand that exclude people from religious office based on their gender identity, gender expression or sex characteristics.
   2. Although we sought feedback on whether these exceptions should be amended, we also said we doubted it would be appropriate in this review for us to revisit the balance reached in sections 28(1) and 39(1) between freedom from discrimination and freedom of religion. For that reason, we tended towards the view that these exceptions would need to cover any new grounds we proposed.
   3. The feedback we received has not altered this view. We recommend that the exceptions in sections 28(1) and 39(1) be extended to both new grounds.

#### History, scope and rationale

* 1. The likely rationale for these two exceptions is to protect freedom of religion. Freedom of religion is guaranteed by the International Covenant on Civil and Political Rights and the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) and includes the right to manifest one’s religion or belief in worship, observance, practice or teaching, either individually or in community with others.[[719]](#footnote-720)
  2. In a decision relating to section 39(1), the Human Rights Review Tribunal said religious liberty is a collective as well as an individual right and includes the right of religious communities to “determine and administer their own internal religious affairs without interference from the state”.[[720]](#footnote-721) The Tribunal described the purpose of section 39(1) as being “to preserve the institutional autonomy of organised religions in relation to their decisions concerning the appointment of clergy and ministers”.[[721]](#footnote-722) It also commented that one of the “very core aspects” of the autonomy of a religious association is the right to choose its own ministers and leaders.[[722]](#footnote-723) Sections 28(1) and 39(1) reflect a legislative intention that, in these circumstances, freedom from discrimination must give way to the right of religious organisations to choose their own ministers and leaders.
  3. These exceptions are, however, narrow. They only allow different treatment where the position, profession or calling is for the purposes of an organised religion *and* is limited to one sex to comply with the doctrines, rules or established customs of the religion. This is narrower in scope than the precursor provisions in the 1977 Act. The 1977 exceptions authorised differences of treatment either “to comply with the doctrines or rules of that religion” or “to avoid offending the religious susceptibilities of its adherents”.[[723]](#footnote-724)
  4. If an organised religion that wished to rely on one of these exceptions was challenged, the onus would be on the religion to prove that the position, profession or calling is limited to one sex to comply with its doctrines, rules or established customs.[[724]](#footnote-725) A tribunal or court is unlikely to second guess a religion’s rules, doctrines or established customs.[[725]](#footnote-726) Nevertheless, the court or tribunal would likely require evidence that the difference in treatment was grounded in them.[[726]](#footnote-727)
  5. The scope of the exception may also be limited by the fact that, in some circumstances, religious leaders may not be considered employees for the purposes of section 22. For example, in *Kapiarumala v New Zealand Catholic Bishops Conference*,the Human Rights Review Tribunal held that an ordained priest was not in any form of employment relationship that would engage the section 22 protections.[[727]](#footnote-728) The Tribunal considered that, based on canon law (the rules that govern the church), Catholic priests in New Zealand are not ordinarily employees.[[728]](#footnote-729)

#### Options for reform

* 1. In relation to each of the two proposed new grounds, we considered two main options for reform of sections 28(1) and 39(1). The first is to extend these exceptions to permit differences of treatment that are based on one or both new prohibited grounds.
  2. In relation to section 28(1), this would clarify that it is lawful for an organised religion to do one of the acts listed in sections 22 and 23 of the Human Rights Act by reason of a person’s gender identity or because they have an innate variation of sex characteristics. For example, the organised religion might:
     + 1. refuse to hire a transgender man because the position is limited to cisgender men;
       2. refuse to hire a person who identifies outside the binary of male and female because a person of the male sex or female sex is required; or
       3. refuse to hire someone because their sex characteristics differ from medical and social norms for male bodies or for female bodies (depending on the position).
  3. In relation to section 39(1), reform along these lines would clarify that it would not breach the protections relating to qualifying bodies (which are found in section 38 of the Human Rights Act) for an organised religion to refuse to confer a qualification on a person by reason of one of these grounds.
  4. In each case, however, the organised religion would only be entitled to do one of these things if it was to comply with the doctrines, rules or established customs of the religion.
  5. The alternative option is to add words to sections 28(1) and 39(1) clarifying that they do not permit differences of treatment based on the new grounds. The effect of this option would be that an organised religion could still limit a position to men or to women but could not rely on this to exclude a person who is transgender from a position that aligns with their gender identity or to exclude a person based on their innate variation of sex characteristics.

#### Analysis and conclusions

* 1. We recommend extending these exceptions to the two new prohibited grounds of gender identity and having an innate variation of sex characteristics.
  2. This is consistent with the rationale underlying the exceptions, which, as noted, is to recognise the institutional autonomy of organised religions in choosing their own ministers and leaders. A failure to extend these exceptions would likely constitute an unjustified limit on rights to freedom of religion protected by the NZ Bill of Rights and at international law. Conversely, extending these exceptions to the new grounds is, in our view, a reasonable limit on the right to freedom from discrimination.[[729]](#footnote-730)
  3. Most of those who submitted on these exceptions (including most rainbow organisations that submitted on this point) supported extending them to new grounds.[[730]](#footnote-731) Where submitters supported extending this exception, the main reason they gave was consistency with the underlying purpose of upholding religious freedom.
  4. We received little feedback from submitters on whether the doctrines, rules and customs of any organised religions in Aotearoa New Zealand require distinctions to be made based on a person’s sex assigned at birth, gender identity or sex characteristics. From our own research, the only explicit statement we found from an organised religion on this issue was in the *General Handbook* of the Church of Jesus Christ of Latter-day Saints, which says that a transgender person who has “completed sex reassignment” is not eligible for some callings in that Church.[[731]](#footnote-732)
  5. Although we did not find other explicit statements on this issue, we understand that some religions have views on the relationship between sex and gender that make it unlikely they would knowingly appoint someone to a sex-differentiated religious office that does not accord with their ‘biological sex’. For example, in the Catholic Church, only men may be admitted to the priesthood.[[732]](#footnote-733) We understand that Catholicism teaches that biological sex is a gift from God, that there are two sexes (male and female) and that gender is inseparable from biological sex.[[733]](#footnote-734) The Vatican’s Congregation for the Doctrine of the Faith, which is responsible for enforcing Catholic doctrine, has said that “sex change” procedures do not change a person’s gender in the eyes of the church: “If the person was male, he remains male. If she was female, she remains female.”[[734]](#footnote-735) From our research, we understand that some Catholic scholars consider that this means transgender men cannot be priests and that a person with an innate variation of sex characteristics is only eligible to be ordained if “canonically male”.[[735]](#footnote-736)
  6. Bruce Gray KC, Provincial Chancellor of the Anglican Church in Aotearoa New Zealand and Polynesia, said in his submission that the Canons of the Church and scripture are couched in terms of binary relationships. He said the Anglican Church has not considered whether any Canons need to be changed or whether a person who is transgender or non-binary or who has an innate variation of sex characteristics can be ordained as a priest. He supported the exceptions being extended to new grounds on the basis that: “Suitability for ordination as a priest … is a matter that goes to the heart of any religion.”
  7. Although most submitters supported extending these exceptions to new grounds, some did not. Some said religious organisations should be required to follow the Human Rights Act and commented that religious organisations are responsible for causing harm to members of the rainbow community. One submitter said allowing religious groups to discriminate against the rainbow community “continues the rhetoric about these people living in sin and not being deserving of human rights”.
  8. We acknowledge these concerns. However, freedom of religion is an important right that sits at the heart of a multicultural society, and decisions about who to appoint to religious office sit at the core of that right. As stated above, the exceptions are relatively narrow, applying only to employment and qualifications for professions or callings for the purposes of an organised religion. These exceptions do not allow religious organisations to discriminate in who may practise a religion or attend religious services.
  9. We consider that the potential for unjustified harm is also mitigated by the fact that the exceptions only apply where different treatment is required to comply with the doctrines or rules or established customs of that religion.

#### Recommendation and wording

1. Sections 28(1) and 39(1) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.
   1. For reasons we outlined above, we recommend that sections 28(1) and 39(1) of the Human Rights Act be amended to allow differences of treatment based on both the new grounds we have proposed. One way to achieve this policy intent could be simply to add the following underlined words:
2. Section 28 Exceptions for purposes of religion
   1. (1) Nothing in section 22 shall prevent different treatment based on sex, gender identity, or having an innate variation of sex characteristics where the position is for the purposes of an organised religion and is limited to one sex, to persons of a particular gender identity or to persons with particular sex characteristics so as to comply with the doctrines or rules or established customs of the religion.
3. Section 39 Exceptions in relation to qualifying bodies
   1. (1) Nothing in section 38 shall apply where the authorisation or qualification is needed for, or facilitates engagement in, a profession or calling for the purposes of an organised religion and is limited to one sex, to persons of a particular gender identity, to persons with particular sex characteristics or to persons of that religious belief so as to comply with the doctrines or rules or established customs of that religion.
   2. We do not consider it is necessary to provide in either exception for the possibility that a position in an organised religion could be limited to persons “without an innate variation of sex characteristics”. Rather we think that, to the extent organised religions may wish to treat people differently based on sex characteristics, it would be because of views within the particular religion that those sex characteristics are relevant to whether the candidate is of the particular sex under the doctrines, rules or established customs of the religion.

CHAPTER 10

# Goods, services, facilities, places and vehicles

## Introduction

* 1. In this chapter, we consider the provisions in Part 2 of the Human Rights Act 1993 that relate to two areas of life: access to places, vehicles and facilities; and the provision of goods and services.
  2. We start by addressing the protections from discrimination in the subparts that concern these two areas of life. We explain the implications of reform of section 21 of the Human Rights Act for these discrimination protections and why we are satisfied those implications are appropriate.
  3. We then address three exceptions in Part 2 that allow distinctions to be drawn based on a person’s sex when providing goods, facilities or services to the public:[[736]](#footnote-737)
     + 1. an exception for when the nature of a skill varies according to whether it is exercised in relation to men or women;
       2. an exception that allows insurers to offer different terms and conditions of insurance based on a person’s sex in certain circumstances; and
       3. an exception to allow superannuation schemes to provide different benefits for members of each sex in certain circumstances.[[737]](#footnote-738)
  4. We recommend that the skill exception is substantially reworded so that it applies where the nature of a skill varies according to the physical characteristics of the person it is exercised in relation to.
  5. We recommend that the exceptions for insurance and superannuation are extended to allow for differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.
  6. This chapter should be read alongside Chapter 8, which set out our general approach to reviewing Part 2 of the Human Rights Act and analysed some common issues that arise across more than one area of life.

## Discrimination protections for these areas of life

* 1. Sections 42 and 44 of the Human Rights Act contain the protections from discrimination that relate to access to places, vehicles and associated facilities and to the provision of goods, facilities or services. There is overlap between these two provisions.
  2. Section 42 prohibits discrimination in relation to public access to places, vehicles and associated facilities. If members of the public are entitled or allowed to enter or use a place or vehicle, it is unlawful to do the following by reason of a prohibited ground of discrimination:
     + 1. refuse to allow a person to access or use a place or vehicle;
       2. refuse to allow a person to use any associated facilities;
       3. require a person to leave or stop using the place, vehicle or facilities.
  3. This provision applies to places like supermarkets, gyms, restaurants, pools and shopping centres, to transport such as charter buses, aeroplanes and taxis and to facilities within these places or vehicles.
  4. Section 44 prohibits discrimination when supplying goods, facilities or services to the public or to any section of the public. When engaged in that activity, it is unlawful to do the following by reason of a prohibited ground of discrimination:
     + 1. refuse or fail on demand to provide a person with those goods, facilities or services; or
       2. treat a person less favourably in connection with the provision of those goods, facilities or services than would otherwise be the case.
  5. This provision applies to businesses such as shops, restaurants, private healthcare providers, insurers, gyms and sports centres.
  6. As noted, sections 42 and 44 only apply where goods, facilities or services are supplied to the public or a section of the public. These terms are not defined in the legislation and there is little guidance in case law.[[738]](#footnote-739)
  7. As with other provisions in Part 2, neither section 42 nor section 44 apply to goods, services, places, vehicles or facilities that are provided by the government or in connection with a public function. For example, swimming pools and libraries provided by local councils are likely not covered by these provisions and instead fall under Part 1A.
  8. For reasons we explained in Chapter 8, it would be difficult for us to propose amendments to the discrimination protections in sections 42 and 44 as part of this review because they apply uniformly to all prohibited grounds of discrimination. We nevertheless need to be satisfied that the implications of reform for these provisions are broadly appropriate. For that reason, we asked some questions in the Issues Paper about the implications of reform for these discrimination protections.[[739]](#footnote-740)

### Issues of concern to people in these groups

* 1. If the two new grounds of discrimination that we propose are added to section 21 of the Human Rights Act, it will clarify that people who are transgender or non-binary or who have an innate variation of sex characteristics can complain under the Human Rights Act about discrimination in these two areas of life. In the Issues Paper, we explained that people in these groups can face discrimination in relation to goods, services, facilities, places and vehicles and we discussed some data about relevant experiences of discrimination.[[740]](#footnote-741) More recent data from the 2022 Counting Ourselves survey of people who are transgender or non-binary (published in 2025) confirm that discrimination in these areas continues to be an issue of concern.[[741]](#footnote-742)
  2. We asked in the Issues Paper whether the protections that are available under sections 42 and 44 capture issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. Some submitters (including Community Law Centres o Aotearoa and Te Kāhui Ture o Aotearoa | New Zealand Law Society) thought that, as long as the Human Rights Act is amended to include new prohibited grounds of discrimination, sections 42 and 44 will likely cover issues of concern to people in these three groups. Some submitters (including InsideOUT Kōaro, the Wellington Pride Festival and ICONIQ Legal Advocates) said the current protections are not sufficient because of the absence of express grounds in section 21. Other submitters said the current protections are not sufficient but did not explain how.
  3. Some people told us in consultation about some specific issues of concern to them. These included:
     + 1. banks and financial services discriminating against people whose income comes from sex work;
       2. transgender people being unable to participate in single-sex sports aligned with their gender identity;
       3. being challenged when accessing facilities such as bathrooms aligned with gender identity and a lack of gender-neutral or inclusive facilities;
       4. application forms such as for loans or other financial services not having gender-neutral options for a person’s gender or title; and
       5. health insurance not providing cover for gender-affirming health care.
  4. Although we understand that high numbers of people who are transgender have worked in sex work, the adverse treatment of people who receive income from sex work is unlikely to amount to discrimination by reason of gender identity.
  5. The next two issues (relating to single-sex sports and facilities such as bathrooms) are both covered by the discrimination protections in sections 42 and 44 but are subject to specific exceptions. In Chapters 14 and 15, we discuss the application of these exceptions to the new prohibited grounds of discrimination and propose amendments to ensure a fair balance of rights and interests.
  6. It might be possible to complain about discrimination in relation to the last two issues (the absence of gender-neutral options on forms and lack of insurance cover for gender-affirming health care) but whether a claim was successful would depend on the facts and the evidence. A complainant would have to establish that the specific tests in section 44 were met, including that the adverse treatment was by reason of their gender identity. This could be particularly challenging in relation to the health insurance issue but might be possible if the complainant could point to a comparable treatment that was being funded for other groups.[[742]](#footnote-743)
  7. Some other concerns we have heard about relating to discrimination in these areas of life (for example, through the 2022 Counting Ourselves survey) include being treated unfairly when visiting or using services at retail stores, gyms or pools, on public transport, at restaurants, hotels or theatres or at banks.[[743]](#footnote-744) Depending on the facts and evidence, these forms of discrimination could all potentially be covered.
  8. Overall, we are satisfied that, while not all types of adverse treatment we heard about in consultation would necessarily result in a successful challenge under Part 2 of the Human Rights Act, sections 42 and 44 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 in these areas of life.

### Other implications

* 1. In the Issues Paper, we asked submitters whether they had any practical concerns about the impact for sections 42 and 44 of adding new grounds to section 21. We also asked whether new exceptions might be desirable to accommodate any new grounds.
  2. Some submitters suggested a need for exceptions for medical practitioners and, more broadly, to protect freedom of conscience and belief. Some submitters raised concerns about not being permitted to exclude transgender women from women’s gatherings.
  3. We discussed these issues in Chapter 6. For the reasons explained there, we are satisfied that none of these concerns make reform of section 21 undesirable and that no new exceptions are needed to address any of the matters raised.

## Goods, facilities and services exceptions

* 1. In this chapter, we discuss three exceptions relating to provision of goods, facilities or services. Two of these sit in the subpart in Part 2 on provision of goods and services but the third (relating to superannuation schemes) sits in its own subpart.[[744]](#footnote-745)
  2. There are three other sex exceptions in the subpart about provision of goods and services that we discuss in other chapters. In Chapter 13, we discuss an exception relating to participation in courses and group counselling on highly personal matters. In Chapter 14, we discuss an exception relating to single-sex facilities. In Chapter 15, we discuss an exception for competitive sports.
  3. There is only one exception in the Act for different treatment by reason of sex when providing public access to places, vehicles and associated facilities. That exception allows for single-sex facilities. We discuss it, together with a similar exception applying to the provision of goods, services and facilities, in Chapter 14.
  4. For reasons outlined in Chapter 8, this report does not consider reform of exceptions that apply to all prohibited grounds. This chapter therefore does not discuss section 44(4), which provides a broad exception relating to membership of clubs and the provision of services or facilities to members of a club.
  5. In the Issues Paper, we sought feedback on whether to amend any of the sex exceptions we discuss in this chapter to reflect any new prohibited grounds of discrimination that are added to section 21 of the Human Rights Act as a result of this review. We explain the feedback we received and our recommendations for reform of each exception below.
  6. The recommendations for reform set out in this chapter need to be understood against the backdrop of Chapter 8. It explained some significant issues that arise in relation to the wording of exceptions.

### Skill — section 47

* 1. Section 47 of the Human Rights Act states:

1. Where the nature of a skill varies according to whether it is exercised in relation to men or women, a person does not commit a breach of section 44 by exercising the skill in relation to one sex only, in accordance with that person’s normal practice.
   1. We recommend that section 47 be reworded to provide an exception for when the nature of a skill varies according to whether the customer or client has particular physical characteristics.

#### History, scope and rationale

* 1. Section 47 allows service providers to offer a specialist service to one sex only where the nature of a skill differs depending on whether the customer or client is a man or a woman. Some situations where the exception might apply include where a beauty salon offers services such as waxing to women but not men or where a tailor specialises in men’s suits.
  2. We think the rationale for this exception is to allow professionals to develop expertise in particular kinds of services. The legislative history suggests that a similarly worded provision in the Human Rights Commission Act 1977 (1977 Act) was intended, in addition, to reflect broader ideas about practicability, custom and common sense.[[745]](#footnote-746) In the 1970s (and perhaps also the 1990s), it was simply seen as unthinkable that certain industries should be prevented from offering single-sex services. Although otherwise similarly worded to the current exception, the 1977 exception listed the specific example of hairdressing as an applicable skill.[[746]](#footnote-747)
  3. In the Issues Paper, we suggested that section 47 has not aged well. We said we thought a crude division of services between men and women would no longer be seen as sufficient to justify a skills-based exception. For example, while a barber should be entitled to decline to cut long hair based on their expertise, this would not justify refusing to serve a woman or non-binary person who wants a buzz cut.
  4. On further reflection, we think the problem with section 47 is not its wording but the historical assumptions that underlie it such as that only a man would want a buzz cut. On the ordinary meaning of the words in section 47, it covers situations where the *nature of the skill* varies according to whether it is exercised in relation to men or women. Therefore, a barber would not be entitled to refuse a woman a buzz cut because the nature of the skill is the same whether it is exercised in relation to a man or a woman.
  5. In the Issues Paper, we also questioned whether additional rationales might underlie the exception in some contexts such as the provider’s comfort and privacy or their religious beliefs. After further consideration, we do not think these rationales underlie section 47. If they did, the exception would not be limited to situations in which the nature of the skill varies depending on whether it is exercised in relation to men or women.
  6. In consultation, some submitters referred to gynaecological services and said doctors should be able to specialise in particular anatomy. Although section 47 could cover this situation, we do not think that healthcare providers would need to rely on it. Healthcare providers have a duty under the Code of Health and Disability Services Consumers’ Rights to provide services with reasonable care and skill.[[747]](#footnote-748) Notwithstanding anything in the Human Rights Act, this includes declining to provide services when they are not within their experience or skill.[[748]](#footnote-749)

#### Options for reform

* 1. Because of the way section 47 is drafted (for example, because it refers to “men” and “women” rather than “sex”), we found it difficult to formulate reform options along similar lines to other exceptions. For these reasons, as well as our concern that the historical assumptions underlying this exception are outmoded, the reform options on which we consulted involved more significant changes to the wording of the current exception than we proposed for most other exceptions.
  2. We sought feedback on three possible options:[[749]](#footnote-750)
     + 1. option 1: the exception should be retained in its current form;
       2. option 2: there should be an exception providing that, where a skill differs depending on a person’s sex characteristics, a person does not breach the Human Rights Act by only offering a service in relation to persons with particular sex characteristics; and
       3. option 3: there should be an exception that applies to services where a customer would be fully or partially unclothed.
  3. We do not recommend option 1 and do not consider it further below. As we explained in Chapter 8, leaving existing exceptions unamended is likely to lead to considerable uncertainty.
  4. Option 2 would be relatively straightforward in its application. For example, if a person specialised in providing vulva waxing, they would be able to decline to provide the service to anyone who did not have a vulva regardless of their sex or gender. We recommend below a modified option 2, which would have the same legal effect.
  5. Option 3 would allow service providers to set their own comfort level in intimate situations regardless of a person’s sex, gender identity or sex characteristics.

#### Analysis and conclusions

* 1. There were submitters who supported and opposed each of the three options on which we consulted.[[750]](#footnote-751) No particular option stood out as having the most support.
  2. We recommend a modified version of option 2: amending section 47 to state that a person does not breach section 44 of the Human Rights Act by reason of the prohibited grounds of sex, gender identity or having an innate variation of sex characteristics if:
     + 1. the nature of the skill varies according to whether the customer or client has particular physical characteristics; and
       2. the person exercises the skill in relation to particular physical characteristics in accordance with their normal practice.
  3. We propose using the phrase “physical characteristics” rather than “sex characteristics” (the language we presented in the Issues Paper) because we think it will be more readily understood. For example, it may not be immediately clear that “sex characteristics” includes things like facial hair.
  4. We think (a modified) option 2 reflects the current scope and meaning of section 47 as it applies to people who are cisgender and who do not have an innate variation of sex characteristics. As we explained above, section 47 can only be relied on where the nature of the skill varies depending on whether it is exercised in relation to men or women. In practice, this means the exception is almost certainly limited to situations where the skill varies based on a person’s physical characteristics (intimate waxing being an obvious example). We cannot think of any other reasons (not related to a person’s physical characteristics) why the nature of a skill would differ depending on whether the person receiving the service was a man or a woman. Submitters who supported option 2 considered that sex characteristics (the term we used in the Issues Paper) are more likely to be the basis on which a skill varies than sex or gender.
  5. We think that, if a skill legitimately varies depending on a person’s physical characteristics, service providers should have the benefit of this exception regardless of a person’s gender identity. This is consistent with the core underlying rationale of allowing service providers to specialise. Option 2 (or a variation of it) would achieve that outcome, while also best ensuring that different treatment is based on a legitimate variation in the skillset required.
  6. (A modified) option 2 would also give potential customers certainty. If a service provider offers a skill that differs depending on a customer’s physical characteristics, customers who have those characteristics will know that the service provider must serve them. Conversely, customers (including cisgender women) will know they cannot be turned away from a service simply because it has customarily only been provided to men or women. We are aware, for example, that some barbershops have declined to provide haircuts (of a type they usually offer such as short back and sides) to women or non-binary people.[[751]](#footnote-752) The amendments we suggest would make it clearer this is not lawful.
  7. We heard in consultation that some services that may be engaged by this exception such as hair removal are forms of gender-affirming care for some transgender people.[[752]](#footnote-753) We also heard that having hair permanently removed from genitals is a requirement for some kinds of genital surgery. Option 2 may facilitate access to services for people who require them for gender-affirming care, while also allowing service providers to decide what services they wish to provide.
  8. The advantage of option 3 (as some submitters pointed out) is that it would allow service providers choice over which customers they see or interact with when a customer is unclothed. However, option 3 would involve a significant expansion to the scope of the current exception, permitting discrimination that is unconnected to the nature of a service provider’s skill. As stated above, comfort and privacy are not rationales that underlie section 47 in its current form. While it might be possible to add an exception to the Human Rights Act to allow for discrimination in goods and services for these reasons, it would be inappropriate for us to recommend such a significant change to the scope and rationale of section 47 in this review.
  9. Some submitters also raised concerns about option 3 being too broad. Another disadvantage of option 3 is that it may not facilitate access to services for people who require them for gender-affirming care.
  10. Some rainbow groups did not support option 2. InsideOUT Kōaro was concerned that it would encourage policing of a person’s body and gender expression. The Wellington Pride Festival was concerned that it could be misused to justify excluding people who are transgender or non-binary or who have an innate variation of sex characteristics in a wide range of services beyond the intended scope of the exception.[[753]](#footnote-754)
  11. We have not thought of any examples of services that would fall under option 2 that would not be covered by the current exception. The exception we propose would apply narrowly to cover situations where:
      + 1. a person actually has (or does not have) particular physical characteristics; and
        2. exercising the skill in relation to certain physical characteristics and not others is part of the service provider’s normal practice.
  12. This means the exception could not be used where the skill would be exercised in the same way regardless of a customer’s physical characteristics. Nor would it allow for service providers to make assumptions about customers’ physical characteristics based on their sex, gender identity or gender expression.
  13. Finally, some submitters raised concerns about how option 2 would apply to people with innate variations of sex characteristics. There is a danger that an exception based on physical characteristics will allow people to be refused services where their sex characteristics do not fit stereotypical assumptions about what is “typical” for the development, appearance or function of female bodies or male bodies.
  14. Although we do think this is an issue of concern, it is difficult to know how to address it effectively other than through repeal of the exception (which, as we discussed in Chapter 8, would be outside the scope of this review). Option 3 would have an even broader impact on people with innate variations of sex characteristics. Under (a modified) option 2, a person could only be denied a service if, because of their particular physical characteristics, it would be outside of a provider’s skillset to provide the service sought.

#### Recommendation and wording

1. Section 47 of the Human Rights Act 1993 should be redrafted to specify that a person does not commit a breach of section 44 by reason of the grounds of sex, gender identity or having an innate variation of sex characteristics if:
   1. the nature of a skill varies according to whether a customer or client has particular physical characteristics; and
   2. the person exercises the skill in relation to particular physical characteristics only in accordance with their normal practice.
   3. For the reasons we outlined above, we recommend that section 47 be amended to focus more explicitly on situations in which a skill varies based on a person’s physical characteristics. We think key elements of a revised test are that:
      * 1. the exception applies where the nature of the skill varies according to particular physical characteristics (rather than whether the customer or client is a man or a woman);
        2. any difference in access to services based on a person’s physical characteristics is in accordance with the provider’s normal practice; and
        3. the difference in treatment is by reason of the prohibited grounds of sex, gender identity or having an innate variation of sex characteristics.
   4. This third element was not part of the option on which we consulted. It is, however, a necessary element in the modified option 2. Otherwise, the broader expression “physical characteristics” would allow differences of treatment based on physical characteristics associated with other prohibited grounds such as race, disability and age.
   5. One way to achieve the policy intent outlined in our recommendation might be to redraft section 47 as follows:
2. A person does not commit a breach of section 44 by reason of the prohibited grounds of sex, gender identity, or having an innate variation of sex characteristics if:
   1. (a) the nature of a skill varies according to whether a customer or client has particular physical characteristics; and
   2. (b) the person exercises the skill in relation to particular physical characteristics in accordance with their normal practice.

### Insurance — section 48

* 1. Section 48 of the Human Rights Act permits insurers to offer or provide annuities and insurance policies (including accident and life insurance) on different terms or conditions for each sex or for disabled people or for people of different ages. It is subject to strict threshold requirements.[[754]](#footnote-755)
  2. We recommend that section 48 be extended to allow for differences of treatment based on each of the two new prohibited grounds of discrimination we propose.

#### History, scope and rationale

* 1. Insurance involves pooling premiums from a group of policyholders and using money from the pool to pay members of the group who make a claim.[[755]](#footnote-756) The rationale for section 48 is to facilitate fair pricing by limiting the extent to which groups of people posing a lower risk of insurance claims are subsidising those who pose a higher risk.[[756]](#footnote-757) When pricing insurance, insurers classify people into groups with similar risk characteristics. Section 48 allows insurers to offer different terms and conditions for each sex, for disabled people or for people of different ages on the basis that these factors may influence the likelihood that a person will make an insurance claim and the nature of that claim.
  2. The terms and conditions that insurers use to mitigate the risk of claims from people in certain groups include charging a more expensive premium, excluding particular health conditions from cover or imposing stand-down periods on certain conditions.[[757]](#footnote-758)
  3. A similar provision in the 1977 Act allowed insurance to be provided on different terms or conditions for each sex.[[758]](#footnote-759) When the Human Rights Bill was introduced in 1992, there was considerable debate about whether the sex exception should be retained.[[759]](#footnote-760) Arguments against related to inadequacy of the actuarial or statistical data, women’s disadvantaged position in the workplace and the possibility that lifestyle factors (such as occupation and smoking habits) might be more relevant to risk.
  4. Ultimately, the Select Committee recommended retaining the exception on the basis that this would result in fairer pricing. The Committee also thought eliminating sex differentiation in insurance would lead to women paying more.[[760]](#footnote-761)
  5. There is no similar exception for race, colour or ethnic or national origin even though life expectancy can vary depending on ethnicity.[[761]](#footnote-762) This recognises that social and moral reasons can override the objective of minimising cross-subsidisation. We understand that, when the Race Relations Bill was being considered in 1971, the Select Committee decided against a race exception over the objections of the life insurance industry. This was because of a concern this would result in higher life insurance rates for Māori due to higher mortality rates (as well as a concern about insufficient data).[[762]](#footnote-763)
  6. Section 48 requires a difference of treatment based on sex to be:
     + 1. based on actuarial or statistical data, upon which it is reasonable to rely, relating to life expectancy, accidents or sickness; and
       2. reasonable having regard to the applicability of the data and of any other relevant factors, to the particular circumstances.[[763]](#footnote-764)
  7. Section 48(2) states an additional protection that is largely obsolete. It provides that, in assessing reasonableness, Te Kāhui Tika Tangata | Human Rights Commission or the Complaints Division may require justification to be provided for reliance on the data or advice or opinion and for the different treatment and may also request advice from an actuary.[[764]](#footnote-765) The Human Rights Amendment Act 2001 abolished the Complaints Division and removed the Human Rights Commission’s power to investigate complaints.

#### Current practice

* 1. From our research and engagement, we were able to ascertain the following information about current practice in the insurance industry regarding exceptions based on sex, gender identity or sex characteristics.

##### Current practice in the insurance industry regarding the relevance of sex

* 1. Whether a person’s sex is a relevant factor, and how it influences terms and conditions, is likely to depend on the kind of insurance and the kind of risk. For example:
     + 1. In Aotearoa New Zealand, women’s life insurance premiums tend to be lower than men’s (because women have a longer life expectancy).[[765]](#footnote-766)
       2. By contrast, women pay around 10 per cent more for health insurance than men of the same age and health profile (likely based on different risks of developing different health problems and using particular services).[[766]](#footnote-767)
       3. Car insurance premiums can vary by both sex and age.[[767]](#footnote-768) Young male drivers are commonly charged higher premiums, but this is not so of older male drivers. We heard from Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand that the higher risk associated with younger male drivers reflects a behavioural issue rather than physical characteristics.
       4. Some insurers have moved away from differentiating car insurance on the basis of sex. For example, Vero Insurance removed “gender-based factors” from personal car insurance products in 2023 because its research showed that “other factors such as vehicle make and model were more useful than the driver’s gender”.[[768]](#footnote-769)
  2. Several states in the United States have banned the use of sex or gender in determining car insurance premiums.[[769]](#footnote-770) Reasons for this include that there is variation among insurance companies about whether men or women are higher risk and because other factors such as years of driving experience are more predictive.[[770]](#footnote-771)
  3. Since 2012, insurance companies in the European Union have been required to charge men and women the same for insurance products, including car and life insurance.[[771]](#footnote-772)

##### Current practice in the insurance industry regarding gender identity

* 1. In its submission, the Financial Services Council told us that insurers typically price cover for people who are transgender or non-binary or who have an innate variation of sex characteristics based on “the sex they identify with”.[[772]](#footnote-773) It said sex assigned at birth is sometimes relevant to the risk of developing particular health conditions, including those that relate to male or female anatomy, but that:

1. Some insurers … are of the view that currently there is little actuarial or statistical data to support using a customer’s sex assigned at birth or sex characteristics instead of the sex the customer identifies with, but this position may change as actuarial evidence develops.
   1. It said insurers who have previously used customers’ sex assigned at birth or sex characteristics “have found this to be both operationally clunky and a bad experience for their customers”.
   2. We were unable to find much information about the practices of individual insurance providers. The only information we found was from Southern Cross Health Insurance, which states on its website that it generally provides coverage based on a member’s “biological sex”.[[773]](#footnote-774) It seems that it only provides a transgender person coverage based on the gender they identify with if they have undergone gender affirmation surgery and request to be covered on this basis.[[774]](#footnote-775)
   3. We received little direct feedback about the experiences of people who are transgender or non-binary with respect to insurance.[[775]](#footnote-776)

##### Current practice in the insurance industry regarding innate variations of sex characteristics

* 1. We also received little feedback about the experiences of people with innate variations of sex characteristics in relation to insurance. The only information we found about the practices of insurance providers was on the Southern Cross Health Insurance website, which says: “for an intersex member, our health insurance cover applies to both ‘male’ and ‘female’ organs”.[[776]](#footnote-777)
  2. Most health insurance policies do not cover congenital conditions.[[777]](#footnote-778) We are not sure what this means for whether and when medical issues stemming from a person’s innate variation of sex characteristics would be excluded.

#### Options for reform

* 1. In the Issues Paper, we asked submitters if section 48 should be amended to allow insurers to differentiate based on a customer’s sex assigned at birth or sex characteristics. We also asked if there should be a new exception to allow insurers to offer different terms and conditions based on whether someone is transgender or non-binary or has an innate variation of sex characteristics.
  2. We have considered three main options for reform of section 48. The first would be to clarify that section 48 entitles insurers to differentiate based on a customer’s sex assigned at birth or sex characteristics.
  3. The second option would be to amend section 48 to clarify that it allows insurers to set different terms and conditions based more broadly on a person’s gender identity or their innate variation of sex characteristics. For example, if there was sufficient evidence to support it, an insurer could offer people who are transgender different insurance premiums from people who are not.
  4. The third option would be to amend section 48 to clarify that it does not allow for different terms or conditions based on a person’s gender identity, sex assigned at birth or sex characteristics.
  5. Under either option 1 or 2, any different treatment would need to meet the threshold requirements in section 48 relating to reasonable reliance on actuarial or statistical data.
  6. Under option 3, a person would need to be treated in accordance with their gender identity for the purposes of the existing sex exception. The fact they have an innate variation of sex characteristics would also have to be disregarded.

#### Analysis and conclusions

* 1. We recommend option 2 — amending section 48 to allow insurers to offer different terms and conditions based on both the new prohibited grounds of gender identity and having an innate variation of sex characteristics.[[778]](#footnote-779)
  2. Our primary reason is that we consider the existing sex exception in section 48 is intended to cover aspects of sex assigned at birth, gender identity and sex characteristics, depending on the circumstances, and that these are difficult to untangle in the insurance context. For example:
     + 1. For health insurance and life insurance, the ground of sex is often a shorthand for sex characteristics based on an assumption that most people of a particular sex have certain sex characteristics. For example, when setting premiums for a woman, an insurer may take into account the risk of that woman developing cervical cancer based on an assumption she has a cervix.
       2. According to the submission we received from the Insurance Council of New Zealand, offering different car premiums based on a customer’s sex reflects behavioural differences. We do not know the extent to which behavioural differences between sexes reflect differences in sex characteristics (such as hormones), social conditioning or something else.
  3. We think it is consistent with the exception’s underlying rationale to enable insurers to take similar 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 good enough statistical or actuarial data to support that. We also think, given the overlap, not extending the exception to new grounds would create incoherence and confusion, potentially cutting across the sex exception.
  4. For example, some men with an innate variation of sex characteristics have ovarian tissue. Under current law, a health insurer would likely be permitted to take into account the person’s risk of developing ovarian cancer when offering terms and conditions of insurance.[[779]](#footnote-780) If a new ground of having an innate variation of sex characteristics is added to section 21 and the insurance exception is not extended to this ground, this might be less clear. Similarly, if a health insurer took into account any (statistically established) risks associated with a customer receiving hormone treatment, that might be able to be challenged as gender identity discrimination.
  5. Not extending the exception to new grounds would also cut across the disability exception. Disability has a broad definition in the Human Rights Act.[[780]](#footnote-781) In some circumstances, aspects of a person’s health that relate to being transgender or having an innate variation of sex characteristics may count as a disability for the purposes of the existing exception. To give one example, in some circumstances, a person with an innate variation of sex characteristics may have an innate abnormality of an anatomical structure (including, in some cases, a heart defect).
  6. In feedback, we heard a range of views about the relevance of gender and sex characteristics to insurance risks. Many submitters considered that sex assigned at birth and sex characteristics (including hormones and physical characteristics) are relevant to health insurance but not to other kinds of insurance. Some submitters said gender is more relevant for car insurance, including because social factors are what affects a person’s risk of having a car accident. The Insurance Council of New Zealand was concerned that not extending the exception to gender could interfere with current practices relating to different treatment based on sex in relation to car insurance. This is because customers are generally asked about their gender, not their sex.
  7. Some submitters said a person’s sex assigned at birth can be irrelevant, inaccurate or provide misleading information about health risks for people who are transgender or non-binary or who have an innate variation of sex characteristics. For example, one submitter said they were aware of an intersex transgender woman being charged male rates for health insurance. They said this did not make sense because the person’s intersex condition meant they did not produce testosterone. We think the range of submitter views reflects the overlapping roles played by concepts such as sex, gender and sex characteristics in the insurance context.
  8. Some submitters were concerned about insurers offering people higher premiums purely because they are transgender or non-binary. The threshold requirements of section 48 mitigate that risk. The exception only allows different treatment if it is based on actuarial or statistical data relating to life expectancy, accidents or sickness and on which it is reasonable to rely in all the circumstances. There is currently little actuarial or statistical data relating to life expectancy, accidents or sickness for people who are transgender or non-binary — a point made by some submitters.[[781]](#footnote-782) Further, we understand there might be significant difficulties in obtaining such data.[[782]](#footnote-783) Historically, data about sex have mostly been based on a gender binary and it is not always clear whether they are based on sex assigned at birth or self-identified gender.[[783]](#footnote-784)
  9. Even taken together, people who are transgender or non-binary are a small group. To obtain meaningful data on health risk, it might be necessary to break this group down into even smaller categories (for example, transgender men with the same or similar sex characteristics).
  10. The Financial Services Council and the Insurance Council of New Zealand submitted they had not identified a need for insurers to offer different terms and conditions based on whether a person is transgender or non-binary or has an innate variation of sex characteristics. As stated above, the Financial Services Council said some insurers consider there is little actuarial or statistical data to support using a customer’s sex assigned at birth or sex characteristics rather than gender identity.
  11. However, the Financial Services Council also considered that insurers should be able to offer different terms and conditions based on a customer’s medical history, which might include things like having received hormone treatment. As noted above, the Insurance Council of New Zealand considered insurers should be able to take into account a person’s gender.
  12. Ultimately, although we do not anticipate much use for an insurance exception based on gender identity or having an innate variation of sex characteristics, we consider it is more consistent with the underlying rationale, more likely to promote coherence in the law and fairer to insurers for this exception to be extended to both new grounds.

#### Recommendation and wording

1. Section 48(1) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.
   1. For reasons we outlined above, we recommend that section 48(1) be amended to allow differences of treatment based on the two new grounds we have proposed. One way to achieve the policy intent outlined in our recommendation would be to add the following (underlined) words:
   2. 48 Exception in relation to insurance
   3. (1) It shall not be a breach of section 44 to offer or provide annuities, life insurance policies, accident insurance policies, or other policies of insurance, whether for individual persons or groups of persons, on different terms or conditions for each sex, or for persons of different gender identities, or for persons with innate variations of sex characteristics, or for persons with a disability, or for persons of different ages if the different treatment—
      1. (a) is based on—
         1. (i) actuarial or statistical data, upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness; or
         2. (ii) where no such data is available in respect of persons with a disability, reputable medical or actuarial advice or opinion, upon which it is reasonable to rely, whether or not contained in an underwriting manual; and
      2. (b) is reasonable having regard to the applicability of the data or advice or opinion, and of any other relevant factors, to the particular circumstances.
   4. As noted earlier, section 48(2), which refers to the Complaints Division and assumes the Human Rights Commission has a power to investigate complaints, is largely obsolete. It is outside the scope of the review to make a formal recommendation in relation to this provision. However, if amendments to the Human Rights Act are being contemplated, the government may wish to consider updating this provision, for example, to transfer the relevant powers to Te Taraipiunara Mana Tangata | Human Rights Review Tribunal.

### Superannuation — section 70(2)

* 1. Section 70(2) of the Human Rights Act states:[[784]](#footnote-785)

1. (2) It shall continue to be lawful for the provisions of a superannuation scheme to provide—
   * 1. (a) different benefits for members of each sex on the basis of the same contributions; or
     2. (b) the same benefits for members of each sex on the basis of different contributions,—
     3. if the different treatment—
     4. (c) is based on actuarial or statistical data, upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness; and
     5. (d) is reasonable having regard to the applicability of the data, and of any other relevant factors, to the particular circumstances.
   1. We recommend that section 70(2) be extended to allow for differences of treatment based on each of the two new prohibited grounds of discrimination we propose.

#### History, scope and rationale

* 1. Section 70 of the Human Rights Act sits in a subpart entitled “Special provisions relating to superannuation schemes”. It states separate superannuation exceptions applying to the grounds of sex, age and disability. The sex exception is in subsection (2).[[785]](#footnote-786)
  2. Although section 70(2) does not state the areas of life to which it relates, it takes its colour from the age and disability exceptions, which refer expressly to discrimination in employment (section 22) and provision of goods and services (section 44).
  3. The purpose of section 70(2) 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 payments differently for men and women. According to Te Ara Ahunga Ora | Retirement Commission, women have fewer retirement savings than men.[[786]](#footnote-787) On average, women’s life expectancy is higher, meaning women are likely to spend more years in retirement living alone, which comes with increased costs.[[787]](#footnote-788)
  4. The exception in section 70(2) is narrow in scope. It only applies to superannuation schemes that provide “different benefits for members … on the basis of the same contributions” or “the same benefits for members … on the basis of different contributions”. While superannuation schemes of this kind were once a significant part of the New Zealand landscape, few such schemes exist today.[[788]](#footnote-789)
  5. Section 70(2) is based on a similar exception in the 1977 Act.[[789]](#footnote-790) In 1993, policy makers considered removing the exception in relation to sex. Views were divided on whether that should happen.[[790]](#footnote-791) The Department of Justice noted that many superannuation schemes did not differentiate according to gender and that overseas trends were moving towards unisex provisions for superannuation.[[791]](#footnote-792)
  6. Ultimately, the reason the exception was retained appears to have been to preserve a consistent approach between the insurance and superannuation exceptions.[[792]](#footnote-793)
  7. As with the insurance exception, section 70(2) is subject to strict threshold requirements relating to the reasonableness and availability of relevant data.
  8. Section 70(6) provides that, in assessing whether it is reasonable to rely on any data and whether different treatment is reasonable, the Human Rights Commission or the Complaints Division may require justification and may request the views of an actuary.[[793]](#footnote-794) For reasons explained earlier in relation to the matching insurance provision, this protection is largely obsolete.

#### Options for reform

* 1. In relation to each of the two proposed new grounds, we considered two main options for reform of section 70(2). The first is to extend the exception to clarify that, as long as the other requirements of the exception are met, a superannuation scheme provider does not breach Part 2 of the Human Rights Act if it provides different benefits to members by reason of their gender identity or their innate variation of sex characteristics. For example, under this option, if there was sufficient evidence to support it, a superannuation scheme could offer a transgender person and a cisgender person different benefits.
  2. In accordance with the other requirements of the exception, any different treatment would need to be based on actuarial or statistical data, upon which it is reasonable to rely, relating to life expectancy, accidents or sickness. The differences in treatment would also have to be reasonable having regard to the applicability of the data, and any other relevant factors, to the particular circumstances.
  3. The alternative reform option is to amend the Act to clarify that section 70(2) does not apply to either or both the new grounds. For example, the Act might clarify that, for the purposes of the sex exception, a person needs to be treated as the gender with which they identify.

#### Analysis and conclusions

* 1. Some submitters did not think the superannuation exception needed to be extended to new grounds. These included the Retirement Commission and the Financial Services Council.
  2. One reason given was the limited application of the exception. As stated above, few superannuation schemes of the kind covered by section 70(2) exist in Aotearoa New Zealand today. Most of those that do are closed to new members.[[794]](#footnote-795) Few, if any, of these schemes determine pension rates based on a retiring member’s sex, preferring to rely on other factors such as age at retirement, length of contributory membership and salary. Further, most existing members have already had their benefits determined and therefore would not be affected by an amendment.
  3. Neither KiwiSaver nor New Zealand Superannuation (the government-paid pension) are covered by this exception.
  4. As discussed earlier in relation to insurance, we also heard that there are inadequate data about life expectancies and other factors for people who are transgender or non-binary or who have an innate variation of sex characteristics. In the absence of data, the threshold criteria for invoking section 70(2) could not be met.
  5. For these reasons, little turns on whether this exception is extended to new grounds. We nevertheless recommend extending section 70(2) primarily for consistency with the insurance exception. As noted above, this was the reason why a superannuation exception was included in the Human Rights Act in the first place.
  6. Further, as with the insurance exception, we think it is difficult to separate gender identity and having an innate variation of sex characteristics from sex in the context of this exception. The rationale for the exception as it relates to sex is that men and women have different health outcomes and life expectancies, but this depends partly on social factors and partly on physical characteristics. Both gender identity and having an innate variation of sex characteristics may be relevant to health outcomes and life expectancies.
  7. We acknowledge that there is a concern about inadequate data for people who are transgender or non-binary or who have an innate variation of sex characteristics. However, as with the insurance exception, the safeguards in the section address the issue. The exception can only be utilised if that is reasonable based on the adequacy of the statistical or actuarial data.
  8. Finally, the Financial Services Council said that it would be helpful if the Human Rights Act clarified that, for the purposes of the exception, a scheme manager could treat a transgender member’s sex as the sex with which they identify. The Financial Services Council was concerned that the current exception may not permit this because of the requirement for differences in treatment to be based on actuarial or statistical data on which it is reasonable to rely. It referred specifically to situations where a person exchanges some or all of their pension for a lump-sum payment. It said females receive higher lump-sum payments than males because they are assumed to live longer in retirement. It said it may be beneficial to treat a transgender woman as female for the purpose of calculating their lump-sum payment but it is unclear whether this would meet the requirements of section 70(2).
  9. We do not recommend any reform on this issue. We think the issue of calculating lump-sum benefits for people who are transgender is likely to arise relatively infrequently. In some situations, it may also be advantageous for a person who is transgender to have their benefit calculated in line with their sex assigned at birth (for example, for transgender men in the scenario presented by the Financial Services Council).
  10. We think reform to address this issue would likely require a positive discrimination provision that would enable a scheme manager to calculate a transgender person’s benefits in accordance with their gender identity without having to show that any advantageous treatment was justified by reference to actuarial or statistical data.[[795]](#footnote-796) Although the Human Rights Act does contain some positive discrimination provisions, we do not think we have a sufficient basis to recommend one in relation to superannuation. We did not specifically seek feedback on it and therefore have limited evidence of the desirability of such a provision to address this narrow situation.

#### Recommendation and wording

1. Section 70(2) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new grounds of gender identity and having an innate variation of sex characteristics.
   1. For reasons we outlined above, we recommend that section 70(2) be amended to allow differences of treatment based on the two new grounds we have proposed. One way to achieve this policy intent would be to add the following (underlined) words:
2. (2) It shall continue to be lawful for the provisions of a superannuation scheme to provide—
   * 1. (a) different benefits for members of each sex, for persons of different gender identities, or for persons with an innate variation of sex characteristics, on the basis of the same contributions; or
     2. (b) the same benefits for members of each sex, for persons of different gender identities, or for persons with an innate variation of sex characteristics, on the basis of different contributions,—
     3. if the different treatment—
     4. (c) is based on actuarial or statistical data, upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness; and
     5. (d) is reasonable having regard to the applicability of the data, and of any other relevant factors, to the particular circumstances.
   1. As noted earlier, section 70(6), which refers to the Complaints Division and assumes the Human Rights Commission has a power to investigate complaints, is largely obsolete. It is outside the scope of the review to make a formal recommendation in relation to this provision. However, if amendments to the Human Rights Act are being contemplated, the government may wish to consider updating this provision, for example, to transfer the relevant powers to the Human Rights Review Tribunal.

CHAPTER 11

# Land, housing and accommodation

## Introduction

* 1. In this chapter, we consider the provisions in Part 2 of the Human Rights Act 1993 that relate to land, housing and accommodation.
  2. We start by addressing the protections from discrimination in the subpart that relates to provision of land, housing and accommodation. We explain the implications of reform of section 21 of the Human Rights Act for these accommodation protections and why we are satisfied these implications are appropriate.
  3. We then address three exceptions in Part 2 that allow distinctions to be drawn based on a person’s sex in relation to the provision of land, housing and accommodation:
     + 1. an exception for shared accommodation such as hostels; and
       2. two exceptions for employer-provided accommodation.[[796]](#footnote-797)
  4. We recommend that the Human Rights Act is amended to provide that, where the shared accommodation exception is being relied on to provide accommodation only for persons of the same sex, it cannot be used to discriminate against a person whose gender identity aligns with that sex unless that is reasonably required for certain purposes stated in the legislation.
  5. We recommend similar amendments in respect of one of the exceptions for employer-provided accommodation.
  6. We recommend the other employer-provided accommodation exception is amended to allow for differences of treatment based on the new ground of gender identity.
  7. We do not recommend any of these exceptions are extended to the new proposed ground of having an innate variation of sex characteristics.
  8. This chapter should be read alongside Chapter 8, which set out our general approach to reviewing Part 2 of the Human Rights Act and analysed some common issues that arise across more than one area of life.

## Discrimination protections for accommodation

* 1. Section 53 of the Human Rights Act contains the discrimination protections that relate to accommodation.
  2. Section 53(1) is the main protection. It prohibits the following actions if done by reason of a prohibited ground of discrimination:
     + 1. refusing or failing to dispose of land or accommodation to someone;
       2. disposing of land or accommodation on less favourable terms and conditions than are or would be offered to other persons;
       3. treating someone who is seeking to acquire or has acquired land or accommodation differently from other people in the same circumstances;
       4. denying someone the right to occupy any land or accommodation; and
       5. terminating someone’s interest in any land or right to occupy any land or accommodation.
  3. Examples of activities prohibited by section 53(1) include: refusing to sell or lease a house to someone, to sublet them a room or to book them a room in a hotel; charging someone a higher rent than others; subletting a room on less favourable conditions than are available to others; or evicting someone or terminating their lease.
  4. Section 53(2) of the Human Rights Act prevents a person (such as a landlord) from requiring a person occupying their land or accommodation (such as a tenant) to limit the people who can come onto the property based on a prohibited ground of discrimination.
  5. The protections from discrimination in section 53 of the Human Rights Act are narrowed substantially by a broad exception (applying to all prohibited grounds) for residential accommodation that is to be “shared with the person disposing of the accommodation”.[[797]](#footnote-798) This would include many flatting situations.
  6. As with other provisions in Part 2, the application of section 53 is also narrowed substantially by the operation of Part 1A of the Human Rights Act, which, since 2002, has regulated accommodation that is provided by the government or by people or bodies exercising public functions.[[798]](#footnote-799) The circumstances in which provision of accommodation is a public function are hard to determine as there is almost no case law. One case from 1997 held that the provision of boarding accommodation at a state school did not constitute a public function.[[799]](#footnote-800) However, that decision was critiqued at the time[[800]](#footnote-801) and has since been overtaken by legislative developments.[[801]](#footnote-802) We think it highly likely that provision of boarding facilities in state and state integrated schools (and possibly even in private and charter schools) would now be considered a public function.[[802]](#footnote-803)
  7. We think it is possible that accommodation in university-run hostels, and privately run hostels that have entered a written agreement with a tertiary provider, fall under Part 1A.[[803]](#footnote-804) In one case, Te Taraipiunara Mana Tangata | Human Rights Review Tribunal assumed that a university-run hostel fell under Part 2 but this may simply be because neither party raised the issue in argument.[[804]](#footnote-805)
  8. Although we cannot say for certain, we also think it is highly likely that accommodation in public hospitals falls under Part 1A.[[805]](#footnote-806)
  9. For reasons we explained in Chapter 8, it would be difficult for us to propose amendments to the discrimination protections in section 53 of the Human Rights Act as part of this review because they apply uniformly to all prohibited grounds of discrimination. We nevertheless need to be satisfied that the implications of reform for this provision are broadly appropriate. For that reason, we asked some questions in the Issues Paper about the implications of reform for these discrimination protections.[[806]](#footnote-807)

### Issues of concern to people in these three groups

* 1. If the two new grounds of discrimination that we propose are added to section 21 of the Human Rights Act, it will clarify that people who are transgender or non-binary or who have an innate variation of sex characteristics can complain under the Human Rights Act about discrimination in accommodation. In the Issues Paper, we explained that people in these groups can face discrimination and we discussed some data about relevant experiences of discrimination.[[807]](#footnote-808) More recent data from the 2022 Counting Ourselves survey of people who are transgender or non-binary (published in 2025) confirm that discrimination in accommodation continues to be an issue of concern.[[808]](#footnote-809)
  2. We asked in the Issues Paper whether the protections that are available under section 53 capture accommodation issues of concern to people who are transgender or non-binary or who have an innate variation of sex characteristics.
  3. Some submitters said the discrimination protections in section 53 are sufficient to cover the types of discrimination in accommodation faced by people who are transgender or non-binary or who have an innate variation of sex characteristics.[[809]](#footnote-810) For example, Community Law Centres o Aotearoa said section 53 covers the accommodation issues it has encountered when advising its clients.
  4. Some submitters pointed to accommodation discrimination experienced by people who are transgender or non-binary or who have innate variations of sex characteristics as evidence that section 53 did not provide sufficient protection. Some submitters said the discrimination protections were not sufficient because people in these groups are not currently covered by section 21.
  5. Some people told us in consultation about some specific accommodation issues of concern to them. These included the following:
     + 1. Being evicted from accommodation.
       2. Being refused rental accommodation by landlords or property managers. We were also told that it can be particularly difficult for rainbow refugees and migrants to access rental accommodation if they cannot access identification documents consistent with their gender identity and expression.
       3. Being harassed by landlords and property managers.
       4. Accommodation providers not taking into account the specific needs of transgender students when making decisions about placement in university accommodation.
       5. Being forced out of accommodation shared with flatmates.
  6. If new grounds are added to section 21 of the Human Rights Act, we think section 53 would provide a basis for complaining about many of the issues raised by submitters. For example:
     + 1. Section 53 clearly covers issues such as landlords or property managers refusing to rent accommodation to people who are transgender or non-binary or who have an innate variation of sex characteristics, harassing them or evicting them.
       2. Landlords having identification requirements that disproportionately affect prospective tenants who are transgender or non-binary or who have an innate variation of sex characteristics could be indirect discrimination (unless there is a good reason for the requirement).
       3. To the extent that university accommodation is not a public function, we think that decisions about room placement would fall under section 53. For example, it is possible that a blanket policy that fails to take into consideration the needs of transgender students might be considered indirect discrimination.[[810]](#footnote-811)
  7. One issue that would not generally be covered is discrimination by flatmates. That is because of the exception in section 54 (applying to all prohibited grounds) that covers accommodation that is being shared with the person disposing of the accommodation. For reasons we have explained in Chapter 8, general exceptions of this kind fall outside of our review.
  8. Whether a particular claim of discrimination will be successful will depend on the facts and the evidence. For example, it would be necessary to establish that any different treatment was “by reason” of gender identity or having an innate variation of sex characteristics.
  9. It may also be that some of the concerns raised by submitters may be more appropriately addressed through other complaints mechanisms such as a university accommodation provider’s complaints process or the Tenancy Tribunal. Overall, however, we are satisfied that, if new grounds are added to section 21 of the Human Rights Action, section 53 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 in accommodation.

### Other implications

* 1. In the Issues Paper, we asked whether submitters had any practical concerns about the impact for section 53 of adding new grounds to section 21. We also asked whether new exceptions might be desirable to accommodate any new grounds.
  2. We discuss below two issues raised by submitters. We are satisfied that neither make reform of section 21 undesirable.

#### Difficulties of proof

* 1. A few submitters were concerned that it would be difficult for tenants who are transgender or non-binary to prove claims of accommodation discrimination. For example, one submitter pointed out landlords “can just quietly put your application on the bottom of their list of 30, without being open about their motivation”. Some submitters thought it would be particularly difficult to prove discrimination if an amendment to the Residential Tenancies Act 1986 permitting 90-day ‘no cause’ terminations, then before Parliament, were to be enacted. They said this would mean landlords would not need to give a reason for terminating a lease.[[811]](#footnote-812)
  2. We agree that it can sometimes be difficult for plaintiffs to prove why they missed out on accommodation. However, as we discussed in relation to employment, these difficulties are faced by all those seeking to rely on the Human Rights Act and are not specific to the new grounds we propose. Addressing these concerns is outside the scope of our review.

#### Education and enforcement

* 1. A few submitters observed that, while adding new grounds to section 21 will help to mitigate discrimination against people who are transgender or non-binary or who have an innate variation of sex characteristics, this will be undermined if “landlords and property managers are [not] fully aware of their obligations”. Submitters also said there is a need for “robust” enforcement measures and accountability mechanisms to ensure that the protections are effective. We address issues relating to dispute resolution and education in Chapter 20.

## Accommodation exceptions

* 1. The subpart in Part 2 of the Human Rights Act that relates to accommodation only contains one exception that allows specifically for differences of treatment based on the prohibited ground of sex. We discuss that exception below. We also discuss two exceptions that relate to employment discrimination. They are addressed in this chapter because they concern employer-provided accommodation.
  2. For reasons discussed in Chapter 8 (and mentioned above), this report does not include substantive discussion of exceptions that apply to all prohibited grounds.[[812]](#footnote-813)
  3. In the Issues Paper, we sought feedback on whether to amend any of the sex exceptions we discuss in this chapter to reflect any new prohibited grounds of discrimination that are added to section 21 of the Human Rights Act as a result of this review. We explain the feedback we received and our recommendations for reform of each exception below.
  4. The recommendations for reform set out in this chapter need to be understood against the backdrop of Chapter 8. It explained some significant issues that arise in relation to the wording of exceptions.

### Shared accommodation — section 55

* 1. Section 55 of the Human Rights Act states:

1. Nothing in section 53 shall apply to accommodation in any hostel or in any establishment (such as a hospital, club, school, university, religious institution, or retirement village), or in any part of a hostel or any such establishment, where accommodation is provided only for persons of the same sex, marital status, or religious or ethical belief, or for persons with a particular disability, or for persons in a particular age group.
   1. We recommend the Human Rights Act be amended to provide that, where the section 55 exception is being relied on to provide accommodation only for persons of the same sex, it cannot be used to discriminate against a person whose gender identity aligns with that sex unless the difference of treatment is reasonably required for certain purposes we discuss below.
   2. We do not recommend this exception allow for differences of treatment based on having an innate variation of sex characteristics.

#### History, scope and rationale

* 1. Section 55 applies, in general terms, to shared accommodation in hostels or other establishments. It was carried over from a provision in the Human Rights Commission Act 1977 (1977 Act).[[813]](#footnote-814) However, the wording of the 1993 exception is wider in three respects. First, it was extended to the new grounds of disability and age. Second, “retirement village” was added to the list of examples. Third, the 1977 exception only applied to “residential” accommodation whereas the 1993 exception is not qualified in this way.
  2. In *Zhang v Victoria University of Wellington*, the Human Rights Review Tribunal said “the purpose of section 55 is to permit segregation in hostel living arrangements” but did not explain the legislative aim in providing for segregated living.[[814]](#footnote-815)
  3. The departmental report on the Human Rights Bill in 1993 said this exception was for “positive discrimination” to allow people in certain groups to live together.[[815]](#footnote-816) In its application to the ground of sex, this reflects the role played by female-only residential accommodation (such as single-sex boarding schools and university hostels) in supporting “communities of female togetherness and support”.[[816]](#footnote-817) However, this exception goes well beyond positive discrimination. For example, it allows male-only hostels just as much as female-only hostels.
  4. In its application to the ground of sex, we think section 55 also reflects the rationales of privacy and decency that, as we explained in Chapter 8, underlie several exceptions. These rationales seem to best explain how the exception is currently used, as we explain further below.
  5. Although the departmental report referred to people living together, on its plain wording, section 55 also applies to temporary accommodation.
  6. Some accommodation sites to which section 55 might apply include backpackers’ hostels, boarding schools, retirement villages, boarding houses (unless the landlord lives there),[[817]](#footnote-818) ski resorts, hospitals, rehabilitation centres, supported or transitional accommodation, university hostels and school or summer camps.
  7. Women’s refuges are also covered. As they only emerged in Aotearoa New Zealand in the 1970s, it is unlikely they were a central concern of those drafting the legislation.[[818]](#footnote-819) However, as we discuss below, they were the main focus for many who submitted on this exception.
  8. Section 55 applies both to hostels and establishments and to any part of those hostels and establishments.[[819]](#footnote-820) For example, it would apply to both a women’s hostel and a hostel that has some bunkrooms specifically for women.

#### Current practice

* 1. We did not receive much feedback about current practice in submissions. However, from our research and engagement with sector organisations and accommodation providers, residential accommodation in Aotearoa New Zealand provided only for people of one sex now seems to be relatively rare.[[820]](#footnote-821) Social norms and assumptions about the need for sex-segregated accommodation have shifted significantly since the 1970s.
  2. For example, as far as we can ascertain, all university hostels in Aotearoa New Zealand are now mixed sex. We contacted several universities, who told us hostels tend to contain a variety of sleeping arrangements, including single or mixed-sex floors, twin-share rooms, single rooms, studios, apartments, and flats or pods.[[821]](#footnote-822)
  3. Single-sex schools with boarding facilities are one of the main contexts of which we are aware in which accommodation is still provided solely to people of one sex. There are 83 of these in Aotearoa New Zealand, of which, 20 are located in private schools.[[822]](#footnote-823)
  4. Another current context in which the exception likely operates is seminaries and monasteries.[[823]](#footnote-824) We are also aware of other religious institutions that provide hostel accommodation. We do not know how many provide it only to people of one sex.[[824]](#footnote-825)
  5. The fact there is so little residential accommodation being provided only for people of one sex suggests that the original positive discrimination rationale (of enabling people to live together in communities of mutual support) is no longer the main reason providers rely on the sex exception in section 55. Privacy and decency seem to be more important to many providers. For example, the sector body representing private schools, Independent Schools of New Zealand, told us that the motivations for single-sex boarding facilities in co-educational private schools were decency, privacy and preventing sexual contact between boys and girls. The organisation was unsure about the current practice of housing students who are transgender or non-binary.
  6. The New Zealand Private Surgical Hospitals Association advised us that specific practice regarding single or multiple occupancy rooms varies from hospital to hospital although most would try to allocate multiple occupancy rooms to people of one sex.
  7. The Backpacker Youth Adventure Tourism Association explained that some hostels have single-sex shared rooms, although most provide mixed-sex shared rooms. It said there are no hard industry rules around how people who are transgender or non-binary are accommodated. It said it would expect that anyone who books into a mixed-sex room would be welcomed but understands that some hostels only let a person book into a female-only room if they have a female sex marker on their passport.
  8. Aged Care Association New Zealand told us there are no standardised policies about housing people who are transgender or non-binary in residential aged care facilities. It indicated that, for single-sex areas or shared rooms on wards, residents are usually placed in line with their gender identity rather than their sex assigned at birth, unless the resident requests otherwise.
  9. The National Collective of Independent Women’s Refuges told us transgender women are welcome in all 41 of its refuges and that, from 2019 to 2024, its refuges supported 179 transgender clients. This is consistent with a 2023 report, which found that only a few women’s refuges in Aotearoa New Zealand exclude people who are transgender or non-binary.[[825]](#footnote-826) However, we were told in consultation that some people who are transgender have been denied access to women’s refuges that align with their gender identity. In the 2022 Counting Ourselves survey of people who are transgender or non-binary, some respondents said they had been denied access to emergency housing because they are transgender or non-binary.[[826]](#footnote-827)
  10. Based on the information we have been able to gather, it is clear that, while single-sex accommodation is far rarer than it was, there are still contexts in which providers separate accommodation on the basis of sex (for example, by having separate floors or separate dorms). Where that occurs, practice as to how people who are transgender or non-binary are accommodated varies between industries and providers and standard policies may not exist.
  11. We do not have any information about current practice with respect to accommodating people who have an innate variation of sex characteristics in shared accommodation. We doubt the fact a person has an innate variation of sex characteristics would generally be known to an accommodation provider.

#### Options for reform

* 1. We have not considered seriously the possibility of simply adding gender identity to section 55 of the Human Rights Act to permit accommodation to be provided only for people of a particular gender identity. That would allow accommodation providers to limit mixed-sex accommodation only to people who are cisgender. We can see no clear policy rationale for such an exception.
  2. That also means none of the options we are considering would permit providers to offer accommodation only for people who are transgender or non-binary. Some submitters said that such arrangements are unlikely to be feasible because of the small population size of these groups.[[827]](#footnote-828)
  3. The real issue in relation to this exception is whether and how gender identity should be relevant when accommodation providers are relying on section 55 to provide single-sex accommodation options (whether that be in dedicated facilities, separate floors, single-sex dorms or some other way).
  4. We have considered three main options. The first is to permit providers that offer single-sex accommodation to limit it to people of a particular sex assigned at birth. The second is to clarify that, when single-sex accommodation is being provided, section 55 does not permit providers to exclude a person from the accommodation (or to do one of the other acts made unlawful by section 53) if their gender identity aligns with the designated sex.[[828]](#footnote-829) Because of the breadth of the section 55 exception and the many different situations in which it could apply, we have also considered an intermediate option. This would allow for differences in treatment based on a person’s gender identity in some circumstances but introduce a threshold requirement for when this can occur. We discuss this option further below.

#### Overview of feedback

* 1. Submissions were evenly divided as to whether section 55 should allow providers of single-sex accommodation to restrict it to people who are of the same sex assigned at birth. Many submitters thought it should, including Lesbian Resistance New Zealand, Save Women’s Sports Australasia, Speak Up for Women and the Association of Proprietors of Integrated Schools. Submitters who expressed this view generally highlighted the needs of cisgender women for privacy, dignity and safety and the “right to choice”. A few submitters highlighted rights to freedom of belief, religion and association but did not explain how these were implicated.
  2. Te Kāhui Ture o Aotearoa | New Zealand Law Society said “it would be consistent with the existing scope of section 55 to amend it to include any new grounds”. The Rainbow Support Collective supported extending the exception but did not think it should allow for transgender women to be excluded from a women’s hospital or shelter.
  3. Many other submitters, including Community Law, the Backbone Collective (a national coalition of survivors of violence against women), Hohou Te Rongo Kahukura (a rainbow anti-violence organisation), the National Collective of Independent Women’s Refuges, Rainbow Wellington and Te Aho Kawe Kaupapa Ture a ngā Wāhine | New Zealand Women’s Law Journal said section 55 should not allow people to be excluded from single-sex accommodation based on their gender identity. These submitters were concerned about people who are transgender or non-binary facing exclusion, violence or discrimination.
  4. Implications for women’s refuges was a core concern for many submitters. Again, the views we heard on this issue were very divided. Many submitters wanted transgender women excluded from women’s refuges. Key themes were a view that transgender women pose a risk to the safety and privacy of cisgender women and that cisgender women who are victims of family violence could be traumatised by the presence of transgender women in refuges.[[829]](#footnote-830) For example, one submitter commented that “the vast majority of people who use such refuges are biological females escaping from biological male violence, and therefore want to be in an environment free from biological males”.
  5. Conversely, many submitters were concerned about people who are transgender or non-binary being excluded from women’s refuges. We heard that people in these groups face high rates of intimate partner violence and that transgender women do not pose a risk to cisgender women.
  6. Among submitters who shared this view were three anti-violence organisations: the National Collective of Independent Women’s Refuges, the Backbone Collective and Hohou Te Rongo Kahukura. The National Collective of Independent Women’s Refuges said its member refuges have supported a number of transgender women, and it was not aware of this resulting in any complaints from other clients. It said allowing transgender women to stay in women’s refuges does not place cisgender women at risk of harm and that claims that it does are based on “harmful and baseless prejudice”.
  7. A small number of submitters raised concerns about hospital rooms. For example, the Women’s Rights Party was concerned about cisgender women having to share hospital rooms with transgender women.[[830]](#footnote-831)

#### Analysis and conclusions in relation to gender identity

* 1. We recommend the Human Rights Act be amended to state that, where single-sex accommodation is being supplied, section 55 does not permit providers to exclude a person whose gender identity aligns with the designated sex from the accommodation (or to do one of the other acts made unlawful by section 53) unless that is reasonably required to meet certain purposes we discuss further below.

##### Extending the exception in an unqualified way would be unfair

* 1. For three reasons, we consider that extending the exception so that, whenever an accommodation provider is supplying accommodation to people of one sex, they can limit the accommodation based on a person’s sex assigned at birth would go too far.
  2. First, section 55 of the Human Rights Act is very broad. It contains no threshold requirement linking the circumstances in which it operates to its underlying aims. This contrasts, for example, with the employment exception in section 27(3)(a), which also protects privacy in intimate situations. That exception only applies where a position “needs to be held by one sex to preserve reasonable standards of privacy”.[[831]](#footnote-832)
  3. Second, excluding a person who is transgender from certain types of accommodation, or from accommodation that aligns with their gender identity, affects their equality and dignity. In some cases, very significant consequences may be at stake such as homelessness or returning to an unsafe home.
  4. Third, section 55 applies to a broad range of accommodation types. As we outlined above, there is considerable variation in current practice, both as to whether providers separate accommodation by sex and as to how they accommodate people who are transgender or non-binary when they do so. It is difficult in those circumstances to see the need to extend this exception to permit the blanket exclusion of people who are transgender from accommodation that aligns with their gender identity.

##### Specifying that the exception precludes any different treatment would be too restrictive

* 1. On the other hand, it would be inconsistent with the rationales underlying section 55 and too restrictive for providers to preclude completely the possibility of people being treated differently based on their gender identity in single-sex accommodation.
  2. As we discussed in Chapter 8, social and cultural norms about bodily privacy are evolving. Specifically in relation to sleeping situations, we acknowledge that mixed-sex accommodation is far more common than it was in the 1970s when the exception was first introduced. However, social norms about keeping men and women separate when they are sharing communal accommodation are still important to some people.
  3. As we also explained in Chapter 8, norms of this kind are also evolving in their application to gender identity. While some people would consider their privacy is best maintained by sharing accommodation with a person who has the same sex characteristics as them, for others, it might be about sharing with a person of the same gender identity or with a person they perceive to be of the same sex. People’s perspectives as to how their privacy can be maintained may differ depending on characteristics such as age, sex, religious beliefs and life experience.
  4. We also think that privacy interests may be particularly strong in relation to the place where a person sleeps and that this is a situation in which personal comfort may need to be weighted heavily. An accommodation facility serves as a person’s home while they are there. Further, people are vulnerable when sleeping, particularly when in bunkrooms or other communal accommodation.[[832]](#footnote-833) Section 55 also covers situations in which accommodation is provided for people who are particularly vulnerable for reasons such as age (for example, boarding schools and aged care facilities) or trauma (for example, women’s refuges).
  5. As we discussed above, section 55 applies to a broad array of accommodation types. Further, it does not just apply to decisions about whether to accept someone into an establishment but also to decisions about how to accommodate them within a mixed facility that has some single-sex accommodation options. We do not think the law should remove all discretion for providers to accommodate matters of gender identity in a way that is sensitive to the needs of all users and in the light of evolving norms.
  6. Specifically in the context of women’s refuges (which, as we noted, was a context of concern to many submitters), the interests that are at stake also include the welfare of vulnerable survivors of family violence. Some submitters told us that the presence of transgender women in women’s refuges may, in some circumstances, traumatise clients who are cisgender women and who have experienced violence at the hands of men.[[833]](#footnote-834) We think it is important that refuges, as experts in the field, have at least some flexibility to manage issues that arise (although we acknowledge that most are already taking inclusive approaches to accommodating transgender women).
  7. Although some submitters also suggested that transgender women may pose a safety risk to cisgender women in refuges, we have not found any evidence to support that concern.

##### A threshold requirement of “reasonably required”

* 1. In short, where accommodation providers are offering accommodation that is separated by sex, we do not think it is desirable for the Human Rights Act either to:
     + 1. allow them a blanket licence to exclude people who are transgender from accommodation that aligns with their gender identity even when there is no sound reason for this; or
       2. deny them any discretion to treat people differently based on their gender identity no matter the circumstances.
  2. Neither approach would reflect a fair balance of the competing rights and interests.
  3. Instead, we consider the Act should state a threshold requirement to ensure that providers can only rely on section 55 to restrict the access to single-sex accommodation of a person whose gender identity aligns with the designated sex if there is a good reason to do so. We have identified two legitimate reasons for such differences of treatment that we think should be stated in the legislation.
  4. First, providers should have discretion to limit single-sex accommodation based on sex assigned at birth when reasonably required to preserve privacy. As noted, privacy is a key rationale underlying section 55 as well as some other Part 2 provisions. In Chapter 9, we recommended extending an employment exception protecting reasonable expectations of privacy to the proposed new gender identity ground.
  5. The second circumstance in which we think providers should be entitled to limit access based on sex assigned at birth is when reasonably required to protect the welfare of users of the accommodation (whether that is the transgender person themselves or other users of the accommodation). This second rationale acknowledges the setting of women’s refuges, which was a central concern to many submitters (although we are not suggesting it would only apply in that setting).
  6. The standard of “reasonably required” is consistent with recommendations we are making for threshold requirements in relation to other exceptions.[[834]](#footnote-835) It is more modern statutory language than “need” in section 27(3)(a) and more clearly imports an expectation that competing rights and interests are balanced fairly. It will enable providers to consider matters such as the nature and purpose of the accommodation, the impact of the different treatment and the extent of cost or inconvenience to the provider in making suitable provision for people of a particular gender identity. For example, a decision to exclude a transgender woman from the only women’s refuge in a small town (potentially forcing her back into an abusive relationship) involves different considerations from asking a transgender woman to sleep in the mixed dormitory rather than the female-only dormitory at a backpackers’ hostel that provides both.
  7. We considered whether the legislation should include a mandatory list of factors that providers must consider but decided against it for two reasons. First, we were concerned it would be too onerous given the nature and variety of accommodation providers that may be affected. Second, it would also be less consistent with the approach to privacy interests taken in other provisions such as section 27(3)(a).

#### Analysis and conclusions in relation to having an innate variation of sex characteristics

* 1. We do not recommend extending this exception to allow for differences of treatment linked to the proposed new ground of having an innate variation of sex characteristics.
  2. Submitters who thought section 55 should be extended rarely mentioned people who have an innate variation of sex characteristics.[[835]](#footnote-836) We do not think extending section 55 to this new ground is required for consistency with the rationales underlying section 55. We have not heard anything to suggest that social norms about keeping men and women separate in single-sex accommodation are engaged differently when a person has an innate variation of sex characteristics. We are not aware of any accommodation providers currently excluding people from single-sex accommodation on the basis of having an innate variation of sex characteristics.

#### Some other feedback we received

* 1. Community Law said section 55 should allow people who are transgender or non-binary to access unisex or non-gendered accommodation if reasonable. Rainbow Wellington said that, if a hostel only has single-sex options, some rooms should be set aside for non-binary or intersex people.
  2. The Human Rights Act does sometimes impose ‘reasonable accommodation’ obligations on Part 2 actors, which require them to take reasonable measures to make an environment accessible to particular groups.[[836]](#footnote-837) However, we did not consult on the possibility of such a provision in relation to accommodation (as we did in relation to unisex facilities such as bathrooms).[[837]](#footnote-838) We do not think it would be appropriate to recommend a provision imposing positive requirements on accommodation providers in the absence of consultation on this issue.
  3. One submitter said not amending section 55 to allow differences of treatment on the basis of gender identity would breach New Zealand’s obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). We disagree that any obligations in CEDAW explicitly require states to limit shared accommodation based on sex assigned at birth.[[838]](#footnote-839)
  4. In relation to women’s refuges, the body that monitors CEDAW has issued guidance on violence against women where it made some recommendations relating to establishing and supporting women’s refuges.[[839]](#footnote-840) It did not, however, address specifically the application of these obligations to transgender women.

#### Recommendation and wording

1. The Human Rights Act 1993 should be amended to specify that the sex exception in section 55 of the Human Rights Act does not permit the different treatment of a person whose gender identity aligns with the sex for which accommodation is being provided unless that is reasonably required to preserve the privacy or to protect the welfare of any occupant or potential occupant of the accommodation.
   1. For reasons we outlined above, we recommend that the Human Rights Act be amended to clarify how the section 55 exception applies to people who are transgender when accommodation is being provided only for persons of one sex. We recommend this exception should not permit the different treatment of a person whose gender identity aligns with the designated sex of the accommodation unless the difference of treatment is reasonably required for one of the two purposes we have outlined.
   2. The assessment of privacy and welfare concerns should relate to all occupants or potential occupants of the accommodation. This could include the transgender person themselves as well as any other person who occupies, or wants to occupy, the accommodation.
   3. One way to achieve this policy intent would be to insert into the Human Rights Act a new gender identity exception (say, section 55A). It could read:
   4. (1) Nothing in section 53 shall apply to different treatment based on gender identity in relation to accommodation of the kind outlined in section 55, or any part of that accommodation, where:
      1. (a) that accommodation, or any part of that accommodation, is provided only for persons of the same sex; and
      2. (b) the different treatment is reasonably required to preserve the privacy or to protect the welfare of any person who is occupying, or wishes to occupy, that accommodation.
   5. (2) Except in the circumstances set out in subsection (1), section 55 does not permit the different treatment of a person, in relation to accommodation that is provided only for persons of one sex, if their gender identity aligns with that sex, unless that different treatment is by reason of marital status, religious or ethical belief, disability, or age.

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

* 1. Subsections 27(3)(b) and 27(5) contain exceptions to the protections from discrimination in employment in section 22 of the Human Rights Act.
  2. Section 27(3)(b) states:

1. (3) Nothing in section 22 shall prevent different treatment based on sex where—
   * 1. …
     2. (b) the nature or location of the employment makes it impracticable for the employee to live elsewhere than in premises provided by the employer, and—
        1. (i) the only premises available (being premises in which more than 1 employee is required to sleep) are not equipped with separate sleeping accommodation for each sex; and
        2. (ii) it is not reasonable to expect the employer to equip those premises with separate accommodation, or to provide separate premises, for each sex.
   1. We recommend amendments to the Human Rights Act to introduce a threshold requirement (along similar lines to the one suggested for section 55) before the section 27(3)(b) exception can be relied on to discriminate against a person whose gender identity aligns with the sex for which on-site accommodation is being provided.
   2. Section 27(5) states:

Where, as a term or condition of employment, a position ordinarily obliges or qualifies the holder of that position to live in premises provided by the employer, the employer does not commit a breach of section 22 by omitting to apply that term or condition in respect of employees of a particular sex or marital status if in all the circumstances it is not reasonably practicable for the employer to do so.

* 1. We recommend simply extending this exception to gender identity.
  2. For reasons discussed at the end of this chapter, we do not consider either exception should be extended to having an innate variation of sex characteristics.

#### History, scope and rationale

* 1. The two exceptions for employer-provided accommodation are located in a section headed “Exceptions in relation to authenticity and privacy”. They are based on very similar provisions in the 1977 Act.[[840]](#footnote-841)

##### Section 27(3)(b)

* 1. The legislative history of section 27(3)(b) and its 1977 counterpart reveals little about the rationales that underlie it, and there is no case law where it has been applied. However, we think that it likely reflects social norms about decency and privacy from the time the exceptions were drafted. As we discussed earlier, this includes norms about keeping men and women separate when they are unclothed or sleeping.
  2. Section 27(3)(b) also reflects ideas of practicality, again within the context of the times. The exception applies where a workplace provides shared sleeping quarters for one sex only and it is “impracticable” for the employer to provide accommodation for “each sex”. We suspect that, in 1977, a number of industries and professions may have been dominated by persons of one sex (and to a lesser extent in 1993).
  3. Section 27(3)(b) might apply to employer-provided accommodation in seasonal work, cruise ships, the armed forces, live-in support roles, boarding schools, accommodation on a small island, on-call doctors, firefighters who are sleeping on site, accommodation for miners or people working on offshore oil rigs.
  4. Although all these contexts are potentially applicable, as we discuss further below, section 27(3)(b) only applies if the employer has provided accommodation for just “one sex” and if that is reasonable. As we discuss further below, we doubt there are many contexts in contemporary Aotearoa New Zealand where these conditions exist.

##### Section 27(5)

* 1. Section 27(5) allows an employer to omit to apply a term or condition that would otherwise permit or require an employee to live on site if that is not reasonably practicable based on their sex or marital status. There is no case law where section 27(5) has been applied.
  2. Depending on the circumstances, an employee may consider living on site a benefit or a detriment.[[841]](#footnote-842) Therefore, section 27(5) is, to some extent, a ‘positive discrimination’ provision, enabling people to access jobs that might otherwise have been unavailable for them. An example would be a workplace without suitable on-site accommodation for a married person.
  3. As with section 27(3)(b), we think this exception also reflects rationales of privacy and practicality. The exception does not expressly refer to the premises only being equipped with accommodation for one sex, but, specifically in its application to the ground of sex, those are the circumstances in which it would apply. When the 1977 Act was enacted, the Minister of Justice gave the example of homes for female nurses.[[842]](#footnote-843)
  4. To rely on section 27(5), an employer must prove it is not reasonably practicable to require or allow the person to live in the employer’s premises in the circumstances.

#### Current practice

* 1. As far as we can tell, employer-provided accommodation is no longer a major feature of New Zealand’s job market. Further, employer-provided accommodation that is not equipped with separate sleeping accommodation for each sex is, we suspect, extremely rare. We were unable to obtain much information about this in consultation. However, we understand that many industries or professions that may have been exclusively male or female in 1977 are now mixed. For example, men work as nurses, and women work in seasonal work, on cruise ships, on oil rigs and in mines, as firefighters and as doctors.
  2. Therefore, it seems unlikely that employers providing accommodation would only be equipped to house people of one sex, let alone that this would be reasonable. For example, in response to an inquiry from us, Te Whatu Ora | Health New Zealand said most public hospitals offer mixed-gender Resident Medical Officer lounges and sleeping arrangements.[[843]](#footnote-844)
  3. Despite our efforts, we do not know much about current employer practice on housing people who are transgender or non-binary in employer-provided accommodation. No submitter commented on this.

#### Options for reform in relation to a gender identity ground — section 27(3)(b)

* 1. As with section 55, we have not considered seriously the possibility of simply adding the new ground of gender identity to section 27(3)(b) of the Human Rights Act alongside sex. That would permit employers to insist on accommodation being limited to people who are cisgender or transgender. It would go well beyond what is needed to give effect to the privacy rationale and therefore would not reflect a fair balance of competing interests.
  2. The real issue is how gender identity should be taken into account in the situation that section 27(3)(b) contemplates — that is, where an employer is treating people differently based on sex because:
     + 1. the nature or location of the employment makes it impracticable for an employee to live off site;
       2. the employer only has accommodation for one sex; and
       3. it is not reasonable to expect the employer to provide accommodation for each sex.
  3. We have considered three main options. The first is to permit employers, in the circumstances outlined by section 27(3)(b), to treat an employee or prospective employee differently depending on whether their sex assigned at birth aligns with the accommodation that is being provided. This would mean, for example, that an employer could deny a transgender man employment because the only on-site accommodation option available is for men.
  4. A second option would be to clarify that section 27(3)(b) does not permit an employer to refuse a person employment (or to do one of the other acts made unlawful by section 22) if their gender identity aligns with the sex for which accommodation is being provided.[[844]](#footnote-845)
  5. For similar reasons to those we explained earlier in relation to section 55 (and for consistency with section 55), we have also considered a third intermediate option that would introduce a threshold requirement. We discuss this option further below.

#### Options for reform in relation to a gender identity ground — section 27(5)

* 1. We considered two main options for amending section 27(5). The first is to clarify that it does not breach the Part 2 employment discrimination protections for an employer, by reason of an employee’s gender identity, to omit to apply a term or condition that obliges or qualifies an employee to live on site. The existing threshold requirements in section 27(5) would still apply, which means an employer would need to establish that it would not be reasonably practicable to apply the term or condition.
  2. The alternative option would be to clarify that section 27(5) does not permit an employer, by reason of an employee’s gender identity, to omit to apply a term or condition that obliges or qualifies the employee to live on site.

#### Analysis and conclusions in relation to a gender identity ground — section 27(3)(b)

* 1. Section 27(3)(b) of the Human Rights Act has little current practical application. For that reason, it would make little practical difference whether it is amended or not. Nevertheless, for reasons of principle and for consistency, we propose extending the exception to gender identity but introducing a similar threshold requirement to the one we recommend for section 55.

##### Specifying that the exception precludes any different treatment would be too restrictive

* 1. We do not think the law should remove all discretion for employers, in the situations section 27(3)(b) contemplates, to consider matters of gender identity in the light of evolving norms. As our reasons are similar to those stated earlier in relation to section 55, we only summarise them briefly.
  2. First, removing discretion for employers would be inconsistent with the privacy and practicality rationales that underlie section 27(3)(b). As noted earlier, while we acknowledge that social and cultural norms about keeping men and women separate in sleeping situations are evolving, we cannot say they no longer exist. Nor can we say that, for everyone, these norms are about sharing a gender identity rather than a sex assigned at birth. Some submitters told us that employer-provided accommodation should be separated by sex assigned at birth due to privacy concerns.
  3. As we also observed above, we think expectations of privacy are high in sleeping situations because of the length of time people spend there and the inherent vulnerability in being asleep.
  4. In terms of the practicality rationale, the New Zealand Law Society agreed in its submission with our assessment in the Issues Paper that larger employers may be able to accommodate people who are transgender or non-binary and those with innate variations of sex characteristics. However, it was concerned that other employers may not reasonably be able to provide alternative accommodation arrangements and gave the example of on-site school boarding houses with limited space or land. A few other submitters said employers would face practical constraints in housing transgender employees such as the imposition of additional costs.

##### Extending the exception in an unqualified way would be unfair

* 1. We have less concern about a blanket extension of section 27(3)(b) to allow for differences of treatment based on gender identity in the situations section 27(3)(b) contemplates than we did about a blanket extension of section 55. As explained above, the exception has very narrow practical application. Further, it does not apply in the same situations of vulnerability as section 55. A prospective employee who misses out on employment because of this exception is unlikely to find themselves homeless or returning to family violence as a direct result.
  2. Nevertheless, for three reasons (alongside consistency with section 55), we consider that it would not be fair to extend the exception so that people can always be treated differently based on their gender identity in these situations.
  3. First, although the effect on equality and dignity may be less than in relation to section 55, the exception nevertheless has an exclusionary impact. Therefore, it should only apply where necessary to serve other important objectives (such as privacy). Dignity is affected where people are treated differently without there being a good reason for it.[[845]](#footnote-846)
  4. Second, although section 27(3)(b) only applies if it is not reasonable to expect the employer to provide suitable accommodation, the exception is not limited to what is needed to protect reasonable expectations of privacy. This is inconsistent with the employment exception in section 27(3)(a) of the Human Rights Act, which appears directly above section 27(3)(b). That exception relates to positions that need to be “held by one sex to preserve reasonable standards of privacy”.
  5. Finally, we did not receive any submissions disclosing current problems for employers in accommodating people who are transgender.

##### A threshold requirement of “reasonably required”

* 1. We recommend that the Human Rights Act should be amended to introduce a threshold requirement before section 27(3)(b) can be relied on to discriminate against a person whose gender identity aligns with the sex for which on-site accommodation is being provided. As with our recommendation on section 55, employers should only be entitled to do this if it is reasonably required to preserve the privacy of people with whom the accommodation is being shared.
  2. This threshold requirement would limit the application of the exception to differences in treatment that advance the underlying privacy rationale.[[846]](#footnote-847) This would encourage employers to turn their mind to the impact of any different treatment on all employees and prospective employees and promote a fair balance of competing right and interests.
  3. The threshold requirement would also promote internal coherence of the Human Rights Act. It is consistent with the existing reference to reasonable expectations of privacy in section 27(3)(a), with our recommendations in relation to section 55 and with recommendations we are making about reform of other exceptions.[[847]](#footnote-848)

#### Analysis and conclusions in relation to a gender identity ground — section 27(5)

* 1. We recommend amending section 27(5) to allow for differences of treatment by reason of gender identity. This is the reform option that best supports the rationales of privacy, practicality and positive discrimination that underlie this exception. Section 27(5) gives employers flexibility not to apply a term or condition that would otherwise oblige an employee to live on site. This may be beneficial for some transgender or non-binary employees who may have privacy concerns about being housed on site, for example, because of particular needs associated with affirming their gender. This positive discrimination rationale distinguishes section 27(5) from the other accommodation exceptions we have discussed in this chapter.
  2. We appreciate this will also mean an employer could rely on the exception to refuse to house a transgender or non-binary employee on site even if this is what they would prefer. Some submitters (such as OutLine Aotearoa and the Rainbow Support Collective) told us that an employer should not be able to force an employee who is transgender or who has an innate variation of sex characteristics to use alternative accommodation if there is on-site accommodation that aligns with the employee’s gender.
  3. According to the terms of the section, however, this could only occur if, in all the circumstances, it is not reasonably practicable for the employer to apply the relevant term or condition.[[848]](#footnote-849) That test of reasonable practicability would require employers to take into account the competing rights and interests at play, including the non-discrimination rights of transgender or non-binary employees, and the rights to privacy and dignity of other employees. For that reason, a new “reasonably required” threshold of the kind we have recommended in relation to sections 55 and 27(3)(a) would be largely redundant.

#### Having an innate variation of sex characteristics

* 1. We do not recommend extending either of the employer-provided accommodation exceptions to allow for differences of treatment based on the proposed new ground of having an innate variation of sex characteristics. This is not required by the underlying rationales of either exception. We have not heard anything to suggest that social norms about keeping men and women separate in single-sex accommodation are engaged differently when a person has an innate variation of sex characteristics.
  2. Regarding the positive discrimination rationale underlying section 27(5), it is possible that an employee with an innate variation of sex characteristics might themselves have a relevant privacy interest relating to their innate variation. However, extending the exception is not needed to protect that interest. For example, an exception is not needed to make it lawful for an employer to excuse a person with an innate variation of sex characteristics from living on site for reasons associated with their innate variation. This is because, under the reform we propose of section 21, the new ground of having an innate variation of sex characteristics will be asymmetrical. Not having an innate variation of sex characteristics will not be a prohibited ground of discrimination and therefore people will not be able to complain about discrimination on that basis.

#### Some other feedback we received

* 1. We heard some other arguments about the employer-provided accommodation exceptions that were similar to those we heard about section 55. For example, we received feedback about the need for employers to provide unisex and non-gendered accommodation options and about the relevance of CEDAW. Our responses to these arguments are the same here as above (in relation to section 55).

#### Recommendations and wording

1. The Human Rights Act 1993 should be amended to specify that the exception in section 27(3)(b) of the Human Rights Act does not permit the different treatment of a person whose gender identity aligns with the sex for which accommodation is being provided unless that is reasonably required to preserve the privacy of any occupant or potential occupant of the accommodation.
2. Section 27(5) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new ground of gender identity.
   1. For reasons we outlined above, we recommend amendments to the Human Rights Act to clarify how the section 27(3)(b) exception applies to people who are transgender when on-site accommodation is being provided only for people of one sex. We recommend this exception should not permit the different treatment of a person whose gender identity aligns with the sex for which on-site accommodation is being provided unless the different treatment is reasonably required to preserve the privacy of any occupant or potential occupant of the accommodation.
   2. In Chapter 9, we suggested that it may be appropriate to separate out the two exceptions in sections 27(3)(a) and 27(3)(b) so that the amendments we propose for section 27(3)(a) do not also apply to section 27(3)(b) and vice versa.
   3. One way to achieve the policy intent outlined in our recommendation above might be to retain the current wording of section 27(3)(b) as subsection (3A) and then insert two new subsections (say, subsections (3B) and (3C)). The employer-provided accommodation exceptions might then read as follows:[[849]](#footnote-850)
   4. (3A) Nothing in section 22 shall prevent different treatment based on sex where the nature or location of the employment makes it impracticable for the employee to live elsewhere than in premises provided by the employer, and—
      1. (a) the only premises available (being premises in which more than 1 employee is required to sleep) are not equipped with separate sleeping accommodation for each sex; and
      2. (b) it is not reasonable to expect the employer to equip those premises with separate accommodation, or to provide separate premises, for each sex.
   5. (3B) Nothing in section 22 shall prevent different treatment based on gender identity in the circumstances set out in section 27(3A) if that is reasonably required to preserve the privacy of people with whom the accommodation is shared.
   6. (3C) Except in the circumstances set out in section 27(3B), section 27(3A) does not permit the different treatment of a person, in relation to accommodation that is not equipped with separate sleeping accommodation for each sex, if the person’s gender identity aligns with the sex for which accommodation is being provided.
   7. For section 27(5), the following (underlined) words could simply be added to the existing provision:

(5) Where, as a term or condition of employment, a position ordinarily obliges or qualifies the holder of that position to live in premises provided by the employer, the employer does not commit a breach of section 22 by omitting to apply that term or condition in respect of employees of a particular sex, gender identity, or marital status if in all the circumstances it is not reasonably practicable for the employer to do so.

CHAPTER 12

# Education

## Introduction

* 1. In this chapter, we consider the provisions in Part 2 of the Human Rights Act 1993 that relate to educational establishments.
  2. We start by addressing the protections from discrimination in the subpart about educational establishments. We explain the implications of reform of section 21 of the Human Rights Act for these education protections and why we are satisfied these implications are appropriate.
  3. We then address an exception in Part 2 that allows educational establishments to be maintained wholly or principally for students of one sex. We recommend this exception be amended to clarify that it does not entitle educational establishments to refuse to admit a student whose gender identity aligns with the establishment’s designated sex.
  4. This chapter should be read alongside Chapter 8, which set out our general approach to reviewing Part 2 of the Human Rights Act and analysed some common issues that arise across more than one area of life.

## Discrimination protections for education

* 1. Section 57 of the Human Rights Act sets out the discrimination protections that relate to educational establishments. It applies to people and bodies who control, manage and teach at educational establishments and prohibits the following actions if done by reason of a prohibited ground of discrimination:
     + 1. refusing or failing to admit a student;
       2. admitting a student on less favourable terms;
       3. denying or restricting a student’s access to any benefits or services; and
       4. excluding a student or subjecting them to any other detriment.

### Limited application of Part 2 education provisions

* 1. On its face, “educational establishment” is a broad term. The Act states it includes establishments “offering any form of training or instruction” as well as establishments controlled by vocational training bodies.[[850]](#footnote-851) Some examples of educational establishments are: early childhood education centres; schools; tertiary institutions such as universities, wānanga, institutes of technology and polytechnics; and training establishments set up to serve industries or professions (such as the Royal New Zealand Police College).
  2. Despite the breadth of this term, since 2002, section 57 has had limited application. This is because, as we explained in Chapter 8, providing education will often be a public function. Since 2002, public functions have been regulated by Part 1A of the Human Rights Act rather than Part 2.
  3. There is insufficient case law to identify with any certainty the circumstances in which section 57 might still apply (that is, the circumstances in which actions of educational establishments are not public functions). Commentary and existing case law suggest section 57 is unlikely to apply to the provision of education by state schools, state integrated schools and tertiary institutions such as universities and wānanga.[[851]](#footnote-852) We think it is also unlikely to apply to provision of education by a charter school.[[852]](#footnote-853)
  4. Commentators are divided on whether the provision of education by private schools would qualify as a public function.[[853]](#footnote-854) Section 57 may apply to some activities of private schools, early childhood education centres and training establishments set up to serve industries or professions, but the extent of its application has not been tested.
  5. For reasons we explained in Chapter 8, it would be difficult for us to propose amendments to the discrimination protections in section 57 of the Human Rights Act as part of this review because they apply uniformly to all prohibited grounds of discrimination. We nevertheless need to be satisfied that the implications of reform for this provision are broadly appropriate. For that reason, we asked some questions in the Issues Paper about the implications of reform for these discrimination protections.[[854]](#footnote-855)

### Issues of concern to people in these three groups

* 1. If the two new grounds of discrimination that we propose are added to section 21 of the Human Rights Act, it will clarify that people who are transgender or non-binary or who have an innate variation of sex characteristics can complain under the Human Rights Act about discrimination in education. In the Issues Paper, we explained that children and young people in these groups can face discrimination in educational environments and we discussed some data about relevant experiences of discrimination.[[855]](#footnote-856) More recent data from the 2022 Counting Ourselves survey of people who are transgender or non-binary (published in 2025) confirm that discrimination in education continues to be an issue of concern.[[856]](#footnote-857)
  2. We asked in the Issues Paper whether the protections that are available under section 57 capture issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. Community Law Centres o Aotearoa told us in its submission that section 57 covers the main issues that its clients experience in education. It thought that, if section 21 is amended to add new grounds, section 57 will likely provide sufficient protection. OutLine Aotearoa also considered that the existing protections were sufficient.
  3. Some people told us in consultation about some specific education issues of concern to them. These included:
     + 1. being denied admission to academic programmes due to gender identity;
       2. being denied admission to single-sex schools;
       3. students being made to wear a uniform that does not correspond with their gender identity;
       4. not being able to apply for gendered leadership positions (such as Head Boy or Head Girl) that correspond with the student’s gender identity;
       5. bullying and harassment at school;
       6. issues with how personal information about gender identity is treated by schools, for example, schools not permitting information to be corrected or disclosing a student’s gender history to others;
       7. relationships and sexuality education that is not inclusive of students who are transgender or non-binary or who have an innate variation of sex characteristics; and
       8. schools reinforcing the binary of male and female in the way they operate.
  4. If the new grounds are added to section 21 of the Human Rights Act, we think section 57 would provide a basis for complaining about many, if not all, of the issues submitters mentioned. For example:
     + 1. Denying a student admission to an academic programme is clearly covered.[[857]](#footnote-858)
       2. Making a student wear a uniform that does not align with their gender identity might amount to admitting a student on less favourable terms and conditions than others[[858]](#footnote-859) or subjecting them to a detriment.[[859]](#footnote-860)
       3. Not being able to apply for gendered leadership positions that correspond to a student’s gender identity might also be considered less favourable terms and conditions or a detriment. It might additionally amount to restricting access to a benefit.[[860]](#footnote-861)
       4. Bullying and harassment would again likely amount to subjecting a student to a detriment.[[861]](#footnote-862) Section 57 would apply to behaviour of a staff member as well as to a situation where the educational establishment took bullying by students that is linked to a student’s gender identity or innate variation of sex characteristics less seriously than if it had occurred for other reasons.
       5. Similarly, if an educational establishment treated a student’s personal information less carefully than others by reason of their gender identity or having an innate variation of sex characteristics, this would likely amount to a detriment.
  5. Whether a particular claim of discrimination will be successful will depend on the facts and the evidence. For example, a plaintiff must prove that the treatment they suffered was “by reason of” a prohibited ground of discrimination. Some issues of concern submitters told us about may be easier to frame as discrimination claims than others. For example, claims about schools reinforcing the gender binary may be somewhat harder to bring given the challenges in finding an appropriate comparator.
  6. In some cases, concerns of the kind submitters raised with us may be more appropriately addressed under other complaints mechanisms. For example, a complaint could be made internally to a teacher, principal or the school board or to an agency such as Tari o Te Kaitiaki Mana Tangata | Office of the Ombudsman or Matatū Aotearoa | Teaching Council of Aotearoa New Zealand.[[862]](#footnote-863) There are also obligations in relation to student wellbeing in the Education and Training Act 2020, health and safety obligations in the Health and Safety at Work Act 2015, principles relating to acceptable online conduct in the Harmful Digital Communications Act 2015 and the information privacy principles in the Privacy Act 2020.[[863]](#footnote-864)
  7. Overall, we are satisfied that, once new grounds are added to section 21 of the Human Rights Act, section 57 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 the discrimination they experience in education.
  8. A final matter raised by some submitters is that providing education through single-sex schools is out of date and detrimental to students who are transgender or non-binary or who have an innate variation of sex characteristics. As we discuss below, single-sex schools are expressly permitted by section 58(1) of the Human Rights Act. For reasons we discussed in Chapter 8, it is not open to us to recommend removing sex exceptions in the Act altogether.

### Other implications

* 1. In the Issues Paper, we asked whether submitters had practical concerns about the impact for section 57 of adding new grounds to section 21. We also asked whether new education exceptions might be desirable to accommodate any new grounds.
  2. We discuss below several issues raised by submitters. We are satisfied none of them make reform of section 21 undesirable or need to be addressed through new exceptions.

#### School clubs

* 1. Some people told us that school clubs may need to be able to discriminate in choosing their members such as rainbow clubs that exclude cisgender and heterosexual students.
  2. Section 57 only places obligations on those who control, manage or teach at educational establishments. If a club is set up by students, it would not fall under section 57 (although the school itself would need to comply with the Human Rights Act in relation to any support it offered). There is no exception for school clubs related to other prohibited grounds of discrimination, and we do not think it is necessary to recommend one as part of this review.

#### Personal information about sex assigned at birth

* 1. Some submitters were worried that schools would be prevented from collecting or sharing information about staff or students’ sex assigned at birth if the Human Rights Act was amended. For example, Resist Gender Education said: “It is not possible to properly protect children and run a school safely if the sex of all the children and the staff is not known. This is a basic safeguarding principle.” It also said teachers need to know “the actual sex” of children under their care so they can safely provide medical assistance, plan for residential camps and offer sex-specific advice. It considered that a student’s “biological sex” must be declared to the school when enrolling.
  2. Educational establishments are already subject to extensive requirements about the collection, use and disclosure of personal information.[[864]](#footnote-865) Although the reform we propose of section 21 of the Human Rights Act will clarify the availability of an additional complaints mechanism, we doubt this will create new obligations for schools about the handling of personal information. We think it is unlikely that collection, use or disclosure of information in compliance with the Privacy Act would be held to be a detriment and therefore a breach of section 57.

#### Positive duties for educational establishments to protect students

* 1. Rainbow Wellington submitted that educational institutions should have a positive duty to protect students from discrimination by staff and fellow students.
  2. Educational establishments already have duties under the Human Rights Act to take steps to prevent discrimination by staff. Under section 68, anything done by an employee is attributed to the employer unless it took reasonable steps to prevent it or to prevent acts of that kind. We think it would be outside the scope of the review to recommend expanding this vicarious liability provision to cover the actions of students.
  3. Educational establishments also have extensive obligations to make schools a safe place for students under other laws (including obligations to take all reasonable steps to eliminate discrimination).[[865]](#footnote-866) We therefore do not consider it is necessary to have a specific provision in the Human Rights Act requiring schools to prevent discrimination on the basis of gender identity and having an innate variation of sex characteristics.

#### Human Rights Act obligations imposed directly on students

* 1. Some submitters went further and suggested the Human Rights Act should impose obligations on students, while others were concerned that the Act might apply to students.
  2. For example, Te Kāhui Ture o Aotearoa | New Zealand Law Society said its only concern with the scope of section 57 was that it would not cover bullying or harassment by other students (although it observed that other legal protections exist to promote a safe student environment).
  3. A few submitters expressed concern about the impact of discrimination protections on other students, for example, that students would be required to use their classmates’ preferred names or pronouns.
  4. The Human Rights Act does not currently apply to students directly, and we do not propose amending its scope in this way.

## Education exceptions

* 1. The subpart in Part 2 of the Human Rights Act that relates to educational establishments contains two exceptions that allow for differences of treatment based on the prohibited ground of sex.[[866]](#footnote-867) We discuss one of these exceptions in this chapter. We discuss the other (for courses and group counselling) in Chapter 13.
  2. The recommendation for reform set out below needs to be understood against the backdrop of Chapter 8. It explained some significant issues that arise in relation to the wording of exceptions.

### Single-sex schools — section 58(1)

* 1. Section 58(1) of the Human Rights Act states:

1. An educational establishment maintained wholly or principally for students of one sex, race, or religious belief, or for students with a particular disability, or for students in a particular age group, or the authority responsible for the control of any such establishment, does not commit a breach of section 57 by refusing to admit students of a different sex, race, or religious belief, or students not having that disability or not being in that age group.
   1. In the Issues Paper, we sought feedback on whether to amend this provision to reflect any new prohibited grounds of discrimination that are added to section 21 of the Act as a result of this review.
   2. We recommend the Human Rights Act be amended to clarify that section 58(1) does not entitle schools to refuse to admit a student whose gender identity aligns with the school’s designated sex.

#### History, scope and rationale

* 1. This exception allows educational establishments to be restricted (in whole or in part) to students of a particular sex, race, religious belief, disability or age. It is based on a provision in the Human Rights Commission Act 1977 with the only difference being the grounds to which it applies.[[867]](#footnote-868)
  2. Although section 58(1) refers generally to educational establishments, the only single-sex establishments we know of in Aotearoa New Zealand are schools.[[868]](#footnote-869)
  3. There is no explanation in the legislative history for the policy rationale of section 58(1) or its 1977 equivalent. However, the 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. These include single-sex Māori educational institutions such as TIPENE St Stephen’s and Te Aute College.[[869]](#footnote-870)
  4. The exception also accommodates the specific educational needs and preferences of students and their parents. We think it is one of the provisions in the Human Rights Act that seeks to support substantive equality.
  5. Two factors limit significantly the scope and application of section 58(1). First, section 58(1) only applies to decisions about admission. It does not permit differences in treatment once a student is admitted to a school.
  6. Second, as we explained earlier in the chapter, many (and possibly even all) decisions about school admissions are public functions, which are regulated by Part 1A of the Human Rights Act, not Part 2. It is unlikely that Part 2 covers admission decisions made by state schools, state integrated schools or charter schools. It is more likely Part 2 covers admission decisions made by private schools, although, as we explained, even this is debated. We think admission decisions, being about access to education, are more likely to be considered public functions than some other functions that schools exercise.
  7. There are currently only 21 single-sex private schools in Aotearoa New Zealand.[[870]](#footnote-871) Assuming section 58(1) has any application at all to school admissions since the enactment of Part 1A, we think it likely only applies to these 21 schools.[[871]](#footnote-872)
  8. Other school admission decisions would need to be challenged under Part 1A using the tests we set out in Chapter 18.

#### Options for reform

* 1. In the Issues Paper, we asked whether section 58(1) should be amended to reflect any new grounds of discrimination. We identified four options for reform:[[872]](#footnote-873)
     + 1. option 1: the exception should be retained in its current form;
       2. option 2: the exception should clarify that it does not entitle single-sex schools to refuse to admit transgender students whose gender identity aligns with the school’s designated sex;
       3. option 3: the exception should clarify that it entitles schools to refuse to admit students whose sex assigned at birth does not align with the school’s designated sex; and
       4. option 4: the exception should clarify that it entitles schools to refuse to admit students whose sex recorded on their birth certificate does not align with the school’s designated sex.
  2. As discussed in Chapter 8, the effect of option 1 would be significant uncertainty about the scope of the exception as it relates to gender identity.[[873]](#footnote-874) We do not consider this option further.
  3. Option 2 would require a school that is covered by Part 2 of the Human Rights Act to admit a transgender student whose gender identity aligns with the school’s designated sex on the same basis as a cisgender student of that sex.
  4. By contrast, options 3 and 4 would each make it lawful, in different circumstances, to refuse to admit a transgender student whose gender identity aligns with a school’s designated sex. Option 3 would permit this to occur whenever their sex assigned at birth differed from the school’s designated sex. Option 4 would only permit it if the student had not obtained a birth certificate containing a sex marker that aligns with the school’s designated sex.
  5. Option 4 would therefore tie a transgender student’s entitlement to attend a (Part 2-regulated) single-sex school that aligns with their gender identity to their willingness or ability to change the sex marker on their birth certificate. As we explained in Chapter 3, the Births, Deaths, Marriages, and Relationships Registration Act 2021 enables people born in Aotearoa New Zealand and who are transgender or non-binary to obtain a birth certificate with a sex marker that reflects their “nominated sex” (either male, female or non-binary).
  6. The process for doing this is, however, slightly more complicated for children and young people than for adults. If a person is under the age of 16, their guardian must make the application on their behalf.[[874]](#footnote-875) If a person is 16 or 17, they must obtain either the consent of their guardian or a letter of support from a “suitably qualified” person.[[875]](#footnote-876) If a student is born overseas, their ability to change the sex recorded on their birth certificate would depend on the administering jurisdiction.
  7. For students who identify outside the gender binary, options 2 and 3 would likely each have the same effect. The student would be entitled to attend a school that aligned with their sex assigned at birth on the same basis as a cisgender student of that sex but could potentially be refused admission to a (Part 2-regulated) single-sex school that did not align with their sex assigned at birth.
  8. Depending on how it was worded, option 4 might empower Part 2-regulated single-sex schools to refuse to admit a student who had nominated the sex on their birth certificate as “non-binary” regardless of their sex assigned at birth.[[876]](#footnote-877)
  9. For students who have an innate variation of sex characteristics, the choice of reform option will have little impact unless the student is also transgender or non-binary. We have not considered, and nor did we consult on, an option that permits discrimination in admission to single-sex schools by reason of having an innate variation of sex characteristics. We could see no basis for this and nor did one emerge from feedback.

#### Analysis and conclusions

* 1. Feedback on this exception was strongly divided. We received many submissions from people who supported option 2 (allow admission in line with gender identity). Similar numbers of submitters supported each of option 3 (admission in line with sex assigned at birth) and option 1 (no reform), although many did not give reasons. Few submitters supported option 4 (admission in line with birth certificate).
  2. Option 2 was the most popular option among organisations that submitted on this question. It was supported by ICONIQ Legal Advocates, Identify Survey, the Rotorua Chamber of Pride, Chinese Pride New Zealand, Community Law, InsideOUT Kōaro, Te Pūkenga Here Tikanga Mahi | Public Service Association, Rainbow Wellington, Gender Minorities Aotearoa, OutLine Aotearoa, the Rainbow Support Collective, the New Zealand Law Society and Meredith Connell’s Rainbow Alliance. Some organisations supported other options.[[877]](#footnote-878)
  3. We recommend the Human Rights Act be amended to clarify that section 58(1) does not entitle a single-sex school to refuse to admit a student whose gender identity aligns with the school’s designated sex (option 2). We prefer this option for several reasons.
  4. First, we are not convinced that admitting what is likely to be, at most, a handful of transgender students to a single-sex school would interfere with its general character. Some submitters who did not support this option said parents should be entitled to choose to send their children to a single-sex school and that girls’ schools can adapt to girls’ different needs and experiences. We do not think the amendment we propose will interfere with that except in a minimal way. Relevantly, there are provisions in the Education and Training Act that contemplate single-sex state schools having a few pupils of a different sex attending,[[878]](#footnote-879) and section 58(1) itself refers to schools that are maintained “wholly or principally” for students of one sex.
  5. Second, transgender children and young people are a particularly vulnerable group and their rights to equality, dignity and autonomy should not be limited without good reason, especially in relation to something as important as education. Research shows that transgender and gender-diverse school students have high rates of self-harm, suicide ideation and suicide.[[879]](#footnote-880) The choice of school can mitigate these factors: research indicates that a positive school environment is a protective factor for mental health outcomes.[[880]](#footnote-881)
  6. Third, we heard in consultation that choosing an appropriate school can be difficult for transgender students and their parents. For this reason, some submitters supported maximising choice for transgender students.
  7. We acknowledge that some students who are transgender or non-binary may prefer to attend a co-educational school. There appear to be few locations in Aotearoa New Zealand where there is no co-educational public school such that a single-sex school would be the only option.[[881]](#footnote-882) However, it does not follow that the choice of which school to attend should be removed from transgender students and their families. We heard in consultation that some transgender students and their parents might feel a single-sex school is the best option for them. In some places, the most suitable option may be a private single-sex school that is covered by Part 2.
  8. Fourth, option 3 (admission in line with sex assigned at birth) would have issues of proof and practical implementation, while option 4 (admission in line with birth certificate) could lead to inconsistencies and anomalies. We also think it is undesirable as a matter of public policy to push children towards the significant step of changing their birth certificate in order to attend their choice of school.
  9. Fifth, we have carefully considered whether option 2 is compatible with the right in section 15 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) for people to manifest their religion or belief in community with others. In its submission, the Association of Proprietors of Integrated Schools supported option 2 and said that, for some Christian schools, affirming the gender of a transgender student may be inconsistent with their beliefs.[[882]](#footnote-883) We also heard from other submitters that some versions of Christian theology reflect the belief that humans were created by God to be male and female and that affirming a transgender student’s identity may be inconsistent with that belief.[[883]](#footnote-884)
  10. From our research, many religious schools in Aotearoa New Zealand are state integrated rather than private so admission decisions for many religious schools would likely be regulated by Part 1A of the Human Rights Act.[[884]](#footnote-885) We have reviewed the information that is publicly available on the websites of the 21 private single-sex schools in Aotearoa New Zealand (these being the ones most likely caught by Part 2). None of them identify religious doctrine as the reason they are single-sex schools. Where these schools discuss the single-sex nature of the school on their websites, the rationales they give relate to student achievement and adapting to different learning needs. A multi-national literature review found that many faith-based schools had transgender and gender diversity-affirming policies and practices.[[885]](#footnote-886)
  11. Even assuming one of these schools (or some other Part 2-regulated single-sex school in the future) wished to restrict admission to transgender students for reasons linked to religious belief, we do not consider preventing them from doing so would result in incompatibility with the NZ Bill of Rights. First, the right in section 15 is to manifest religion or belief in “worship, observance, practice, or teaching”. As we explained in Chapter 6, the relevant test is whether the practice is “intimately linked to the religion or belief”.[[886]](#footnote-887) Whether a school excluding transgender students whose gender identity aligns with the school would meet this test is uncertain.[[887]](#footnote-888)
  12. Even if the right is engaged, section 5 of the NZ Bill of Rights states that the rights in it can be subject to reasonable limits that are demonstrably justified.[[888]](#footnote-889) We consider that a law requiring single-sex schools to admit transgender students in line with their gender identity would be a demonstrably justified limit on the right to manifest religion. Promoting the equality, dignity and autonomy of transgender children and young people is an important objective, and the limit on the right (assuming it is limited at all) is quite small. Importantly, section 58(1) will continue to empower religious faiths to maintain schools only for students of that faith and to refuse to admit students of a different faith. If a school does not consider a particular student shares its religious beliefs, it could refuse to admit the student on that basis.
  13. Finally, several submitters who supported option 2 referred us to international obligations on the right to education.[[889]](#footnote-890) None of the options we consider in this chapter would limit the right of students who are transgender or non-binary to access education. The Education and Training Act specifically provides that all domestic students are entitled to free enrolment and education at state schools or charter schools.[[890]](#footnote-891)

#### Students who identify outside the gender binary

* 1. Single-sex schools, by definition, are not well placed to cater for students who identity outside the gender binary. Because of this, we asked submitters whether further amendments are required to accommodate students who have a gender identity that is not exclusively male or female. The main suggestion we received was that the Human Rights Act should permit students in this position to attend a school for which they are not zoned.
  2. We do not think it would be desirable for us to recommend such reform as part of this review as it would be inconsistent with existing provisions in the Education and Training Act. That Act sets out a process for obtaining an individual exception to zoning requirements if a student would be disadvantaged. The Secretary for Education can direct a school to enrol a student if “not giving a direction would be so disadvantageous to the applicant that overriding the enrolment scheme is justified”.[[891]](#footnote-892) A direction of this kind overrides any enrolment scheme the school has, including any zoning requirements.
  3. This process for obtaining an exemption from zoning requirements applies to state schools, state integrated schools, Kura Kaupapa Māori and designated character schools. Te Tāhuhu o te Mātauranga | Ministry of Education has issued guidance that this provision can be relied on in relation to gender-diverse students who wish to attend an out-of-zone co-educational school because they think it will be harmful to their mental health to attend a single-sex school.[[892]](#footnote-893)
  4. There may be many other reasons why a student is disadvantaged by zoning requirements, all of which fall to be considered under this process. We therefore think it would be incongruous to recommend a specific provision requiring schools to enrol out-of-zone students who identify outside the gender binary and difficult to achieve through reform of the Human Rights Act.

#### Some other feedback we received

* 1. One submitter suggested section 58(1) should be tied to whether a transgender student had “fully transitioned” but did not explain further what they meant. We do not think legal recognition of a person’s gender identity should depend on them taking particular steps in their gender transition and, in the case of children and young people, we consider it particularly undesirable for the law to incentivise it.
  2. Some submitters suggested the solution was to have specific schools for gender non-conforming students or transgender students.This is not a practicable option given the small size of this population group.[[893]](#footnote-894) We also doubt being separated in this way would be a welcome solution for all transgender students.

#### Recommendation and wording

1. Section 58 of the Human Rights Act 1993 should be amended to specify that section 58(1) 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.
   1. For the reasons we outlined above, we recommend that section 58(1) be amended to clarify that an educational establishment that is maintained wholly or principally for students of one sex cannot refuse to admit a student whose gender identity aligns with that sex.
   2. One way to achieve the policy intent outlined in our recommendation might be to insert a new subsection 58(1A) along the following lines:
2. Nothing in section 58(1) entitles 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.

CHAPTER 13

# Courses and counselling

## Introduction

* 1. In this chapter, we discuss three exceptions in the Human Rights Act 1993 that relate to courses and counselling on highly personal matters such as sexual matters or the prevention of violence. In broad terms, these exceptions allow for:
     + 1. employers to treat employees and prospective employees differently based on their sex where the position is that of a counsellor on highly personal matters of this kind (section 27(4)); and
       2. service providers and educational establishments, respectively, to restrict courses and group counselling to people of one sex where highly personal matters of this kind are involved (sections 45 and 59).
  2. Although these exceptions relate to different areas of life (employment, goods and services, and education, respectively), many similar reform considerations apply. Therefore, we have grouped them together for analysis in this chapter.
  3. We recommend the employment exception be amended to allow for differences of treatment by reason of gender identity.
  4. We recommend the exceptions for service providers and educational establishments be amended to enable courses or counselling to be restricted to persons of a particular gender identity where highly personal matters are involved. However, we recommend the restriction must be reasonably required to achieve the purpose of the course or counselling.
  5. We do not consider any of the three counselling exceptions should be extended to the new proposed ground of having an innate variation of sex characteristics.
  6. The recommendations for reform set out in this chapter need to be read alongside Chapter 8, which outlined our general approach to reviewing Part 2 exceptions and explained some significant issues that arise in relation to the wording of exceptions.

## Overview of feedback

* 1. In the Issues Paper, we sought feedback on whether to amend the counselling exceptions to reflect any new prohibited grounds of discrimination that are added to section 21 of the Human Rights Act as a result of this review. Although we consulted separately on each exception, there were some common themes that emerged from the feedback.

### ****Importance of access to courses and counselling****

* 1. Many submitters focused on the importance of everyone being able to access courses and counselling on highly personal matters.
  2. Some submitters expressed specific concerns about the counselling exceptions preventing people who are transgender or non-binary or who have an innate variation of sex characteristics from accessing services such as sexual assault courses or counselling groups. We were told that people in these groups already face significant access issues, especially in less populated areas, where there may be few options.

### ****Privacy, safety and comfort of people accessing courses and counselling****

* 1. Many submitters referred to the need for privacy when participating in courses and counselling on highly personal matters, saying participants need to feel comfortable and safe.
  2. Some submitters said survivors of sexual violence (and other harm) should be entitled to choose a counsellor of the same sex to avoid compounding the abuse they have experienced. It was clear from context that some submitters were referring to the counsellor’s sex assigned at birth.
  3. A number of submitters referred to the need for women-only courses and counselling groups, particularly for female survivors of sexual assault. Some submitters considered women-only courses and counselling should be restricted to cisgender women, while others thought they should be inclusive of transgender women and non-binary people.

### ****Importance of counsellor having lived experience****

* 1. Many submitters mentioned the importance of counsellors sharing lived experience with their clients or being able to understand their needs. Several submitters (including OutLine Aotearoa and Te Kāhui Ture o Aotearoa | New Zealand Law Society) made this point specifically in relation to people who are transgender or non-binary or who have an innate variation of sex characteristics. The Professional Association for Transgender Health Aotearoa said many transgender people actively choose to access transgender-led support services such as counselling and that having access to a transgender counsellor with lived experience may be beneficial.

## Employment — section 27(4)

* 1. Section 27(4) is an exception to section 22 of the Human Rights Act. Section 22 contains the main Part 2 protections that make it unlawful to discriminate against someone in employment. We discussed section 22 in Chapter 9.
  2. Section 27(4) states:

1. Nothing in section 22 shall prevent different treatment based on sex, race, ethnic or national origins, or sexual orientation where the position is that of a counsellor on highly personal matters such as sexual matters or the prevention of violence.
   1. We recommend that section 27(4) be amended to allow for differences of treatment by reason of gender identity. For reasons discussed at the end of this chapter, we do not recommend section 27(4) should be amended to allow for differences of treatment by reason of having an innate variation of sex characteristics.

### History, scope and rationale

* 1. Section 27(4) is a narrow exception that allows employers discretion to treat employees or prospective employees differently based on their sex if the position is that of a counsellor on highly personal matters. As well as sex, this exception also applies to the prohibited grounds of race, ethnic or national origins and sexual orientation. There was no such exception in the Human Rights Commission Act 1977 (1977 Act). The legislative history does not indicate why this exception was added in 1993.
  2. The likely rationale for this exception is to facilitate effective counselling services by recognising that a client may be more willing to undertake counselling on highly personal and sensitive matters if their counsellor shares with them certain personal characteristics or lived experience. Counselling is a process based on the client and counsellor forming a “trusting, respectful and non-judgemental professional relationship”.[[894]](#footnote-895) For counselling to be effective, the client must be willing to engage.[[895]](#footnote-896) An organisation may therefore need to hire counsellors with certain characteristics to meet their clients’ needs. An example might be a rape crisis centre hiring female counsellors.
  3. While almost all counselling is likely to be personal to some degree, this exception is limited to counselling on matters that are “highly personal”. We think “highly personal” matters may include issues relating to sex, sexuality, sex characteristics, sexual or family violence, anger management or gender identity. The section itself gives examples of sexual matters and the prevention of violence.
  4. The wording of section 27(4) does not require further justification for the different treatment. For example, it does not specify that an employer must demonstrate the position can only be held by a person with the particular characteristic.[[896]](#footnote-897) However, we think it is likely a tribunal or court would at least expect a rational connection between the difference in treatment and the counselling need. For example, if the need was for a counsellor who was Māori to fill a counselling role for a kaupapa Māori wellbeing service, section 27(4) would not give the employer a blanket licence to discriminate based on a person’s sexual orientation. New Zealand courts and tribunals have said their duty is to construe anti-discrimination legislation in such a way as will best promote the goal of equality.[[897]](#footnote-898)

### Options for reform in relation to a gender identity ground

* 1. We have considered two main options for reform of section 27(4) to reflect a gender identity ground. The first is to clarify that section 27(4) permits differences of treatment that are based on a person’s gender identity. This would mean that, in relation to a position as a counsellor on highly personal matters, an employer would not breach the employment protections in Part 2 of the Human Rights Act by doing one of the acts prohibited by section 22 (such as refusing to hire someone or to assign them a particular role in the organisation) by reason of their gender identity.
  2. As noted above, the exception would only operate if there was a rational connection between the person’s gender identity and the counselling need. For example, although our proposed definition of gender identity includes gender expression, we do not think an employer would be able to rely on the exception simply because a person dresses in a gender non-conforming way.
  3. The employer would also need to comply with section 35 of the Human Rights Act, which provides that an employer cannot rely on an employment exception if they can deal with the issue by reassigning certain duties. Requirements in other legislation such as the Employment Relations Act 2000 would also still apply.
  4. The alternative reform option is to clarify that, where a particular counselling role is restricted to persons of a particular sex, section 27(4) does not permit the exclusion of a person whose gender identity aligns with that sex from the role.[[898]](#footnote-899)

### Analysis and conclusions in relation to a gender identity ground

* 1. We recommend amending section 27(4) to allow for differences in treatment based on a person’s gender identity. First, we think this is consistent with the underlying rationale of the exception, which we have suggested is to facilitate effective counselling and clients’ willingness to engage when discussing highly personal matters.
  2. As well as sex, section 27(4) applies to the grounds of race, ethnic or national origin and sexual orientation. It is one of the few exceptions in the Human Rights Act that applies to these additional grounds.[[899]](#footnote-900) In the narrow circumstances anticipated by this exception, Parliament has recognised that a client’s willingness to engage in counselling can depend on the client and counsellor sharing certain deeply personal aspects of their identity and life experience. It would be anomalous not to add gender identity to this list.
  3. It is evident from the feedback we received that some people have strong preferences for counsellors of a particular gender identity. This included feedback that some women, including some female sexual assault survivors, would prefer a cisgender woman counsellor. We also heard that some people who are transgender would prefer a counsellor who is transgender. One submitter who identified as non-binary said they would prefer a counsellor who “has had similar experiences” to them.
  4. According to Te Ohaakii a Hine | National Network Ending Sexual Violence Together, it is good practice for sexual violence crisis services to ask all survivors, regardless of their sex, gender identity or sexual orientation, if they have a preferred gender of those who will support them.[[900]](#footnote-901)
  5. Second, we think the underlying rationale of ensuring access to effective counselling services (including for people in disadvantaged groups) is a legitimate one that serves the values of dignity, autonomy and equality that underlie the Human Rights Act. As set out above, many submitters referred to the personal or intimate nature of counselling and the need for clients to feel comfortable and safe. According to Te Roopu Kaiwhiriwhiri o Aotearoa | New Zealand Association of Counsellors: “Finding a Counsellor that you feel comfortable with is very important and can take time.”[[901]](#footnote-902)
  6. Receiving counselling on highly personal matters is not only important to the individuals receiving the counselling. It may also be in the public interest, particular in areas such as violence prevention or where a person has suffered trauma or abuse. According to *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction*, “poor mental wellbeing … is a high cost to individuals, families and whānau, businesses and organisations, communities, government and the country as a whole”.[[902]](#footnote-903)
  7. Extending this exception to allow for distinctions to be drawn based on a person’s gender identity would not require employers to employ or to assign counsellors based on their sex or gender identity. Rather, it facilitates employer discretion, as experts in the particular field, to determine who they need to employ to best serve their clients.
  8. Most of those who submitted on this issue supported extending this exception to new grounds, including Community Law Centres o Aotearoa and Speak Up for Women.[[903]](#footnote-904) However, some submitters had concerns about extending this exception and several rainbow organisations opposed this.[[904]](#footnote-905)
  9. Some submitters said a person’s sex or gender is not relevant to their skill as a counsellor and whether a client feels comfortable talking to someone depends on more than that person’s sex or gender identity. We do not think this is a compelling argument in the context of this exception. The aim of this exception is related to client comfort, not to a person’s ability to perform the work. That is why the exception is one of the few in the Human Rights Act to apply to the prohibited grounds of race, ethnic or national origin and sexual orientation. For reasons already discussed, we think this is a legitimate aim that is consistent with the values underlying the Human Rights Act.
  10. InsideOUT Kōaro, OutLine Aotearoa and the Rainbow Support Collective did not favour extending section 27(4) to new grounds. They thought section 73 of the Human Rights Act (which authorises positive discrimination if certain conditions are met) would enable an employer to prefer a counsellor who is transgender or non-binary for a particular role.
  11. We do not agree that the Human Rights Act should only allow employers to prefer someone for a counselling position based on the fact they are transgender or non-binary. A number of submitters told us that, in some circumstances (such as where the client has suffered abuse from a man), it may be important for some clients receiving counselling on highly personal matters to have the option of seeing a counsellor who is a cisgender woman. We think it is consistent with the rationale of the exception to allow employers discretion to be able to facilitate this if they judge it to be appropriate.
  12. Some submitters had concerns about the privacy implications of extending the exception to new grounds because it might require counsellors to disclose their gender identity to their employers. We discussed in Chapter 8 the privacy impacts of extending the sex exceptions and the safeguards put in place by the Privacy Act 2020. We agree that extending this exception may make it permissible for employers, subject to those safeguards, to ask applicants or employees questions relating to their gender identity.
  13. We do not, however, think privacy concerns overcome our reasons for recommending this exception be extended. The impact on prospective employees is limited as the exception only applies to a very specific employment relationship where a person is applying for a role as a counsellor involving highly personal matters. The exception already allows employers to hire counsellors based on race and sexual orientation, which might involve some personal questions being asked during the employment process. An applicant or employee asked a personal question can always refuse to answer, although we acknowledge this might result in the employer declining to employ them.[[905]](#footnote-906)

### Recommendation and wording in relation to a gender identity ground

1. Section 27(4) of the Human Rights Act 1993 should be amended to allow differences of treatment based on the new ground of gender identity.
   1. For reasons we outlined above, we recommend that section 27(4) be amended to allow differences of treatment based on gender identity. One way to achieve this policy intent might be to insert the following (underlined) words:
2. Nothing in section 22 shall prevent different treatment based on sex, gender identity, race, ethnic or national origins, or sexual orientation where the position is that of a counsellor on highly personal matters such as sexual matters or the prevention of violence.

## Goods and services — section 45

* 1. Section 45 is an exception to section 44 of the Human Rights Act. Section 44 makes it unlawful to discriminate when providing goods, facilities or services to the public. We discussed section 44 in Chapter 10.
  2. Section 45 states:

1. Nothing in section 44 shall prevent the holding of courses, or the provision of counselling, restricted to persons of a particular sex, race, ethnic or national origin, or sexual orientation where highly personal matters, such as sexual matters or the prevention of violence, are involved.
   1. We recommend that section 45 be amended to enable courses or counselling to be restricted to persons of a particular gender identity where highly personal matters are involved and where the restriction is reasonably required to achieve the purposes of the course or counselling.
   2. To give effect to our policy intent, section 45 will also need to specify that, where a course or counselling is restricted to persons of a particular sex, the exception does not permit the exclusion of a person whose gender identity aligns with that sex unless that, too, is reasonably required to achieve the purposes of the course or counselling.
   3. For reasons discussed at the end of this chapter, we do not recommend section 45 should be amended to allow for differences of treatment by reason of having an innate variation of sex characteristics.

### History, scope and rationale

* 1. Section 45 entitles service providers to exclude prospective clients or participants from a course or counselling based on their sex, race, ethnic or national origins or sexual orientation. There was no such exception in the 1977 Act.
  2. In the Issues Paper, we identified two possible interpretations of this exception. First, section 45 might be designed solely to cover courses or counselling involving multiple participants. On this interpretation, the rationale might be to enable participants to feel comfortable with each other, participate freely and secure full therapeutic benefits.
  3. Another reading of section 45 is that it applies more broadly to cover individual counselling as well. On that interpretation, the rationale might be to allow counsellors to specialise in offering services to particular communities.
  4. Although the wording of section 45 would benefit from clarification, we think the first and narrower reading is correct. First, the drafting history indicates that section 45 was intended to apply to groups. In 1990, the Department of Justice asked the Parliamentary Counsel Office to draft a new exception “to cover the holding of courses, or the provision of counselling, on matters which are of common interest to a group and which are of some intimacy”. It gave “[s]exual matters of any kind and anger management” as examples.[[906]](#footnote-907)
  5. Second, the fact the exception only covers highly personal matters is a strong indication that it was intended to apply to group situations. If the rationale was to allow counsellors to specialise, there would be no logical reason for the section to be limited in this way.
  6. Finally, refusing individual counselling services based on characteristics such as sex, race and sexual orientation would be contrary to the ethical and professional duties of counsellors. Many counsellors are members of professional associations with codes of ethics that require them not to discriminate against clients based on these characteristics, to prioritise the wellbeing of clients over their own interests or beliefs and to be committed to the equitable provision of counselling services to all.[[907]](#footnote-908) Counsellors (whether or not they are members of professional associations) are also bound by the Code of Health and Disability Services Consumers’ Rights.[[908]](#footnote-909) It stipulates that consumers have the right to be treated with respect, to be free from discrimination and to have services provided in a manner that respects their dignity and is consistent with their needs.[[909]](#footnote-910)
  7. Regardless of the Human Rights Act, a counsellor is always entitled to refuse their services to someone based on the fact they do not have the necessary expertise.
  8. Therefore, we think section 45 is a narrow exception meant to facilitate participation at group courses and counselling where highly personal matters are discussed.

### Options for reform in relation to a gender identity ground

* 1. We have considered three main options for reform of section 45 to reflect a gender identity ground. The first is to extend section 45 to allow for the holding of courses or the provision of counselling restricted to persons of a particular gender identity. This would clarify that it is not unlawful under section 44 of the Human Rights Act to restrict entry to a course or group counselling session involving highly personal matters based on the fact a person is transgender, cisgender or non-binary. As with the employment exception, we think there would need to be a rational connection between the denial of services and the counselling need.
  2. The second option is to amend section 45 to ensure that the exception does not allow for differences of treatment based on gender identity. This would involve clarifying that the sex exception in section 45 does not permit a service provider to exclude someone from a single-sex course or group counselling involving highly personal matters if their gender identity aligns with that sex. Under this option, for example, a service provider could not exclude transgender women from group counselling on highly personal matters restricted to women.[[910]](#footnote-911)
  3. For reasons we discuss further below, we think this issue is more finely balanced than some others we have considered in this review. For that reason, we have also considered a third option: to allow for differences in treatment based on a person’s gender identity but only where this is reasonably required to achieve the purpose of the course or counselling. We discuss how this option would work further below.

### Analysis and conclusions in relation to a gender identity ground

* 1. As noted, this issue is more finely balanced than some others we have considered in this review. In feedback, opinion was strongly divided on whether we should recommend extending section 45 to new grounds.
  2. For the reasons that follow, we recommend section 45 should be amended to allow for courses and group counselling on highly personal matters to be restricted to people of a particular gender identity but only where that is reasonably required to achieve the purposes of the course or counselling. The Act will also need to specify that, where a course or counselling is restricted to persons of a particular sex, section 45 does not permit the exclusion of a person whose gender identity aligns with that sex unless reasonably required to achieve the purposes of the course or counselling.

#### Specifying that the exception precludes any different treatment would be too restrictive

* 1. Many of the arguments that we set out above in relation to the employment exception also support an exception to allow for courses and group counselling to be restricted based on gender identity.
  2. First, as noted above, the rationale for this exception is that a participant may feel more comfortable when discussing highly personal matters in a group course or counselling session with others of the same sex, race, ethnic or national origin, or sexual orientation. As with the employment exception, it would be anomalous not to make any provision for restrictions to be imposed based on a person’s gender identity.
  3. Second, as we discussed in the context of the employment exception, we agree that it is important that participants, particularly those who have suffered trauma or abuse, feel comfortable to engage in counselling and courses where highly personal matters are involved. As we discussed, there can be a public interest in people engaging in courses and counselling.
  4. Many submitters acknowledged the importance of the rationale underlying section 45. Submitters who supported extending the exception to new grounds said participants who need support or counselling on highly personal matters should have the right to choose who they share personal matters with, even if this is exclusionary of others. Some submitters referred to the need for shared lived experience in courses and group counselling sessions on highly personal matters. In some cases, submitters felt women’s courses and counselling groups should be limited to cisgender women (although others thought they should be inclusive of transgender women and people who identify outside the gender binary).
  5. Many submitters said women need women-only courses and counselling groups for safety and therapeutic support. Some said such spaces should be for cisgender women only. Others said women’s courses and counselling should be inclusive of transgender women and people who identify outside the gender binary. Some submitters expressed a desire for certain courses and group counselling sessions on highly personal matters to be restricted to men.
  6. We also think it is important to preserve the ability for courses and counselling groups to be restricted to people who are transgender or non-binary. Some submitters said it is important for people in these groups to be able to get support from people with shared experiences and who understand their challenges.[[911]](#footnote-912)

#### Extending the exception in an unqualified way would be unfair

* 1. We do not favour a blanket extension of section 45 to allow differences of treatment based on gender identity in any circumstances as this could make it difficult for some people to access appropriate therapeutic services. A key concern that we heard from submitters who opposed extending section 45 to new grounds was that group counselling could be restricted to cisgender women or cisgender men, preventing people who are transgender or non-binary from accessing necessary support. Some submitters were particularly concerned about the effect of such an exception on transgender women and non-binary people due to the high rates of sexual violence experienced by these groups.[[912]](#footnote-913)
  2. We have found it difficult to identify whether it is common for courses and group counselling to be restricted to people with a particular gender identity in Aotearoa New Zealand. However, feedback from submitters and some of the research we have seen suggests that this does sometimes happen.[[913]](#footnote-914) A blanket extension of section 45 to gender identity might exacerbate this situation, particularly in smaller communities with limited services available. We do not think this would be consistent with the values of dignity and substantive equality that underlie the counselling exceptions.

#### A threshold requirement of “reasonably required”

* 1. For these reasons, we think the preferable policy approach is to amend section 45 to allow for courses and group counselling on highly personal matters to be restricted to people of a particular gender identity, but only where that is reasonably required to achieve the purpose of the course or counselling.
  2. This would allow for courses or counselling involving highly personal matters to be restricted to, for example, cisgender women. However, it would be necessary to establish that excluding transgender women from such a course or counselling was reasonably required to achieve the purpose of the course or counselling. What is reasonably required may depend on the nature of the course or counselling and the particular needs of other participants. It would also need to be interpreted consistently with counsellors’ ethical and professional commitment to the equitable provision of counselling services.
  3. This approach would also allow for courses or counselling involving highly personal matters to be restricted to people who are transgender or non-binary (although, again, the “reasonably required” threshold would need to be met).
  4. We think this approach is the best way to address the competing concerns and balance the rights and interests of different groups. Introducing a threshold requirement will mean courses can be restricted to people of a particular gender identity but only where that is consistent with the purpose of the course or counselling, which might be enabling participants to feel comfortable, participate freely and secure full therapeutic benefits.
  5. The test of “reasonably required” is consistent with our recommendations for other exceptions where we have concluded that an additional threshold requirement is needed: shared accommodation (Recommendation 12), employer-provided accommodation (Recommendation 13) and competitive sporting activities (Recommendations 23 and 24).
  6. It might be desirable for the “reasonably required” threshold to apply more generally to the section 45 exception — that is, to apply before courses or group counselling can be limited to people of a particular sex, race, ethnic or national origin or sexual orientation. However, such a recommendation is beyond the scope of this review.
  7. Finally, we note that, as with the employment counselling exception, some submitters had concerns about the privacy implications of extending the exception to new grounds. Some submitters questioned how a service provider would know whether a person was cisgender or transgender. The Professional Association for Transgender Health Aotearoa was concerned about a transgender person being forced to disclose their sex assigned at birth when they may prefer not to.
  8. Although having an exception based on gender identity may mean a course or counselling provider has a lawful purpose for seeking information on gender identity, it must still show that collecting information is necessary for that purpose.[[914]](#footnote-915) It may be, for example, that a course or counselling provider could clearly advertise a course as being restricted to cisgender women or transgender women and decide no further collection of information is needed. We discussed in Chapter 8 the further safeguards put in place by the Privacy Act. For example, even where an agency collects personal information, there are significant restrictions on the circumstances in which it can disclose the information to others.[[915]](#footnote-916)

### Recommendation and wording in relation to a gender identity ground

1. Section 45 of the Human Rights Act 1993 should be amended to allow the holding of courses or the provision of counselling to be restricted to persons of a particular gender identity where highly personal matters are involved and where it is reasonably required to achieve the purposes of the course or counselling.
   1. For reasons we outlined above, we recommend that section 45 be amended to allow differences of treatment based on gender identity where that is reasonably required to achieve the purposes of the course or counselling. We think that, to achieve this policy objective, the current provision will need to become section 45(1), and two new subsections will need to be inserted.
   2. The first would create a parallel exception to the current exception in section 45 that allows for restrictions based on gender identity but subject to the threshold requirement just mentioned. It might read:
   3. (2) Nothing in section 44 shall prevent the holding of courses, or the provision of counselling, restricted to persons of a particular gender identity where:
      1. (a) highly personal matters such as sexual matters or the prevention of violence are involved; and
      2. (b) it is reasonably required to achieve the purposes of the course or counselling.
   4. The second subsection would qualify the current sex exception in section 45. It would require the same “reasonably required” threshold to be met before the exception can be relied on to deny a person access to single-sex courses or counselling if the person’s gender identity aligns with the designated sex. It might read:
   5. (3) Where a course or counselling is restricted to persons of a particular sex in accordance with subsection (1), section 45 does not permit the exclusion of a person whose gender identity aligns with that sex from the course or counselling unless that is reasonably required to achieve the purposes of the course or counselling.

## Education — section 59

* 1. Section 59 is an exception to section 57 of the Human Rights Act. Section 57 makes it unlawful for educational establishments to discriminate by reason of a prohibited ground of discrimination. We discussed section 57 in Chapter 12.
  2. Section 59 states:

1. Nothing in section 57 shall prevent the holding or provision, at any educational establishment, of courses or counselling restricted to persons of a particular sex, race, ethnic or national origin, or sexual orientation, where highly personal matters, such as sexual matters or the prevention of violence, are involved.
   1. We recommend that section 59 be amended to enable courses or counselling to be restricted to people of a particular gender identity where highly personal matters are involved and where the restriction is reasonably required to achieve the purposes of the course or counselling.
   2. To give effect to our policy intent, section 59 will also need to specify that, where a course or counselling is restricted to persons of a particular sex, the exception does not permit the exclusion of a person whose gender identity aligns with that sex unless that, too, is reasonably required to achieve the purposes of the course or counselling.
   3. For reasons discussed at the end of this chapter, we do not recommend that section 59 should be amended to allow for differences of treatment by reason of having an innate variation of sex characteristics.

### History, scope and rationale

* 1. Section 59 creates an exception for courses and counselling held or provided at educational establishments such as schools or tertiary institutions. It is almost identically worded to the goods and services exception in section 45. For the reasons discussed in relation to that exception, we think its rationale is to secure the participant comfort needed for effective participation in courses and counselling on highly personal matters. We think it applies only to courses and counselling involving multiple participants (not to individual counselling).
  2. There was no such exception in the 1977 Act.
  3. There are some significant limits to the scope of section 59. First, it is an exception to section 57 of the Human Rights Act, which only confers obligations on people who control, manage or teach at educational establishments. Therefore, peer support groups run by students are not covered.[[916]](#footnote-917)
  4. Second, as we explained in Chapter 12, the education discrimination protections in section 57 have had limited application since Part 1A was inserted into the Human Rights Act in 2002. Section 57 only applies when educational establishments are not exercising public functions.
  5. There is no case law to assist in deciding whether, and when, holding or providing courses or group counselling at an educational establishment would amount to a public function. Some examples of courses and counselling we think may be considered a public function, and therefore unlikely to fall within the scope of sections 57 and 59, are:
     + 1. relationships and sexuality education in state, state-integrated and charter schools;[[917]](#footnote-918)
       2. guidance counselling in state and charter schools;[[918]](#footnote-919)
       3. courses or counselling provided by a tertiary education provider to fulfil a statutory obligation towards its students.[[919]](#footnote-920)

### Options for reform in relation to a gender identity ground

* 1. The reform options that are available are the same as in relation to the goods and services counselling exception. They are:
     + 1. extend section 59 to permit courses and counselling to be restricted to persons of a particular gender identity;
       2. amend section 59 to ensure that it does not allow for differences of treatment based on gender identity; or
       3. amend section 59 to allow for differences in treatment based on a person’s gender identity but only where this is reasonably required to achieve the purpose of the course or counselling.

### Analysis and conclusions in relation to a gender identity ground

* 1. Relatively few submitters gave feedback specifically in relation to section 59. Where submitters did comment, it was often unclear whether they supported or opposed extending the exception to new grounds. We also received very little feedback about the kinds of courses and counselling that are covered by this exception.
  2. As with the goods and services exception, some people thought the law should enable courses and counselling in educational establishments to be restricted in certain circumstances to people who are transgender or non-binary or who are cisgender.
  3. In its current scope, section 59 anticipates that a participant may feel more comfortable with others of the same sex, race, ethnic or national origin, or sexual orientation when discussing highly personal matters in a course or group counselling. As with the goods and services exception, we think it would be anomalous not to make any provision for restrictions to be imposed based on a person’s gender identity.
  4. On the other hand, in line with the feedback we received on section 45, a key concern we heard about extending this exception to gender identity was that, in practice, it would result in students who are transgender or non-binary being excluded. We have not come across any evidence to suggest that educational establishments are likely to hold courses or counselling on highly personal matters that are restricted to, for example, cisgender girls or women. However, it is difficult to find this information and we think that it is a legitimate concern. Some submitters said it can be particularly detrimental for children and young people to be excluded from groups aligned with their gender identity. Some said participating in courses and counselling aligned with one’s gender identity promotes mental wellbeing, academic success and a positive school environment.
  5. For these reasons (and those we articulated more fully in relation to section 45), we think the best way to balance the rights and interests of different groups is to permit courses and counselling to be restricted to people of a particular gender identity under section 59 where that is reasonably required to achieve the purpose of the course or counselling.
  6. Apart from anything else, it would be anomalous for sections 45 and 59 to take a different approach given the current wording of the two provisions is so closely aligned.

### Recommendation and wording in relation to a gender identity ground

1. Section 59 of the Human Rights Act 1993 should be amended to allow the holding of courses or the provision of counselling to be restricted to persons of a particular gender identity where highly personal matters are involved and where it is reasonably required to achieve the purposes of the course or counselling.
   1. For reasons we outlined above, we recommend that section 59 be amended to allow differences of treatment based on gender identity where that is reasonably required to achieve the purposes of the course or counselling. As with section 45, we think that, to achieve this policy objective, the current provision will need to become the first subsection of section 59, and two new subsections will need to be inserted.
   2. The first would create a parallel exception to the current exception in section 59 that allows for restrictions based on gender identity but subject to the threshold requirement just mentioned. It might read:
   3. (2) Nothing in section 57 shall prevent the holding or provision, at any educational establishment, of courses or counselling restricted to persons of a particular gender identity where:
      1. (a) highly personal matters, such as sexual matters or the prevention of violence, are involved; and
      2. (b) it is reasonably required to achieve the purposes of the course or counselling.
   4. The second subsection would qualify the current sex exception in section 59. It would require the same “reasonably required” threshold to be met before the exception can be relied on to deny a person access to single-sex courses or counselling if the person’s gender identity aligns with the designated sex of the course or counselling. It might read:
   5. (3) Where a course or counselling is restricted to persons of a particular sex in accordance with subsection (1), section 45 does not permit the exclusion of a person whose gender identity aligns with that sex from the course or counselling unless that is reasonably required to achieve the purposes of the course or counselling.

## Innate variations of sex characteristics

* 1. We do not consider that any of the three counselling exceptions we have discussed in this chapter should be extended to the new proposed ground of having an innate variation of sex characteristics.
  2. Extending these exceptions is not needed to enable employers to prefer an employee or prospective employee who has an innate variation of sex characteristics for a counselling position. Nor is it needed to permit service providers and educational establishments to restrict a course or group counselling session to people who have an innate variation of sex characteristics. This is because the proposed new ground of having an innate variation of sex characteristics is asymmetrical. People without an innate variation of sex characteristics will not be a protected group under section 21 of the Human Rights Act under the reforms we propose.
  3. Therefore, although we think it is consistent with the rationales of client comfort and effective participation for employers, service providers and educational establishments to be able to give preferential treatment to people who have an innate variation of sex characteristics in the circumstances covered by each of the three counselling exceptions, no amendment to sections 27(4), 45 or 59 is needed to achieve this policy outcome.
  4. Conversely, we can see no 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. We did not receive any feedback indicating that people receiving counselling on highly personal matters might have a preference for a counsellor without an innate variation of sex characteristics. Nor did we hear that people might not want to attend a group counselling session with a person who has an innate variation of sex characteristics.
  5. Therefore, we do not recommend any reform on this issue.

CHAPTER 14

# Single-sex facilities

## Introduction

* 1. The focus of this chapter is two provisions in the Human Rights Act 1993 that relate to single-sex facilities such as bathrooms and changing rooms. These exceptions are in the subparts in Part 2 about public access to places, vehicles and associated facilities and about provision of goods, services and facilities. They allow for the maintenance and provision of separate facilities for each sex for reasons of public decency or public safety.
  2. We recommend amendments to these two exceptions to clarify that they do not permit service providers to exclude a person from a single-sex facility that aligns with their gender identity. This is the most workable of the reform options we have considered, and we anticipate it will allow New Zealanders to go about their daily lives in much the same way as they do presently. It is also the reform option that is best supported by the core values that underlie the Human Rights Act and the rationales of the single-sex facilities exceptions themselves.
  3. There are some situations covered by these two exceptions in which the exception for shared accommodation (which we discussed in Chapter 11) could also apply. 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 should take precedence.
  4. Finally, in this chapter, we also discuss two other related issues on which we consulted:
     + 1. whether there should be new exceptions for single-sex facilities in educational establishments and workplaces; and
       2. whether the Human Rights Act should have a requirement relating to provision of unisex facilities.
  5. We make no recommendations for reform on either of these issues.
  6. The recommendations for reform set out in this chapter need to be read alongside Chapter 8, which outlined our general approach to reviewing Part 2 exceptions and explained some significant issues that arise in relation to the wording of exceptions.

## Exceptions for single-sex facilities — sections 43(1) and 46

* 1. There are two exceptions in the Human Rights Act that permit the maintenance or provision of “separate facilities for each sex”.
  2. Section 43(1) is an exception to section 42 of the Human Rights Act, which contains the Part 2 protections relating to public access to places, vehicles and associated facilities.[[920]](#footnote-921) It provides:

Section 42 shall not prevent the maintenance of separate facilities for each sex on the ground of public decency or public safety.

* 1. Section 46 is an exception to section 44 of the Human Rights Act, which contains the Part 2 protections relating to the provision of goods, facilities or services to the public.[[921]](#footnote-922) It provides:[[922]](#footnote-923)

Section 44 shall not apply to the maintenance or provision of separate facilities or services for each sex on the ground of public decency or public safety.

* 1. There is significant overlap between these provisions both because the scope of the exceptions is the same and because they both apply to facilities.

### History, scope and rationale

* 1. Sections 43(1) and 46 are modelled on similar exceptions in the Human Rights Commission Act 1977 (1977 Act).[[923]](#footnote-924) However, the 1977 exceptions had a single rationale of “public decency” whereas the 1993 exceptions specify an additional rationale of “public safety”.
  2. We think the public decency rationale is grounded in the right to privacy, especially the dimension of that right that is about people having control over who can see their naked body and see or hear their intimate activities. As we discussed in Chapter 8, we also think it is grounded in social and cultural assumptions about whether it is acceptable to expose your body and intimate functions to people who are a different sex.
  3. There is no indication in the Human Rights Act about what is meant by public safety. At a minimum, it would involve protection from physical harm such as assault.
  4. Both these rationales are underpinned by the idea of human dignity, which we identified in the Issues Paper as a core value underlying the Human Rights Act. When someone’s bodily security or their privacy in intimate matters is violated, this has a negative effect on human dignity.
  5. These exceptions also reflect practical and historical considerations. The social reality at the time the 1977 Act was drafted was that many public bathrooms and changing rooms were separated into men’s and women’s facilities. During legislative debates preceding that Act, the chair of the Select Committee that considered the Bill noted that public decency was linked to “common sense or practice”.[[924]](#footnote-925)
  6. The discrimination protections in sections 42 and 44 (and therefore the exceptions we are discussing) apply when the public or a section of the public has been given access to the relevant facility.[[925]](#footnote-926) Examples are facilities in cafés, restaurants, shops and gyms. The facilities must be ones being provided for “each sex”.
  7. Because of the reference to public decency and safety, the exceptions likely also only apply in situations where someone would be partially or fully unclothed such as bathrooms, changing rooms and saunas. They might also apply to shared accommodation (for example, a hostel that supplies separate bunkrooms for men and women).[[926]](#footnote-927)
  8. As we explained in Chapter 8, there is a significant limit on the likely scope and application of these exceptions. Part 2 of the Human Rights Act (and therefore these exceptions) does not apply if the maintenance or provision of the respective facility amounts to a public function. For example, council-run facilities such as swimming pools, libraries and sports grounds are unlikely to be covered. These will be regulated instead by Part 1A.[[927]](#footnote-928)
  9. Finally, like all exceptions in Part 2 of the Human Rights Act, sections 43(1) and 46 are permissive. They do not require providers to maintain single-sex facilities. In fact, it is common for businesses such as cafés and restaurants only to have unisex facilities.

### Options for reform

* 1. We sought feedback in the Issues Paper on four potential options for reform of sections 43(1) and 46 if new grounds are added to section 21 of the Human Rights Act as a result of this review:[[928]](#footnote-929)
     + 1. option 1: the exceptions should be retained in their current form;
       2. option 2: the Act should clarify that it is lawful to use a single-sex facility aligned with your gender identity;
       3. option 3: the Act should clarify that service providers can exclude people from single-sex facilities that do not align with their sex assigned at birth; and
       4. option 4: the Act should clarify that service providers can exclude people from single-sex facilities that do not align with the sex recorded on their birth certificate.
  2. As discussed in Chapter 8, the effect of option 1 would be significant uncertainty about the scope of the exception as it relates to gender identity.[[929]](#footnote-930) We do not consider this option further.
  3. Under option 2, a provider of single-sex facilities could not rely on sections 43(1) or 46 to limit someone’s access to a facility if the person’s gender identity aligned with the designated sex of the particular facility. For example, the provider could not rely on sections 43(1) or 46 to refuse a transgender man access to a male bathroom.
  4. By contrast, options 3 and 4 would each make it lawful, in different circumstances, to exclude a transgender person whose gender identity aligns with the sex of a particular facility. Option 3 would permit this to occur whenever their sex assigned at birth differs from the designated sex of the facility (as long as the other requirements of sections 43(1) and 46 are met).
  5. Option 4 would only permit this to occur if the person had not obtained a birth certificate containing a sex marker that aligns with the designated sex of the facility. As we explained in Chapter 3, the Births, Deaths, Marriages, and Relationships Registration Act 2021 enables people born in Aotearoa New Zealand who are transgender or non-binary to obtain a birth certificate that reflects their “nominated sex”. If option 4 were adopted, consideration would need to be given about how it applies to people who have nominated the sex on their birth certificate as “non-binary”. On one reading, this option would make it permissible to exclude them from both men’s and women’s facilities.
  6. For people who have an innate variation of sex characteristics, the choice of reform option will have little impact unless the person is also transgender or non-binary. We have not considered, and nor did we consult on, an option that permits people to be excluded from single-sex facilities by reason of having an innate variation of sex characteristics. We could see no basis for this and nor did one emerge from feedback.

### Some relevant context

* 1. Before explaining our recommendation, we provide some background about public attitudes on this issue and the approach that has been taken in some other jurisdictions. This is to provide context to what is an important issue for many people.

#### Public attitudes and overview of feedback

* 1. New Zealanders have different views about whether people should be allowed to use single-sex facilities that do not align with their sex assigned at birth, and these views are sometimes strongly held. Public attitude surveys show a strong division of opinion on this issue although responses vary considerably depending on how the question is posed. Three surveys from 2023 illustrate this:
     + 1. An Ipsos survey compared public attitudes across 30 countries to the statement: “Transgender people should be allowed to use single-sex facilities (eg public restrooms) that correspond to the gender they identify with.” In Aotearoa New Zealand, 55 per cent said they strongly or somewhat agreed, 29 per cent said they strongly or somewhat disagreed and 17 per cent said they were unsure.[[930]](#footnote-931)
       2. The Women’s Rights Party *Women’s Issues Poll* was worded somewhat differently. It asked whether “men who identify as women (often called ‘transwomen’) [should] be allowed to have free and unchecked entry into all designated single-sex spaces for women and girls”. When worded this way, 34 per cent of respondents agreed, 47 per cent said they disagreed and 19 per cent were unsure.[[931]](#footnote-932)
       3. In a poll by Talbot Mills that similarly asked how strongly people support or oppose “allowing biological males who identify as women to use women only bathrooms”, 21 per cent supported or strongly supported, 50 per cent opposed or strongly opposed, 9 per cent were unsure and 20 per cent were neutral.[[932]](#footnote-933)
  2. The feedback we received from submitters on options for reform reflects these divisions in public attitudes. We received many submissions on this issue. Support was fairly evenly divided across the first three options. There was little support for option 4. Submitters who supported option 1 understood its likely legal effect in different ways, and it was not always clear what they thought its effect would be.
  3. Option 2 was the most popular option with organisations, with 15 organisations preferring this option.[[933]](#footnote-934) These were Te Kāhui Ture o Aotearoa | New Zealand Law Society, Community Law Centres o Aotearoa, Te Pūkenga Here Tikanga | Public Service Association, Identify Survey, Te Whare Āwhina Mō Ngā Wāhine Puawai | Nelson Women’s Refuge, Women’s Health Action, ICONIQ Legal Advocates, Exercise New Zealand (with some modifications) and all the rainbow organisations that submitted on this issue.[[934]](#footnote-935)
  4. Te Kaunihera Wahine o Aotearoa | National Council of Women of New Zealand and Save Women’s Sports Australasia made statements consistent with support for option 1. The National Council of Women noted different views among its membership but recommended that current sex exceptions should stay the same provided there are always private/unisex facilities available. Save Women’s Sports Australasia said the current single-sex facility exceptions should be retained and expanded to include employers and public facilities such as council pools and schools. Two organisations supported option 3 (Resist Gender Education and Speak Up for Women). No organisation supported option 4.
  5. It was common for those who submitted on this question to mention safety, privacy, comfort, dignity and participation. Some submitters emphasised these interests for people who are transgender or non-binary or who have an innate variation of sex characteristics, while others emphasised these interests for cisgender women and girls.
  6. These are important rights and interests held by all New Zealanders that, as we explain further below, are closely connected to the core values we have identified as underlying the Human Rights Act. A challenge for us in settling on the best policy approach to this issue is that all the options involve, to some extent, trade-offs between these rights and interests as they relate to different groups. Against that background, our approach has been to carefully evaluate the impact of each option, paying close attention to any evidence that is available about the nature and extent of potential harms. We have also paid close attention to the workability of options and how they would impact in practice on the daily lives of New Zealanders.

#### Some approaches overseas

* 1. Another challenge in settling on the best policy approach is the absence of helpful models to draw on from other jurisdictions with similar legal systems. As explained in Chapter 8, there are some significant differences in the way exceptions are structured in overseas anti-discrimination laws that mean they are often not a good basis for comparison. We have examined the law in Australia and Canada (at both the federal and sub-national level) and in the United Kingdom and Ireland. Many of these jurisdictions do not have specific exceptions to allow for single-sex facilities at all. In Canada, only four provinces have exceptions related to sex-separated facilities (on the grounds of public decency).[[935]](#footnote-936) In Australia, no jurisdiction has a sex exception for facilities like bathrooms, although some have exceptions for shared accommodation.
  2. Of the four Canadian jurisdictions that do have a sex exception for single-sex facilities and services, none have an express exception allowing differences of treatment based on gender identity. Indeed, these jurisdictions have not extended any of their sex exceptions expressly to gender identity (except for one employment exception in Saskatchewan that applies to all prohibited grounds).[[936]](#footnote-937)
  3. There is nothing in the relevant legislative history for those four Canadian jurisdictions to indicate how law makers intended this silence regarding the application of sex exceptions to gender identity to be interpreted. To date, no tribunal or court has directly addressed the issue either, although the general tenor of the case law supports the view that people who are transgender are entitled to access bathrooms that align with their gender identity.[[937]](#footnote-938)
  4. No jurisdiction in Australia or Canada has an exception similar to options 2, 3 or 4 in their anti-discrimination legislation. In other words, none has express language permitting people who are transgender to access facilities that align with their gender identity, and none has explicit language authorising providers to prohibit it.
  5. The United Kingdom Supreme Court hasheld that “sex” in the United Kingdom’s anti-discrimination law means “biological sex” and that therefore sex exceptions allow for different treatment of any person who is not of that “biological sex”. Specifically, single-sex facilities exceptions permit providers to exclude transgender women from using women’s facilities and transgender men from using men’s facilities.[[938]](#footnote-939) The relevant legislation contains an express provision allowing discrimination based on “gender reassignment”[[939]](#footnote-940) in relation to accessing single-sex facilities but only if it is “a proportionate means of achieving a legitimate aim”.[[940]](#footnote-941) The Supreme Court did not consider this express exception narrowed the entitlement of service providers to exclude people from facilities based on “biological sex”.
  6. In Ireland, there is an exception to discrimination in the provision of goods and services that applies where embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another “gender”.[[941]](#footnote-942) As we discussed in Chapter 8, the statutory meaning of gender in the Irish anti-discrimination law is being male or female,[[942]](#footnote-943) but the ground of gender has been held to protect people who are transgender.
  7. Some submitters said amendments to the Human Rights Act to clarify that people who are transgender can use facilities if their gender identity aligns with the designated sex of the facility would contravene the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). We have not found any specific obligations in CEDAW that lend clear support to any one of the reform options we have identified.[[943]](#footnote-944)

### The key policy issue: analysis and conclusions

* 1. We recommend amendments to the Human Rights Act to clarify that neither section 43(1) nor section 46 can be relied on to refuse a person access to or use of single-sex facilities that align with their gender identity. This recommendation reflects option 2, as set out above.[[944]](#footnote-945)
  2. In determining our recommendation on this issue, the key policy choice we needed to consider was between option 2 (clarify the ability of people who are transgender to access single-sex facilities that align with their gender identity) and option 3 (extend legal authority to service providers to limit access to single-sex facilities based on a person’s sex assigned at birth).[[945]](#footnote-946)
  3. We set out below the reasons why we consider option 2 is preferable. Our analysis falls into four categories: informal policing; public safety; public decency; and human dignity.

#### Informal policing

* 1. We have significant reservations about the practicability and workability of a reform that involves restricting the access of people who are transgender to single-sex facilities that align with their gender identity and about how it would likely be enforced.
  2. There is no form of identification in Aotearoa New Zealand that reliably records a person’s sex assigned at birth.[[946]](#footnote-947) In any event, we do not consider it is realistic to require New Zealanders to present identification when using bathrooms or changing rooms, nor would people expect to have to do so. Accordingly, option 3 would likely be policed informally based on assumptions about a person’s ‘biological’ or ‘anatomical’ sex.
  3. We consider this would be an issue with option 3 because, while it may sometimes be evident to an outsider that a person is transgender, equally, it is sometimes not. People who are transgender differ in their physical characteristics, their gender presentation and in the steps they have taken to affirm their gender. Some transgender people may have been living in their affirmed gender for many years.
  4. Conversely, people who are not transgender are sometimes mistaken for being so. For example, we have heard of instances overseas of cisgender women with non-conforming gender presentation being harassed on the assumption they are transgender.[[947]](#footnote-948) Many submitters who supported option 2 were concerned about this kind of informal policing occurring under other options.
  5. We anticipate that, under option 3, people with non-conforming gender presentation would find themselves confronted more often when using public facilities. We also anticipate that people who are transgender or non-binary would be challenged in facilities more often, regardless of whether they are complying with the law. For example, a transgender man with a masculine gender presentation may seem out of place to others in a women’s changing room. These implications could have a significant impact on people’s ability to access toilets and changing facilities in the community.
  6. While some people might choose to use unisex facilities, this option is not always available or appropriate. For example, we have heard of people who are transgender or non-binary being challenged when using accessible unisex toilets by patrons who believe they should only be used by disabled people or feeling uncomfortable themselves about using facilities intended for disabled people.[[948]](#footnote-949) We are also aware of signage in some places limiting access to such facilities.

#### Public safety

* 1. Public safety is one of the two reasons stated in sections 43(1) and 46 why it might be lawful to provide or maintain single-sex facilities. As noted below, public safety is linked to the core value of human dignity that we identified as underlying the Human Rights Act. More generally, the protection of public safety is an important function of government, widely recognised in human rights instruments as a legitimate reason to proportionately limit human rights.[[949]](#footnote-950)
  2. We have carefully evaluated arguments made to us about the public safety implications of reform and considered them in the light of all available evidence. Many submitters raised concerns with us about safety. These came both from submitters who supported people who are transgender accessing single-sex facilities that align with their gender identity and from those who opposed it.

##### Safety of people who are transgender or non-binary

* 1. We heard from many people in consultation that requiring transgender and non-binary people to use a facility that does not align with their gender identity and expression would put them at risk of harm. Some submitters told us about the risks people who are transgender or non-binary face when accessing public bathrooms and changing rooms. For example, Rainbow Path (an advocacy and peer support group for rainbow refugees and asylum seekers) told us that: “Many of our members have felt unsafe using gendered public bathrooms, and many avoid using public bathrooms to the detriment of our own health.”
  2. Some submitters shared their experiences of using public bathrooms and changing rooms, including the particular risks encountered by transgender women when using male bathrooms. For example, we heard of transgender women being sexually harassed, verbally abused and physically assaulted in male bathrooms. One submitter said that, during their transition from male to female, they began to encounter abuse and violence in male single-sex facilities. This included hateful and degrading speech, being splashed with water on their crotch and “hands-on assaults”.
  3. Some submitters gave examples of people who are transgender or non-binary or who have an innate variation of sex characteristics being told to use different bathrooms or changing rooms. For example, Community Law told us about a gym that required a transgender patron to use a specific toilet and obtain a key for the toilet from reception each time.
  4. Studies in Aotearoa New Zealand and overseas disclose high rates of harm experienced by people who are transgender or non-binary in public bathrooms and other public facilities. In the 2022 Counting Ourselvessurvey of transgender and non-binary people, one in five respondents (19 per cent) said they had been verbally harassed when they tried to use a public bathroom, 3 per cent reported having been physically attacked when doing so and 5 per cent reported having been sexually harassed.[[950]](#footnote-951) Additionally, 15 per cent said they had been stopped from entering a public bathroom and 43 per cent had been told or asked whether they were using the wrong bathroom.[[951]](#footnote-952) Overseas studies have also found that people who are transgender and non-binary face high rates of harm in bathrooms and other public facilities.[[952]](#footnote-953)
  5. We do not have data about the experiences of people with innate variations of sex characteristics in Aotearoa New Zealand when accessing bathrooms and changing rooms.[[953]](#footnote-954) We have heard anecdotal evidence of people with innate variations of sex characteristics who are perceived as being gender non-conforming being challenged when using bathrooms. In an Australian study about the experiences of people with an innate variation of sex characteristics, some respondents reported discrimination in public places or facilities and gave examples such as being escorted out of bathrooms.[[954]](#footnote-955)

##### Safety of cisgender women and girls

* 1. In consultation, we also heard concerns from many submitters that cisgender women and girls will be at risk of harm if the law enables people who are transgender to use single-sex facilities that align with their gender identity. Some submitters referred to high rates of male violence against women, including sexual violence. Some told us there is a lack of evidence that transgender women are less likely than cisgender men to commit such violence.
  2. Some submitters told us related concerns about voyeurism and exhibitionism, and some were worried that cisgender men would misuse an exception to gain access to women’s spaces.
  3. We have carefully evaluated all the concerns we have heard, which we appreciate are genuine and often deeply held. Research shows that women are more likely to experience sexual violence than men and that sexual violence is usually perpetrated by men. For example, one New Zealand study found that 8 per cent of women had experienced non-partner sexual violence in their lifetime (compared to 2 per cent of men) and that 98 per cent of the perpetrators were male.[[955]](#footnote-956) Research also shows that women have high levels of fear of sexual violence. For example, one American study found that around 61 per cent of women in a survey on victimisation expressed a generalised fear of sexual violence.[[956]](#footnote-957) Fear of sexual violence was even higher among the younger women surveyed (at around 74 per cent).[[957]](#footnote-958)
  4. At the same time, transgender people are themselves overrepresented in sexual violence statistics. Evidence from the 2022 Counting Ourselvessuggests that transgender women, men and non-binary people are more likely to have experienced sexual violence than both women and men in the general population.[[958]](#footnote-959)
  5. Reform of the Human Rights Act that significantly exacerbated safety risks to women would be inconsistent with core values underlying the Human Rights Act, including equality, dignity, autonomy and proportionality. However, we have not found any evidence that clarifying the legal entitlement of people who are transgender or non-binary to use bathrooms that align with their gender identity will have that effect.
  6. While public bathrooms and changing rooms may be potential sites of male offending against women, we are not aware of any evidence to suggest this is common. We are not aware of studies into the prevalence of offending in these settings in Aotearoa New Zealand. However, a study from the United States indicated that violence and privacy-related crimes in public bathrooms and changing rooms are rare.[[959]](#footnote-960)
  7. More importantly, we have not identified any evidence in Aotearoa New Zealand or overseas of people who are transgender being significantly represented in offending statistics relating to crimes in public bathrooms and changing rooms. Nor have we found evidence of such offending statistics increasing in countries where anti-discrimination laws have been reformed.[[960]](#footnote-961) According to a 2023 news article, New Zealand Police had no record of any complaints or threats relating to “the scenarios pushed by those opposed to trans women in women’s toilets or changing rooms”.[[961]](#footnote-962) The article noted that academic research overseas had found the same.
  8. The Women’s Rights Party referred us to one online article from Reduxx (a website that describes itself as providing feminist news and opinion) about a man in the United Kingdom who sexually assaulted a woman in a female bathroom at a train station. The article said the man was dressed in a high-visibility vest when he entered the facility but claimed after his arrest that he was in the facility because he identified as female.[[962]](#footnote-963) Our research uncovered only a few additional claims from overseas of cisgender men masquerading as transgender women to commit offences.[[963]](#footnote-964) Given the extent of public attention on this issue, it is notable that there are such few claims. Further, of those incidents we could verify as having happened, many occurred prior to a relevant anti-discrimination protection entering into force. We found nothing to suggest a correlation between anti-discrimination protections and the prevalence of offending of this kind by men against women.
  9. As mentioned above, some submitters worried that cisgender men would misuse an exception to gain access to women’s spaces. We are not convinced that option 3 would prevent this possibility more than option 2. Under option 3, transgender men could be required to use a female bathroom. Therefore, a cisgender man who wished to enter a female changing room could simply claim to be a transgender man.
  10. For completeness, we also note that there are criminal laws in Aotearoa New Zealand that capture the type of offending in public bathrooms and changing rooms submitters raised with us, regardless of who commits those offences. These include laws relating to assault, sexual violation, committing an indecent act and indecent exposure.

##### Conclusion on safety

* 1. In summary, we agree that protecting women from violence should be an important policy objective for any government. However, we have been unable to find evidence that safety risks to women are exacerbated by laws that clarify it is permissible for people who are transgender to use facilities that align with their gender identity. In contrast, there is evidence of the safety risks faced by people who are transgender or non-binary when they use public facilities that do not align with their gender presentation. We think option 3 would exacerbate safety risks for people who are transgender as well as for people who are non-binary, people with an innate variation of sex characteristics who appear gender non-conforming and cisgender people with non-conforming gender expression.

#### Public decency

* 1. The other reason stated in sections 43(1) and 46 for maintaining single-sex facilities is public decency. As we explained earlier, the idea of public decency is grounded in the right to privacy and in social and cultural assumptions about whether it is acceptable to expose your body and intimate functions to people who are a different sex.
  2. Although most of the concerns we heard from submitters related to safety, we received some submissions raising concerns about public decency or related ideas like privacy, comfort and modesty. Organisations that expressed these concerns included the Women’s Rights Party, Resist Gender Education, Lesbian Action for Visibility Aotearoa, Feminist Older Women Lobbyists, Women’s Declaration International NZ and Speak Up for Women. Several submitters raised concerns about cisgender women and girls seeing, or being seen in a state of undress by, people they perceive as male. Some submitters referred to the need for cisgender women and girls to have privacy to manage menstruation. Two submitters gave examples of cisgender women being uncomfortable with a transgender woman using a female changing room and a women-only sauna.
  3. As we explained in Chapter 8, social norms about keeping men and women separate when they are unclothed are strongly held by many people. We also suggested that these norms are currently in a state of transition regarding the significance of gender. Some people think these norms turn on ‘biological sex’, others on external genitalia and others on gender identity.
  4. People’s feelings and concerns about privacy, modesty and comfort can also differ depending on their cultural and religious background.[[964]](#footnote-965) In consultation, we received several submissions about cisgender Muslim women’s comfort sharing single-sex facilities and services with transgender women, although none of the submitters identified themselves as Muslim. Some said they understood it was a concern for Muslim women to share certain spaces with transgender women in some circumstances, and others said they understood it was not a concern.
  5. Option 3 would likely better address submitters’ concerns about the privacy, modesty and comfort of cisgender women and girls than option 2. However, we do not think it would completely address these concerns. Where providers choose to rely on the exception, people would be legally obliged to use the facility that aligns with their sex assigned at birth even if that is completely at odds with their gender presentation and sex characteristics. For example, under option 3, a transgender man with a male gender-conforming expression and who has undergone phalloplasty would be required to use a women’s changing room.
  6. Many submitters thought concerns about privacy, modesty and comfort are best addressed by well-designed unisex facilities. We agree. However, for reasons discussed later in the chapter, we do not think reform of the Human Rights Act is the appropriate way to encourage the uptake of unisex facilities (nor did submitters support this).
  7. Ultimately, therefore, we have to weigh the modesty, privacy and comfort concerns we heard from some submitters with the other implications of reform (such as those about safety, proof and practicability). While we do not discount the validity of privacy concerns, we think they are outweighed by the harmful effects of exclusion detailed elsewhere in this chapter. 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 rather than in a communal area. As noted above, criminal laws such as those relating to indecent exposure continue to apply. It is also open to providers to enforce non-discriminatory standards about courtesy and modesty, as we discuss below.
  8. Finally, it is also important to note that people who are transgender or non-binary or who have an innate variation of sex characteristics also have privacy interests that deserve to be protected. We doubt this is best achieved by laws that allow providers to require people to use single-sex facilities that do not align with their gender identity. We heard from some submitters that forcing a person to use a facility that does not align with their gender identity would cause them significant discomfort. Several submitters described this possibility as “cruel”, “unfair”, “demeaning” and “invasive and dehumanising”. For example, one person commented:

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

#### Human dignity

* 1. Finally, we think it is important not to lose sight of the core value underlying both the rationales stated in sections 43(1) and 46 of the Human Rights Act: promoting human dignity. As we explained in Chapter 3, dignity is undermined when people lose control over who can see their naked body and see or hear their intimate activities. It is also undermined when the state fails to protect people from violence.[[965]](#footnote-966)
  2. Human dignity is also undermined when groups in the community are prevented from participating in society on an equal basis — a point made by some submitters.

##### Participation in society of cisgender women and girls

* 1. Some submitters said the ability of cisgender women to participate in society could be eroded if people they regarded as men are allowed into women-only facilities. Several said they would not use toilets outside of the home or would stop activities such as swimming if transgender women were allowed in women’s changing rooms. Speak Up for Women submitted that allowing transgender women into women’s bathrooms might lead to a “return of the restrictions of a Urinary Leash” (where, historically, women were unable to leave their houses for extended periods because of a lack of public toilets for women).
  2. These concerns are not universal. According to our research and consultation, some cisgender women do not have concerns about sharing single-sex spaces with people who are transgender or non-binary.[[966]](#footnote-967)
  3. We doubt the way people who are gender non-conforming use public bathrooms and changing rooms would shift dramatically as a result of law reform clarifying people are entitled to use a facility that aligns with their gender identity. We understand that many people who are transgender already use bathrooms and changing rooms that align with their gender identity (although we do not have data about how many or how often).[[967]](#footnote-968) We also understand that many people who are transgender or non-binary or who have an innate variation of sex characteristics prefer to use unisex facilities where they are available (perhaps for reasons of personal safety or privacy). We expect this would continue too.
  4. Although some submitters speculated about what would happen following law reform, we heard no examples of cisgender women currently limiting their use of public bathrooms or confining themselves to the home because of fear of contact with people who are transgender. Although we acknowledge some people have strong feelings on this issue, we think it is unrealistic to suggest women’s participation in society would be greatly affected by clarifying what we understand to already be common practice.

##### Participation in society of people who are transgender or non-binary

* 1. Studies suggest that the fear of being harmed or encountering other problems in public bathrooms and changing rooms often prevents people who are transgender or non-binary from using public facilities.
  2. More than two in five (43 per cent) of respondents in the 2022 Counting Ourselves survey reported they often or always avoided public bathrooms because they were afraid of problems as a transgender or non-binary person.[[968]](#footnote-969) This was an increase from the number of respondents who reported this in the 2018 survey (33 per cent).[[969]](#footnote-970) In another New Zealand survey, a reason frequently given by transgender and non-binary secondary school respondents for why they did not play sport despite wanting to was not being able to use a changing room that matches their gender.[[970]](#footnote-971) An Australian survey showed similar trends.[[971]](#footnote-972)
  3. We also heard about harms to the dignity of people who are transgender or non-binary or who have an innate variation of sex characteristics in consultation. For example, in its submission, Community Law said (referring to a transgender gym member being restricted to a specific toilet): “These kinds of situations can create feelings of exclusion and isolation, can rob that person of fully participating in life, and displace them from their gender identity.”
  4. We think option 3 would have a significant impact on the human dignity of people who are gender non-conforming. It would limit their ability to access toilets and changing facilities in the community, further restricting their ability to participate in society.

#### Conclusion

* 1. For all the reasons discussed above, we prefer option 2 over option 3. We think option 3 would be a retrograde step that would leave people who are gender non-conforming in a worse position than if we were to recommend no reform of the Human Rights Act at all.

### Intermediate options and mitigations: analysis and conclusions

* 1. We have also considered a range of intermediate possibilities. These are options that would neither provide a blanket entitlement for people who are transgender to use facilities if their gender identity aligns with the sex of the facility nor a blanket entitlement to exclude them. For the reasons we explain below, we do not consider any of these intermediate possibilities to be practicable or desirable.

#### Option 4 (person’s birth certificate must match designated sex of facility)

* 1. The first intermediate option we considered was the one we presented in the Issues Paper as option 4. Under this option, service providers would not be entitled to exclude a person from a single-sex facility if the sex marker on their birth certificate matched the designated sex of the facility.
  2. Because this option would tie legal protection to a significant step in a person’s transition, this might address concerns we heard from some submitters about the possibility of cisgender men pretending to be transgender women to gain access to female facilities. Although, for most people, the process of obtaining a birth certificate with a revised sex marker is relatively straightforward, it does involve a fee and making a statutory declaration.[[972]](#footnote-973) Therefore, it might deter casual exploitation of the exceptions by cisgender male predators.[[973]](#footnote-974)
  3. Option 4 would not, however, address other concerns we heard about cisgender women and girls having to share facilities with people with different sex characteristics or a different sex assigned at birth.
  4. Option 4 would also create some significant equity issues. As we explained in Chapter 12, the process of obtaining a birth certificate with a revised sex marker is more complicated for children and young people. Even for adults, the requirements to pay a fee and make a statutory declaration might create barriers for people with limited education or financial resources. Further, people who are born overseas cannot obtain a New Zealand birth certificate. Their ability to change the sex recorded on their birth certificate would depend on the law and administrative practice where they were born. We understand many countries from which New Zealand’s migrant communities originate do not offer any equivalent process.[[974]](#footnote-975)
  5. Another problem with option 4 is that it would introduce an administrative element into a system that is currently self-managing. The only way for it to be applied in a non-discriminatory way would be for all New Zealanders to carry with them a copy of their birth certificate or an equivalent form of identification.[[975]](#footnote-976) We think most New Zealanders would regard this as intolerable.
  6. Short of that, it would likely be applied in a discriminatory way based on the visual appearance of the individual. In practice, it would likely have a similar impact to option 3.
  7. As mentioned earlier, there was very little support for option 4 from submitters and none from organisations that submitted.
  8. Two submitters suggested other forms of documentation that might be able to be used by people who are transgender or non-binary or who have an innate variation of sex characteristics to access their preferred single-sex facility. One submitter suggested a document that was approved by “a medical gender care specialist” and another suggested cards akin to the ‘I can’t wait’ toilet cards used by some people with health conditions.
  9. These options would be very similar to option 4, and many of the same concerns would arise. These include difficulty accessing documentation, the practicalities of having to carry it around and the extent to which requirements of this kind would invite informal policing of bathrooms and changing facilities based on visual appearance. We do not think these options are sufficiently different from option 4 to alleviate the concerns we have identified.

#### Additional provisions to accompany option 3 or 4

* 1. In the Issues Paper, we also asked whether, if options 3 or 4 were adopted, they could be supplemented by additional reforms to mitigate the impact on people who are transgender or non-binary. We identified two possibilities:
     + 1. adding a reasonableness threshold before the single-sex facilities exceptions could be relied on; and
       2. requiring providers who wish to exclude people who are transgender from single-sex facilities to provide a unisex facility.
  2. Most submitters who responded on this issue told us that no mitigation would be sufficient to allay their concerns about the negative impacts of options 3 and 4 for people who are transgender or non-binary or who have an innate variation of sex characteristics. Some of these submitters nevertheless told us that, if option 3 or 4 were to be preferred, some mitigation of its impact would be desirable.

##### **A reasonableness or proportionality threshold**

* 1. The first mitigation we examined in the Issues Paper was to supplement or replace the current threshold in the single-sex facilities exceptions of “on the ground of public decency or public safety” with a requirement of reasonableness. We referred to two overseas examples:
     + 1. Ireland has an exception to the prohibition on gender discrimination with respect to goods and services that applies “where embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender”.[[976]](#footnote-977)
       2. The United Kingdom has an exception permitting gender reassignment discrimination where single-sex services are provided but only if the discrimination is “a proportionate means of achieving a legitimate aim”.[[977]](#footnote-978)
  2. Our research has not uncovered any case law in which courts have interpreted these thresholds. However, as we explained earlier, the United Kingdom exception has limited application since the decision of the United Kingdom Supreme Court in *For Women Scotland Ltd v Scottish Ministers* holding that the exceptions for single-sex facilities in United Kingdom anti-discrimination law permit discrimination based on a person’s “biological sex” regardless of whether any applicable gender reassignment exception applies.[[978]](#footnote-979)
  3. Most submitters thought a reasonableness threshold would not be sufficient to manage the negative implications of option 3 or 4 or were unsure whether it would be. The New Zealand Law Society opposed options 3 and 4 but considered that, if either option were to be adopted, it must include a reasonableness requirement. It pointed to existing reasonableness requirements in sections 29, 35 and 52 of the Human Rights Act.
  4. We have considered carefully whether combining option 3 or 4 with a reasonableness or proportionality requirement similar to the Irish and United Kingdom exceptions could achieve a fair accommodation between the competing rights and interests explored earlier in this chapter. We do not think it would have that effect.
  5. The Irish wording elevates concerns about embarrassment and infringement of privacy over other interests we consider equally if not more important, including the safety, dignity and participation interests we explored above. Worded in this way, the threshold of reasonableness adds little to the statutory test as it does not require providers to achieve a fair accommodation between the competing interests.
  6. The proportionality test in the United Kingdom does, on its face, require providers to weigh these competing concerns. Further, having a requirement that allows discrimination based on gender identity where that is reasonably required to achieve underlying rationales would be consistent with recommendations we have made in some other chapters.[[979]](#footnote-980)
  7. The recommendation we made in Chapter 11 in relation to an exception allowing accommodation providers to offer shared accommodation to people of one sex is particularly relevant. We recommended reform to provide that, when relying on this exception, accommodation providers can exclude a transgender person whose gender identity aligns with the designated sex of the accommodation if that is reasonably required for certain purposes. The purposes that we identified as relevant in that context were to preserve the privacy or protect the welfare of any occupant or potential occupant of the accommodation.
  8. Although there is a case for aligning the accommodation and single-sex facilities exceptions, we have concluded that a matching “reasonably required” threshold would not achieve a fair balance of rights and interests in relation to the single-sex facilities exceptions. There are four differences in context that warrant a different approach.
  9. First, a key reason why we concluded that it would be inappropriate to specify a blanket rule about whether people should be able to access single-sex accommodation if their gender identity aligns with the designated sex of the accommodation was the variety of different settings covered by the shared accommodation exception. As we explained in Chapter 11, these include settings as varied as backpackers’ accommodation, women’s refuges and private school boarding houses.
  10. By contrast, the same range of variables are not present in relation to single-sex facilities. Putting aside the overlap with accommodation (which we discuss later in the chapter), similar considerations will generally arise whatever the setting in which access to a single-sex facility such as a bathroom or changing room is at issue. We therefore think that adding a reasonableness requirement to the exception would effectively invite service providers to decide on access based on personal views, preferences and prejudices.
  11. Second, on such a pervasive issue as accessing bathrooms, people with a non-conforming gender expression need a clear statement of their rights. We think this may help to reduce instances of people with non-conforming gender expression being confronted in bathrooms and may make them feel more confident to use facilities that align with their gender identity.
  12. By contrast, seeking admission to shared accommodation is not a daily occurrence, and as we explained in Chapter 11, few accommodation providers limit accommodation to people of one sex. Therefore, we think the impact of the shared accommodation exception is more confined.
  13. Third, we think privacy interests are particularly strong in accommodation settings because of the length of time people spend in accommodation, because accommodation operates (even if temporarily) as a person’s home and because people are vulnerable when asleep. As noted earlier, there are actions people can take to protect their privacy in single-sex bathrooms and changing rooms such as choosing to get changed in a toilet stall.
  14. Finally, accommodation providers have a relationship with those staying in the accommodation that is more than just transitory and existing obligations in relation to the welfare of those people. Therefore, we consider it is appropriate to require them to weigh the privacy and welfare interests of people who will be using the accommodation. By contrast, we do not think the thousands of café owners and bar owners across Aotearoa New Zealand are equipped to undertake this weighing exercise in relation to people who will be using facilities for a short period. To the contrary, we think service providers of this kind need clear, simple rules on which to rely.

##### A requirement to provide unisex facilities

* 1. The second mitigation we identified in the Issues Paper was to combine option 3 or 4 with a requirement to provide unisex facilities.
  2. As we explain later in the chapter, we also consulted on whether amendments to the Human Rights Act would be desirable to encourage the provision of unisex facilities more generally. We expand on our reasons below. In brief, the Human Rights Act is not the most appropriate regulatory vehicle for a requirement of this kind, such a reform would need broad consultation with industry bodies and we did not hear strong support from submitters for Human Rights Act reform on this issue.
  3. These reasons apply equally to a reform that pairs a requirement to provide unisex facilities with option 3 or 4. We have also identified some other issues. First, no law change could result in unisex facilities being immediately available at all places where bathrooms and changing rooms are made available to the public. Second, a rule that required the provision of unisex facilities but only if a provider wished to enforce a rule about access to single-sex facilities would be complex and would risk confusion and inconsistent application. Third, such a requirement would not address the concerns we set out above about informal policing of bathrooms based on assumptions about a person’s gender. If anything, it might exacerbate this problem.
  4. In consultation, we heard some concerns about people who are transgender or non-binary only being allowed to use unisex facilities. Some concerns related to accessibility. For example, unisex facilities are sometimes located much further away, may require a key to access and are sometimes intended as an accessible facility for disabled people. Some concerns related to other impacts on dignity. For example, we were told in consultation that requiring people to use unisex facilities risks othering, outing and harming them.
  5. These concerns would need to be weighed and addressed before proposing a law reform that requires some people in the community to use a unisex facility. Given the strong practical difficulties with such an option, we do not take the issue further in this review.
  6. In conclusion, we do not consider a requirement to provide unisex facilities is a practical and effective mitigation to address the problems with option 3 or 4.
  7. Several submitters said there should be separate “LGBTQ” toilets. This would be completely impractical for providers to implement as well as stigmatising for the LGBTQI+ community. We do not support a reform of this kind.

#### Additional provisions to accompany option 2

* 1. Some submitters suggested additional requirements that could accompany option 2.
  2. Exercise New Zealand supported option 2 but considered that service providers should be entitled to do two things.
  3. First, it said providers should be entitled to decline a person access to a single-sex facility if their claim to be entitled to access that facility does not appear genuine. We do not think a specific reform is needed to achieve that. Under option 2, service providers would not be required to permit a person access to a single-sex facility if they had good reason to doubt that a person’s sex or gender identity aligned with that facility.
  4. Second, Exercise New Zealand said the law should allow providers to request discretion when “an individual’s external biology does not match their gender”. The organisation gave the example of a transgender woman with male genitalia who walked naked between changing spaces and showers in a female changing facility. It said this caused distress and confusion to other women. Some other submitters expressed broader concerns about people showing insufficient modesty in single-sex facilities.
  5. We have considered whether a provision could sit alongside option 2 clarifying, for the avoidance of doubt, that the Human Rights Act does not prevent providers from enforcing reasonable standards of behaviour in single-sex facilities. Ultimately, we have decided against this option for two reasons. First, we do not think the Human Rights Act is the appropriate vehicle for such a provision. There are no other provisions in the Act setting reasonable standards of behaviour for members of the public.
  6. Second, such a provision might be taken as an invitation to enforce behavioural standards in a discriminatory way against gender non-conforming individuals. Service providers can already take action to respond to criminal behaviour such as committing an indecent act or indecent exposure. They can also advise all their customers about behaviour standards (including through appropriate signage). We think stating this in an ‘avoidance of doubt’ provision would create more problems than it would solve.
  7. Exercise New Zealand also thought clear guidelines and support would be needed alongside option 2 such as from Te Kāhui Tika Tangata | Human Rights Commission. As we discuss in Chapter 20, an aspect of the Human Rights Commission’s function is to educate, and this can include publishing guidance.[[980]](#footnote-981) There may be aspects of this review on which the Human Rights Commission considers it is beneficial to issue guidance but we make no specific recommendations on this.
  8. A few submitters suggested other ways to encourage inclusion to sit alongside option 2. For example, one submitter suggested that providers should display gender-affirming signs such as: “You are welcome to use whatever toilet you are identified with”. There is nothing to prevent providers using signs of this kind, and we understand that some already do so. However, we do not think it is necessary or desirable to amend the Human Rights Act to require signage of this kind.

### Recommendations and wording

1. Section 43 of the Human Rights Act 1993 should be amended to specify that section 43(1) cannot be relied on to refuse a person access to or use of a single-sex facility that aligns with their gender identity.
2. Section 46 of the Human Rights Act 1993 should be amended to specify that it cannot be relied on to refuse a person access to or use of a single-sex facility or service that aligns with their gender identity.
   1. For reasons we outlined above, we recommend the Human Rights Act should clarify that sections 43(1) and 46 cannot be relied on to deny a person access to a single-sex facility that aligns with their gender identity.
   2. While section 43(1) refers only to “facilities”, section 46 also refers to “services”. As mentioned earlier, we think the modern application of these exceptions is primarily to facilities. However, for completeness, any amendment in respect of section 46 will need to refer to both.
   3. One way to achieve our policy intent would be to insert new subsections into sections 43 and 46 along the following lines:

Nothing in section 43(1) shall prevent a person from accessing a facility that aligns with their gender identity.

1. Nothing in section 46 shall prevent a person from using a facility or service that aligns with their gender identity.

## Relationship with exception for shared accommodation

* 1. There is overlap between the single-sex facilities exceptions in sections 43(1) and 46 of the Human Rights Act and the shared accommodation exception in section 55. This overlap exists when an accommodation provider is supplying accommodation to people of “each sex” (the words in sections 43(1) and (46)). For example, a business that runs a backpackers’ hostel with men’s and women’s bunkrooms has obligations under three different provisions in Part 2:
     + 1. section 42 (because they are allowing members of the public access to a place);
       2. section 44 (because they are providing facilities to the public); and
       3. section 53 (because they are disposing of an interest in accommodation).[[981]](#footnote-982)
  2. Therefore, there is a case for ensuring the three exceptions operate similarly.
  3. For the reasons we set out in Chapter 11, we think the general rule we have proposed above in relation to the single-sex facilities exceptions is not warranted in respect of single-sex accommodation. Nor is it desirable for the single-sex facilities exceptions to undermine the recommendations we have made in respect of shared accommodation.
  4. Therefore, we recommend an amendment to the Human Rights Act to ensure that, in the circumstances covered by the shared accommodation exception in section 55, the “reasonably required” test we proposed in Chapter 11 also operates as an exception to the discrimination protections in sections 42 and 44.

### Recommendations and wording

1. Recommendations 19 and 20 should not apply to circumstances covered by Recommendation 12 relating to shared accommodation.
2. There should be new exceptions to sections 42 and 44 of the Human Rights Act 1993 that operate in the same circumstances outlined in relation to Recommendation 12.
   1. For the reasons just outlined, we recommend that our proposed amendments to sections 43(1) and section 46 of the Human Rights Act should not apply to circumstances covered by Recommendation 12 (the proposed exception for shared accommodation). Instead, there should be new gender identity exceptions related to access to places, vehicles and associated facilities (section 42) and provision of goods, facilities or services (section 44) that permit differences of treatment in the same circumstances we outlined in Recommendation 12.
   2. As these recommendations involve the interrelationship of several provisions, we think it is best to leave the wording to Te Tari Tohutohu Pāremata | Parliamentary Counsel Office. However, we consider the amendments should achieve three things.
   3. First, they should ensure that the general rule we propose in Recommendations 19 and 20 does not apply to shared accommodation situations that fall within the terms of section 55 of the Human Rights Act.
   4. Second, it should ensure that exceptions equivalent to Recommendation 12 operate in relation to both sections 42 and 44.
   5. Third, it will need to ensure that, unless the threshold test set out in those new exceptions is met, the existing single-sex facilities exceptions in sections 43(1) and 46 cannot be relied on to treat a person differently in relation to single-sex accommodation that aligns with their gender identity.

## Other issues on which we consulted

* 1. We sought feedback in the Issues Paper on two other issues related to the provision of bathrooms and changing rooms:
     + 1. whether there should be new exceptions for single-sex facilities in educational establishments and workplaces; and
       2. whether the Human Rights Act should have a requirement relating to provision of unisex facilities.
  2. We do not recommend reform on either of these issues.

### Single-sex facilities in educational establishments and workplaces

* 1. We do not recommend amendments to the subparts in the Human Rights Act about educational establishments and employment to make provision for single-sex facilities.

#### Background

* 1. As already explained, sections 43(1) and 46 of the Human Rights Act are exceptions to the discrimination provisions relating to public access to places, vehicles and facilities (section 42) and to the provision of goods, facilities or services to the public (section 44).
  2. There is no equivalent exception in the subpart of the Human Rights Act that relates to educational establishments. The forms of discrimination that are unlawful for educational establishments include denying or restricting a student access to “benefits or services” and subjecting a student to a “detriment”.[[982]](#footnote-983) The Act does not provide an exception from these requirements for single-sex bathrooms and changing rooms.
  3. Likewise, there is no equivalent exception in the subpart that relates to employment. The forms of discrimination that are unlawful for employers include subjecting an employee to a “detriment”.[[983]](#footnote-984) There is no exception from this requirement for single-sex bathrooms and changing rooms.
  4. There is no indication in the legislative history why exceptions were not included for single-sex facilities in workplaces and schools. It may have been overlooked or may not have been considered necessary.[[984]](#footnote-985)
  5. In the Issues Paper, we said it was possible that excluding a transgender person from a bathroom or changing room that aligns with their gender identity might constitute a breach of discrimination protections in Part 2 of the Human Rights Act that apply to employment and education and we pointed to some decisions from overseas courts and tribunals that were generally supportive of this proposition. Although we thought it might be beyond the scope of the review for us to recommend new sex exceptions to address this issue, we invited feedback on this issue.[[985]](#footnote-986)

#### Analysis and conclusions

* 1. For the following reasons, we do not recommend amendments to the Human Rights Act to address this issue.
  2. First, we cannot address the issue of who can access single-sex facilities in workplaces and educational establishments without recommending that entirely new sex exceptions are added to the Human Rights Act. We consider we should be slow to make such a suggestion given the limited scope of this review.
  3. Second, the main reason we consulted on this issue was to allow us to address any inconsistencies arising from our reform recommendations. That could have happened if we recommended option 3 or 4 above. Those options would result in limits being placed on people’s entitlement to use bathrooms and changing rooms that align with their gender identity when accessing goods, services, places and facilities that are available to the public. Without additional reforms, there would be no similar exceptions for bathrooms and changing rooms in workplaces and educational establishments.
  4. For that reason, we suggested in the Issues Paper that one possibility would be to align the legal position in relation to workplaces and educational establishments with whatever position we settled in respect of sections 43(1) and 46.[[986]](#footnote-987)
  5. This issue no longer arises. Our recommendation regarding sections 43(1) and 46 is that they be amended to clarify they do not permit a person to be excluded from a single-sex facility or service that aligns with their gender identity. No amendment is needed to the provisions in the Human Rights Act about educational establishments and workplaces to ensure consistency with this outcome.
  6. Third, it might still be appropriate for us to make recommendations about access to single-sex facilities in educational establishments or workplaces if we considered that wholly different considerations arise in these contexts. However, we do not have a sufficient basis to reach this conclusion. We received some feedback from submitters about whether people should be entitled to access bathrooms and changing rooms in educational establishments and workplaces that align with their gender identity. However, few submitters gave us concrete examples, specific to the context of workplaces or educational establishments, of problems that have arisen in practice. Of the handful that did, some related to cisgender women and girls having to share facilities with people of a different sex assigned at birth. Others focused on the harms for people who are transgender or non-binary or who have an innate variation of sex characteristics from having their access to facilities restricted in workplace and educational contexts.
  7. Finally, we are conscious that the protections in the Human Rights Act regarding educational establishments have very limited application. As we explained in Chapter 12, issues concerning the provision of facilities to students in universities, state schools and state integrated schools are likely to fall under Part 1A.
  8. In sum, we do not think we have a sufficient basis to recommend reforms of the Human Rights Act to introduce new sex exceptions applying to workplaces and educational establishments. Whether there should be additional sex exceptions to the Act’s provisions regarding educational establishments and workplaces is something that could be considered further in a broader review of the Act.

### Unisex facilities

* 1. We do not recommend amendments to the Human Rights Act to encourage or require the provision of unisex facilities.

#### Background

* 1. A unisex facility is one that is designed to be equally private and accessible to people of any sex or gender identity. Many providers in Aotearoa New Zealand already maintain unisex facilities (either alongside or instead of single-sex facilities). However, we do not know how many.
  2. There is no current provision in the Human Rights Act or in other primary legislation that requires people to provide unisex facilities. There are some building regulations that apply if providers choose to build unisex bathrooms (or renovate existing bathrooms), but these do not require unisex bathrooms.[[987]](#footnote-988)
  3. In our preliminary research, we identified some advantages of well-designed unisex facilities as a way to advance the equality values underlying the Human Rights Act while accommodating the concerns about safety and privacy protected by sections 43(1) and 46. For that reason, we sought feedback in the Issues Paper on whether an amendment to the Human Rights Act was desirable to encourage the provision of unisex facilities. We identified reform options ranging from an immediate requirement on all service-providers to make unisex facilities available (which we acknowledged might be impractical) through to requirements tied to new builds or to what might be reasonably expected of the service-provider in the circumstances.
  4. As discussed above, we also asked whether a requirement to provide unisex facilities would be particularly desirable if option 3 or 4 were adopted.

#### Analysis and conclusions

* 1. We do not recommend reform of the Human Rights Act to encourage the provision of unisex facilities as part of this review. We received little feedback from submitters on this issue. Of those that responded to this question, there was little support for adding such a requirement to the Human Rights Act and no consensus about what such a provision might look like.
  2. Some submitters thought a reform of this kind would have significant cost implications for providers. In the light of that concern, a provision of this kind should not be enacted without wide consultation with stakeholders to ensure all relevant implications have been considered. Given the breadth of subject matter covered by this review, we are not confident this issue attracted sufficient attention in consultation or that we have heard all relevant perspectives.
  3. Many submitters expressed reservations about whether the Human Rights Act is the best regulatory vehicle for a provision of this kind. We share those reservations. It is not necessarily inappropriate for the Human Rights Act to impose obligations on providers to take reasonable measures to adapt an environment to make it accessible to certain groups. These are known as ‘reasonable accommodation’ provisions, and the Act already contains several such provisions.[[988]](#footnote-989) For example, section 52 of the Human Rights Act states, in effect, that a provider of facilities or services may be required to make special provision to ensure equal access to goods and services for a disabled person if that can be reasonably expected in the circumstances.
  4. Nevertheless, we think a requirement to provide unisex facilities would be of a different character to these existing reasonable accommodation provisions and would sit less comfortably within the scheme of the Human Rights Act. The current reasonable accommodation provisions explain the terms in which certain exceptions to the Part 2 protections from discrimination apply. They ensure that, if a particular group needs special provision to receive equal access in circumstances regulated by Part 2 (such as when accessing employment, housing or goods and services), that must be accommodated if it is reasonable to do so in all the circumstances. Most relate to disabled people.[[989]](#footnote-990)
  5. A requirement on service providers (or certain kinds of service providers) to make unisex facilities available to everyone in the community would not function in this way. It would not, for example, specify the terms on which it is lawful or unlawful to deny a particular group access to a good, service or facility.
  6. We are conscious that a somewhat analogous provision imposing a requirement to ensure reasonable and adequate access and sanitary facilities for disabled people when undertaking new builds and alterations is found in the Building Act 2004, not the Human Rights Act.[[990]](#footnote-991) We considered whether we should recommend reform of the Building Act to require the provision of unisex facilities in similar circumstances. We have decided against making such a recommendation for the following reasons.
  7. First, it goes beyond the remit of this review to recommend reform of a different statute unless that is a necessary consequence of the reforms we recommend of the Human Rights Act itself. We think we should only recommend amendments to other legislation if needed to address significant incoherence or ambiguity that would otherwise result from our proposed reforms.
  8. Second, broad consultation with people and organisations with an interest in Building Act reform would be required before we could propose such a reform.
  9. Third, as explained above, we did not receive an overwhelming response from submitters that law reform on this issue is desirable.
  10. We acknowledge that the wider availability of well-designed unisex facilities would have significant advantages over exclusively single-sex facilities in advancing the aims of equality, safety and privacy that underlie sections 43(1) and 46 of the Human Rights Act. Well-designed unisex facilities have individual toilets that are fully enclosed with floor to ceiling walls and include their own hand basin.[[991]](#footnote-992) Although there was little support from submitters for Human Rights Act reform on this issue, many submitters wanted unisex facilities to be more widely available.[[992]](#footnote-993)
  11. Many submitters told us that unisex facilities were more inclusive, safe and comfortable, and that this was particularly important for many people who identify outside the gender binary but also for some people who are transgender or who have an innate variation of sex characteristics. Submitters also said properly designed unisex facilities offered better privacy and could be more practical such as by reducing wait times. Several submitters gave examples of situations where well-designed unisex facilities could be beneficial. This included for transgender men who menstruate and need access to sanitary bins, people with children (particularly those of another sex or gender identity) and caregivers assisting a disabled person. We agree that unisex facilities have some significant advantages. They enable all people to use a bathroom or get changed in safety and privacy without contact with strangers, regardless of their sex or gender identity. They provide a suitable option for people who identify outside of the binary of male and female and who may not wish to use single-sex facilities. They also mean children do not need to use changing rooms or bathrooms alongside adults they do not know.
  12. As we identified in the Issues Paper, unisex bathrooms also have some other practical benefits.[[993]](#footnote-994) For example, the Building Code requires fewer toilets overall if unisex bathrooms are provided.[[994]](#footnote-995)
  13. We are conscious there is already a growing trend towards unisex facilities when designing new public buildings.[[995]](#footnote-996) We also acknowledge that, despite strong support from many submitters for unisex facilities being more widely available, other submitters raised concerns about issues such as safety, comfort and cleanliness. Some submitters (such as Resist Gender Education) thought that unisex facilities should only be provided if single-sex facilities are also available. Given we are not making any recommendations in relation to unisex facilities, we do not discuss these points further.

CHAPTER 15

# Competitive sports

## Introduction

* 1. In this chapter, we discuss an exception in section 49(1) of the Human Rights Act 1993 that enables single-sex competitive sporting activities.
  2. We recommend amendments to the Act to specify the circumstances in which a sports organisation can treat people differently by reason of 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. We explain this should only be permissible if it is reasonably required to meet one of the following policy objectives:
     + 1. securing fair competition between participants, having regard to the level of the competition and the public interest in broad community participation in sporting activities;
       2. ensuring the physical safety of all participants; or
       3. complying with international rules that impose a requirement in relation to a particular sporting activity.
  3. We consider this is the reform option that is best supported by the evidence and that best aligns with the rationales underlying section 49(1) and with our key reform considerations.
  4. The recommendations for reform set out in this chapter need to be read alongside Chapter 8, which outlined our general approach to reviewing Part 2 exceptions and explained some significant issues that arise in relation to the wording of exceptions.

## History, scope and rationale

* 1. Section 49(1) is an exception to section 44 of the Human Rights Act, which contains the Part 2 protections relating to the provision of goods, facilities or services. We discussed section 44 in Chapter 10.
  2. Section 49(1) of the Human Rights Act provides:

1. … nothing in section 44 shall prevent the exclusion of persons of one sex from participation in any competitive sporting activity in which the strength, stamina, or physique of competitors is relevant.
   1. The Act does not define ‘competitive sporting activity’. According to one definition used by Ihi Aotearoa | Sport New Zealand, competitive sports or activities involve participation through an organised structure such as in a league or club competition, a tournament or competitive event.[[996]](#footnote-997) Section 49(1) could therefore apply at a wide range of levels ranging from social leagues through to national-level tournaments and Olympic qualifying events. The terms ‘community sport’ and ‘elite sport’ are sometimes used to describe different levels of sport in Aotearoa New Zealand, although the line between them differs between sports. Section 49(1) applies to both.
   2. Section 49(1) does not allow people to be excluded from coaching, umpiring, refereeing or sports administration.[[997]](#footnote-998) In addition, it does not apply to sporting activities for children under 12 years old.[[998]](#footnote-999)
   3. The legislative history does not indicate the rationales for section 49(1). Based on the wider history, context and language of the provision, there are likely four.
   4. The first is custom. There is a long history of competitive sports being separated into men’s and women’s categories, both in Aotearoa New Zealand and internationally. The predecessor provision in the Human Rights Commission Act 1977 allowed people of one sex to be excluded from a competitive sporting event or activity “in which persons of one sex generally compete separately from persons of the other”.[[999]](#footnote-1000)
   5. The predecessor provision did not, however, contain the phrase “strength, stamina, or physique of competitors”. The addition of that language in 1993 suggests that custom was no longer considered sufficient on its own to justify sex-separated sports. Instead, these words reflect two further rationales: fair competition and safety. The logic underlying the exception is that, due to differences in the “strength, stamina, or physique” of men and women, sex-separated competitive sports are necessary to:
      * 1. ensure fair competition for women; and
        2. protect female athletes from being injured.
   6. These rationales of fair competition and safety ultimately link back to a broad underlying goal of supporting participation in sport for a marginalised group — specifically, women. In the Issues Paper, we referred to the historical exclusion of women from sport and explained that the creation of women’s categories was a common strategy to overcome this historical disadvantage.[[1000]](#footnote-1001) In this sense, section 49(1) can be seen as a measure designed to achieve substantive equality.
   7. As there is no case law on section 49(1), there is some uncertainty about what the “strength, stamina, and physique” requirement involves. Similar exceptions in Australian anti-discrimination legislation have been interpreted as limiting the exception to competitions that would otherwise be uneven because of differences in the strength, stamina or physique of male and female competitors.[[1001]](#footnote-1002) It is possible that a New Zealand court or tribunal might also take that approach.

## Current practice

* 1. It is common practice for sports in Aotearoa New Zealand to have separate competitive sporting events for men and women. Our understanding is that this typically happens as a matter of course without consideration being given to whether it is justified on the basis of “strength, stamina, and physique”.
  2. Some New Zealand sports organisations have developed policies on transgender participation in their sport, while others are currently in the process of developing such policies.[[1002]](#footnote-1003)

### Community sport

* 1. Sport New Zealand published guiding principles for the inclusion of transgender people in community sport in 2022. These consisted of an overarching principle of inclusion with five supporting principles.[[1003]](#footnote-1004)
  2. In October 2024, the Minister for Sport and Recreation asked Sport New Zealand to review and update the guiding principles.[[1004]](#footnote-1005) However, subsequently, in July 2025, the Government directed Sport New Zealand to stop all work on the guiding principles and remove them from its website. According to Sport New Zealand: “Sporting organisations will continue to make their own decisions on the participation of transgender people in community sport.”[[1005]](#footnote-1006)

### Elite sport

* 1. At the elite level, sports are generally guided by their international sporting body, which may itself be influenced by governing bodies such as the International Olympic Committee. In Aotearoa New Zealand, the level at which sport is considered to be elite rather than community sport differs depending on the sport.
  2. As we explained in the Issues Paper, many international sporting bodies have developed policies on the participation of transgender athletes. Policies vary widely depending on the sport, and some are more restrictive than others. Almost all the international policies we have seen impose some kind of restrictions on transgender women who wish to compete in women’s sport. Restrictions on transgender men are less common.
  3. It is uncommon for international sporting policies to refer specifically to athletes who identify outside the gender binary. However, restrictions that apply to transgender athletes will usually apply to such athletes if they wish to compete in a category that differs from their sex assigned at birth.
  4. We are only aware of two international sporting bodies with specific rules on the participation of athletes with an innate variation of sex characteristics — World Athletics and World Aquatics.[[1006]](#footnote-1007) These rules only apply to some innate variations of sex characteristics. There are also two international boxing organisations with policies on eligibility for men’s and women’s categories that may affect some boxers with innate variations of sex characteristics.[[1007]](#footnote-1008)

### Individual sports codes

* 1. Some New Zealand sports codes have developed policies on transgender participation, and some others are in the process of doing so.[[1008]](#footnote-1009) We are only aware of one New Zealand policy that refers specifically to athletes with innate variations of sex characteristics.[[1009]](#footnote-1010)
  2. Policies differ between sports. Most New Zealand policies that we have seen specify that the rules of the international governing body apply to international or selection competitions. According to Sport New Zealand, many current policies prioritise inclusion in line with gender identity at the community level, although there are some exceptions.[[1010]](#footnote-1011)
  3. A 2022 New Zealand survey found that 22 per cent of transgender and non-binary people who played competitive sport or were interested in doing so had been told to compete based on their sex assigned at birth, and 3 per cent had been told to undergo hormone treatment before playing in a competitive sport category aligning with their gender.[[1011]](#footnote-1012)

## Options for reform

* 1. We sought feedback in the Issues Paper on six options for reform of section 49(1) should new grounds be added to section 21 of the Human Rights Act as a result of this review:[[1012]](#footnote-1013)
     + 1. option 1: the exception should be retained in its current form;
       2. option 2: the exception should be amended to clarify that it does not allow an organisation to exclude people from a competitive sporting activity on the basis of their gender identity or the fact they have an innate variation of sex characteristics;
       3. option 3: the exception should be amended to allow people to be excluded from a competitive sporting activity on the basis of their gender identity or the fact they have an innate variation of sex characteristics if strength, stamina or physique is relevant to that activity;
       4. option 4: there should be a new exception that allows organisations to exclude people from competitive sporting activities on the basis of their gender identity or the fact they have an innate variation of sex characteristics in any circumstances;
       5. option 5: the exception should be amended so it only applies to women’s sport; and
       6. option 6: the exception should be extended to the new grounds but it should only apply where required to meet policy objectives such as securing fair competition (having regard to the level of the sport and the public interest in participation), ensuring physical safety of participants, and complying with international rules.
  2. As discussed in Chapter 8, the effect of the first option would be significant uncertainty as to the scope of the exception. We do not consider this option further.
  3. Under option 2, sports would be entitled to have men’s and women’s categories but there would be no exception permitting sports to have rules that apply specifically to people who are transgender or non-binary or who have an innate variation of sex characteristics. For example, it would be a breach of Part 2 for a sport to require a transgender woman to provide proof of hormone levels to compete in the women’s category. It is possible, but speculative, that a sport might be entitled in certain circumstances to rely on other rules to justify restrictions. For example, a sport could argue that:
     + 1. certain restrictions are needed to comply with health and safety legislation;[[1013]](#footnote-1014) or that
       2. complying with relevant requirements deriving from international sporting body rules is a genuine justification under section 97 of the Human Rights Act.[[1014]](#footnote-1015)
  4. Under option 3, a person who is transgender or non-binary or who has an innate variation of sex characteristics could be excluded from a competitive sporting activity in which “the strength, stamina, or physique of competitors is relevant”. It is possible this test might be interpreted in line with Australian case law which, as explained above, limits similarly worded exceptions to competitions that would otherwise be uneven because of differences in the strength, stamina or physique of male and female competitors. However, this, too, is speculative.[[1015]](#footnote-1016)
  5. Option 4 would enable sporting organisations to restrict or exclude people who are transgender or non-binary from competing in a single-sex competitive sporting activity that does not align with their sex assigned at birth without having to meet any threshold test or to give any reason for the restriction or exclusion. It would enable sporting organisations to restrict or exclude athletes with innate variations of sex characteristics on the same basis.
  6. Option 5 wouldreform section 49(1) so that it only allows sex-separated competitive sporting activities for women. Women’s sport categories could be limited to either cisgender women or to people assigned female at birth (depending on how the exception was designed). The exception would not allow men’s sporting categories. These would need to be replaced with an open category in which anyone (whether transgender, cisgender or a person who identifies outside the gender binary) could compete. As presented in the Issues Paper, this option would not restrict women with innate variations of sex characteristics from competing in the women’s category (although it would be possible to reword it to that effect). It would also be possible to word this option to retain the strength, stamina or physique test before a sport could run a women’s event.
  7. Option 6 would involvea new exception stating the circumstances in which a person can be excluded or restricted from a single-sex competitive sporting activity that aligns with their gender identity by reason of either of the new grounds we propose. This could only happen where reasonably required to advance certain policy objectives that would be stated in the legislation. In the Issues Paper, we suggested they could be:
     + 1. securing fair competition between participants having regard to the level of the competition and the public interest in broad community participation in sporting activities;
       2. ensuring the physical safety of all participants; and
       3. complying with international rules that apply to that sport.

## Public attitudes and overview of feedback

* 1. Transgender participation in sport (particularly elite sport) is a high-profile issue that often attracts significant media and public attention. It is also an issue on which many people have strong views, mainly about who should participate in women’s sporting categories.
  2. As is the case with access to single-sex facilities, the results of public attitude surveys show a strong division of opinion on this issue with the responses varying considerably depending on how the question is framed:
     + 1. The Aotearoa New Zealand Gender Attitudes Survey conducted by Te Kaunihera Wahine o Aotearoa | National Council of Women of New Zealand found that 74 per cent of female respondents would be comfortable playing sport with transgender women. It also found that 63 per cent of male respondents would be comfortable playing sport with transgender men.[[1016]](#footnote-1017)
       2. A 2023 Talbot Mills survey found that 60 per cent of respondents were opposed or strongly opposed to “allowing biological males who identify as women to compete in women’s sport”.[[1017]](#footnote-1018)
       3. A 2024 Curia Market Research survey found that 72 per cent of respondents did not support allowing “biological males who identity as women to compete in women’s sport”.[[1018]](#footnote-1019)
  3. Many submitters provided feedback on whether they supported transgender athletes being able to complete in line with their gender identity.[[1019]](#footnote-1020) The feedback was very polarised, with some strongly in favour of this and others strongly opposed.[[1020]](#footnote-1021)
  4. Submitters who favoured inclusion tended to prefer option 2. Submitters who were concerned about inclusion tended to prefer either option 1 or 4. Submitters did not always explain why a particular option would best meet their concerns.
  5. Twenty-seven organisations submitted on this issue but not all clearly identified a preferred option. Among those that did, option 6 was the most popular. Some organisations also identified an alternative option.
  6. Despite the polarised nature of the feedback, some common themes emerged.

#### Importance of participation in sport

* 1. Several submitters referred to the positive benefits of sport. For example, the Professional Association for Transgender Health Aotearoa commented: “Access to participation in sports and physical activities is an important opportunity to promote positive physical and mental health.” Some submitters referred to the role of sport in forming social connections.
  2. Some submitters were concerned about the impacts of restrictions and exclusion. For example, the Rotorua Chamber of Pride said participation in sports is a fearful part of life for many transgender people, with the result that many do not play at all. The Professional Association for Transgender Health Aotearoa pointed to data showing low levels of participation in sport for people who are transgender or non-binary, with this inequity existing from as young as 12. Some submitters commented that not participating in sport can have negative implications on physical and mental health.
  3. Other submitters were concerned about the impact on cisgender women’s participation in sports if transgender women compete in women’s competitions. Some said it would spell the end of women’s sports. Save Women’s Sport Australasia commented:

1. The HRA’s sport exception has enabled women to carve out a space in which they have been able to pursue their own personal sporting goals – ranging from connection, fitness and socialisation for some girls and women, to elite competition, status and financial rewards for others … This law change has the potential to completely erode the gains that have been made to date if women are not legally entitled to exclude male bodies from their sports where fair competition and safety are relevant.

#### Fair competition

* 1. Many submitters discussed whether transgender women’s inclusion in women’s sport would compromise fair competition. Of those who opposed inclusion, many were concerned that transgender women would have an unfair advantage over cisgender women. For example, Save Women’s Sport Australasia commented:

1. The only way sport can be fair and equal for women is with a protected female category that excludes competitors with male advantage.
   1. In explaining this concern, submitters generally referred to innate biological differences between men and women. Most did not address the impact of gender-affirming hormone therapy, and it was often unclear if their concerns extended to transgender women who had undergone such therapy. A small number did address this point, arguing that transgender women still have an advantage after undergoing gender-affirming hormone therapy.
   2. Conversely, a key argument from submitters who supported inclusion was that transgender women do not, or do not always, have an advantage over cisgender women in sport. While some submitters made this point very generally, others qualified it explicitly by reference to the mitigating effects of hormone therapy.
   3. A small number of submitters challenged the premise that cisgender men are innately stronger and better at sports than cisgender women or suggested that other factors are more significant than sex. Some pointed out that biological advantage is an accepted part of sporting competition and that cisgender athletes vary in characteristics such as height, natural testosterone levels and how efficiently their body uses oxygen. For example, Meredith Connell’s Rainbow Alliance commented:[[1021]](#footnote-1022)
2. It may be that any advantage that some transgender women may have in comparison to cisgender women is simply a fact of life, and part of the natural variance of the human race rather than being unfair.

#### Safety concerns

* 1. Some submitters expressed concern that the safety of cisgender women and girls could be put at risk if they compete with transgender women. Only a few submitters provided specific details. Those that did tended to refer to contact sports such as rugby, boxing, roller derby and mixed martial arts.
  2. Other submitters thought safety concerns were not supported by the evidence or should be addressed in other ways such as through weight categories. One submitter pointed out there are safety risks for transgender women if they have to compete with cisgender men.

#### Other feedback on harmful effects of restrictions

* 1. Several submitters said forcing transgender people to compete in a category that did not align with their gender identity would be “cruel and degrading”, “humiliating and discriminatory” or “an affront [to] their basic dignity”. Some were concerned that transgender (and cisgender) athletes could be subject to intrusive and degrading tests to determine their eligibility to compete in women’s sport.

## Evidence

* 1. One of the key reform considerations we have identified for this review is that good law reform should be evidence based. The International Olympic Committee advises that restrictions on gender categories should be based on “robust and peer reviewed research” that is “largely based on data collected from a demographic group that is consistent in gender and athletic engagement with the group that the eligibility criteria aim to regulate”.[[1022]](#footnote-1023)
  2. We have reviewed the evidence relevant to any fair competition or safety issues that may arise from the participation of people who are transgender or non-binary or who have an innate variation of sex characteristics in competitive sports.[[1023]](#footnote-1024) At the outset, it is important to acknowledge that Te Aka Matua o te Ture | Law Commission does not have expertise in sports science or physiology. We cannot assess the validity of particular studies or their relevance to particular sports. Rather, we have undertaken a high-level review of the evidence to consider its relevance to the policy questions we need to address. As we are not aware of any relevant research on New Zealand athletes, the research we consider is all from overseas.
  3. It is also important to acknowledge at the outset the significant limitations in the available evidence. For example, some studies do not involve transgender athletes or people who regularly participate in sport and these findings cannot necessarily be applied to athletes.[[1024]](#footnote-1025) The studies that do examine transgender athletes do not necessarily involve elite athletes.
  4. There is also a lack of sport-specific research. The studies we have seen generally test specific measures such as grip strength, jump height and number of press-ups. It is not straightforward to apply the findings of such studies to particular sports.
  5. Another limitation is a lack of longitudinal research on the effect of gender-affirming hormone therapy on performance over time.
  6. Researchers have commented on the inadequacy of the current evidence on the performance of transgender athletes and the need for further research.[[1025]](#footnote-1026) For example, information provided by Loughborough University in the United Kingdom about its research on transgender women and elite sport states:[[1026]](#footnote-1027)

1. … due to the challenges faced in this area of research – namely, very few transgender athletes to assess – it is recognised that it will be many more years before a large enough body of evidence will be available to meaningfully support sporting bodies to develop informed guidelines regarding transwomen athletes in elite sport.
   1. As we discuss below, there is also a lack of research relating to athletes with innate variations of sex characteristics. We found almost no research on athletes who identify outside the gender binary,[[1027]](#footnote-1028) although research on transgender athletes is likely to be relevant to this group.

### Research on sporting advantages associated with male bodies

* 1. Evidence suggests cisgender men have a biological advantage over cisgender women in sports requiring aerobic endurance, muscle strength, power and speed, with exposure to high levels of testosterone during puberty being the primary cause.[[1028]](#footnote-1029) At a population level, cisgender men have larger muscle mass, less body fat, greater blood haemoglobin concentration and mass, a larger heart, larger airways and lungs, greater height and longer limbs than cisgender women.[[1029]](#footnote-1030) Some studies have found differences in male and female athletic performance start to emerge around the age of 12.[[1030]](#footnote-1031) There is some evidence of differences in performance prior to puberty,[[1031]](#footnote-1032) but these may be minimal.[[1032]](#footnote-1033) Socio-cultural factors can also contribute to differences in male and female athletic advantage.[[1033]](#footnote-1034)
  2. The extent of any male performance advantage differs depending on the sport. For example, an analysis of men’s and women’s performances in 82 Olympic events found gender gaps in world records ranging from 5.5 per cent (800 m freestyle swimming) to 36.8 per cent (weightlifting).[[1034]](#footnote-1035) Differences may be minimal for sports that rely on motor skills more than strength, power or aerobic capacity such as archery and shooting.[[1035]](#footnote-1036) A study of elite show jumping (an event that is not separated by sex) found that, overall, there were no statistically significant differences between the final ranking or points of male and female riders.[[1036]](#footnote-1037)

### Research on transgender women and sporting performance

* 1. Research on the athletic performance of transgender women has tended to focus on those who have undergone gender-affirming hormone therapy. Evidence suggests that undergoing such hormone therapy affects body composition and physical performance. For example, studies have shown that transgender women who have undergone gender-affirming hormone therapy for a certain period have decreased strength, lean body mass, muscle area, muscular strength and haemoglobin.[[1037]](#footnote-1038) A key question is the extent to which this reduces physical advantages that transgender women athletes may otherwise have over cisgender women athletes and over what time period.
  2. A number of studies have measured how transgender women who have undergone gender-affirming hormone therapy perform on various physical tests and compared the results with those of cisgender women. Many of these are cross-sectional studies, which assess performance at one point in time. Researchers point to the limitations of this type of study in assessing the impact of hormone therapy compared to longitudinal studies that assess the same participants over an extended period.[[1038]](#footnote-1039)
  3. A key point of difference between studies is how long participants had been undergoing gender-affirming hormone therapy. Some studies look at the impact of a relatively short period of hormone therapy. For example, one study considered how a transgender female competitive cyclist performed on certain physical tests after one year of gender-affirming hormone therapy.[[1039]](#footnote-1040) It found her handgrip strength, countermovement jump and maximal oxygen uptake had all declined and that, when compared to cisgender women, she performed better on some measures but worse on others.[[1040]](#footnote-1041) Another study found that transgender women only experienced “modest” changes in lower limb muscle mass and strength after one year of gender-affirming hormone therapy.[[1041]](#footnote-1042)
  4. A study of transgender women who began gender-affirming hormone therapy while in the United States Air Force compared their performance with cisgender women on several fitness tests. Transgender women performed better at sit-ups and push-ups after one year of hormone therapy, but this advantage had largely disappeared at two. Although their run times declined after commencing gender-affirming hormone therapy, they still performed better than cisgender women after two years of hormone therapy.[[1042]](#footnote-1043)
  5. Other studies have measured the performances of transgender women who have been undergoing gender-affirming hormone therapy for a longer period. For example:
     + 1. One study looked at the performances of 30 transgender women who had undergone hormone therapy for eight to 10 years on a range of fitness tests. It found that they demonstrated significantly lower levels of fitness than cisgender male participants and similar levels of fitness to cisgender female participants.[[1043]](#footnote-1044)
       2. One study compared the performances of cisgender women athletes on a range of laboratory measures to transgender women who had undergone hormone therapy for an average of six years.[[1044]](#footnote-1045) The transgender women had decreased lung functions and performed worse on the countermovement jump. Although they had comparable absolute maximal oxygen consumption levels, when adjusted for body weight, they had lower cardiovascular fitness than the cisgender women.[[1045]](#footnote-1046)
       3. Another study assessed cardiopulmonary capacity and muscle strength in transgender women undergoing long-term hormone therapy for an average of 14.4 years.[[1046]](#footnote-1047) The transgender women had higher absolute grip strength and maximal oxygen consumption levels than the cisgender women in the study. However, these differences disappeared once lean body mass was adjusted for.[[1047]](#footnote-1048)
  6. The literature suggests that there may also be sociocultural factors that affect performance. One systematic literature review found that transgender individuals had lower rates of physical activity than cisgender individuals across all age groups, with transgender women having lower rates than transgender men.[[1048]](#footnote-1049)

### Research on transgender athletes and safety

* 1. We have not identified any studies that assess whether cisgender women have an increased risk of injury when they play sports with transgender women.[[1049]](#footnote-1050) Nor are we aware of studies that assess whether transgender men have an increased risk of injury when they play sports with cisgender men. We imagine there may be difficulties in carrying out research of this kind. One literature review explains that, because men and women have not historically competed against each other in contact and collision sports “… there is not yet experience of the injury risk to which females may be exposed in such competition, nor with the inclusion of transgender people beyond anecdotal reports”. [[1050]](#footnote-1051)
  2. Some concerns about safety are based on differences in height, weight and body composition. For example, the same literature review went on to state that risk of injury may be able to be deduced from:[[1051]](#footnote-1052)

1. … the combination of mass and speed of competitors and hence the force that can be generated, in which the larger and faster opponent will pose a risk to those that are smaller and slower when tackled.
   1. Another review discussed findings that transgender men likely possess lower muscle mass and higher body fat than cisgender men (on average). It commented: “This has potential safety implications, such as increased risk of concussion or injury, for trans men in high-contact sports.”[[1052]](#footnote-1053)
   2. World Rugby carried out modelling to assess the safety implications of transgender women playing women’s rugby. It found that elite men’s rugby involves head and neck forces that are 20 to 30 per cent higher than in women’s elite rugby, and scrum forces that are 40 to 120 per cent higher.[[1053]](#footnote-1054)

### Research on innate variations of sex characteristics and sporting performance

* 1. As we explained in Chapter 2, there are many different innate variations of sex characteristics. Some are highly unlikely to affect athletic performance and some are associated with characteristics that could inhibit athletic performance (such as heart defects).[[1054]](#footnote-1055)
  2. Some innate variations are more likely to have an association with improved athletic performance, but the research is still evolving and there is little current consensus. Experts have pointed to the need for further high-quality research.[[1055]](#footnote-1056) Some experts have also criticised the methodologies used in some existing studies and raised concerns about conflicts of interest.[[1056]](#footnote-1057)
  3. Most of the research focuses on hyperandrogenic female runners. Hyperandrogenism is where the body produces high levels of androgens (including testosterone).[[1057]](#footnote-1058)
  4. According to one source, in over 80 per cent of cases, hyperandrogenism is caused by polycystic ovary syndrome (PCOS).[[1058]](#footnote-1059) While PCOS can be considered an innate variation of sex characteristics, doctors do not generally classify it as an intersex variation or difference of sex development.[[1059]](#footnote-1060) PCOS involves “mild hyperandrogenism”, which can result in testosterone levels that are slightly above the usual range for cisgender women but below the usual levels for cisgender men.[[1060]](#footnote-1061) We are not aware of any sports organisations that impose limitations on women with PCOS competing in women’s sports categories.
  5. Several other innate variations of sex characteristics can involve hyperandrogenism.[[1061]](#footnote-1062) Again, the impact on testosterone levels depends on the particular variation. One source explains that some variations:[[1062]](#footnote-1063)

1. Can cause athletes who were raised and identify as women to have circulating testosterone levels comparable to those of men and greatly exceeding those of non-DSD [without a difference of sex development] (and nondoped) women, including those with PCOS.
   1. We summarise below the findings of some studies on the impact of hyperandrogenism on athletic performance. A number of these studies relate to female athletes with “hyperandrogenic 46XY differences of sex development”. These athletes have XY chromosomes and hyperandrogenism.[[1063]](#footnote-1064)
   2. Some studies on this issue have found that:
      * 1. high free testosterone levels in female athletes were associated with higher athletic performance in certain athletics events;[[1064]](#footnote-1065)
        2. hyperandrogenic female athletes had more lean body mass and higher maximum oxygen consumption levels (VO2 max) than non-hyperandrogenic women athletes;[[1065]](#footnote-1066)
        3. three female distance runners with hyperandrogenic 46XY differences of sex development had an average performance reduction of 5.7 per cent when their testosterone levels were reduced “from the normal male range to the normal female range” over a two-year period;[[1066]](#footnote-1067) and
        4. of the 849 female athletes competing in the 2011 athletics World Championships, six had hyperandrogenic 46XY differences of sex development — a much greater prevalence than in the general population (140 times).[[1067]](#footnote-1068)

## Analysis and conclusions

* 1. For reasons discussed below, we recommend amendments to the Human Rights Act to reflect option 6 (a new exception that only applies where needed to meet certain policy rationales stated in the legislation).
  2. We begin this section by drawing out the key implications for this review of the evidence just discussed. We then evaluate each option in turn.[[1068]](#footnote-1069) We also discuss briefly some other suggestions submitters made. We end this section by analysing in more detail the elements of a potential option 6 exception.

### Key implications of the evidence for this review

* 1. We consider it is possible to draw the following high-level conclusions from the evidence summarised above. First, the evidence is both evolving and incomplete. There are significant limitations in the evidence that is available regarding the participation of transgender women or women with innate variations of sex characteristics in women’s sports.
  2. Nevertheless, it is clear based on current evidence that, at a population level, cisgender men have an advantage over cisgender women in many sports. It seems highly likely that, at a population level, some of this advantage is experienced by transgender women who have not undergone gender-affirming hormone therapy.[[1069]](#footnote-1070)
  3. The extent to which that advantage persists among transgender women who have undergone hormone therapy is a more complex question. The studies we have seen reach differing conclusions depending on factors such as the physical measure that is being assessed and the duration of the 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.
  4. To the limited extent evidence exists about performance advantage in female athletes with innate variations of sex characteristics, it suggests that athletes with certain variations may have a performance advantage in some athletic events. However, as noted earlier, we understand there are significant questions over the quality of the evidence available.
  5. Finally, there is also extremely limited evidence about safety issues that may arise if transgender athletes participate in line with their gender identity. The limited information we have seen suggests safety issues could potentially arise in some contact sports.
  6. Against this background, we think 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. It would be inconsistent with the fair competition and safety rationales underlying section 49(1), the history of the section and its role in promoting female participation in sports. It would undermine the current sex exception, which is designed to respond to biological advantage.
  7. 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. It does not account for the potential for hormone treatment to mitigate advantage nor for the fact that only some innate variations of sex characteristics may confer a performance advantage. It does not account for differences between sports as to safety risks and as to what kind of performance advantage is relevant. Nor does it leave room for sports to adapt their policies to reflect new evidence of safety risk and performance advantage if it emerges.
  8. A reform that would enable total exclusion would also conflict with the further policy rationale of participation that underlies section 49(1). Such a rule would have a significant impact on the ability of people who are transgender or non-binary or who have an innate variation of sex characteristics to participate in sports, both at the elite and at the community level. That would lead to a major impact on the core values of equality, dignity and autonomy underlying the Human Rights Act without any compelling justification.
  9. For these reasons, we consider that neither a reform that requires complete inclusion nor a reform that would allow complete exclusion is justified. Rather, the best reform option will be one that enables sports organisations to develop rules and policies that facilitate the participation of people who are transgender or non-binary or who have an innate variation of sex characteristics in sports while also reflecting the current state of the evidence as to any fair competition and safety concerns.

### Analysis of each option

* 1. Our conclusions on each option flow, in large part, from this overarching analysis.

#### Option 2: people always entitled to participate in line with gender identity

* 1. Option 2 is the most inclusive option and would support and encourage participation in sport for people who are transgender or who have an innate variation of sex characteristics.[[1070]](#footnote-1071) We do not, however, favour this option as it would provide a universal rule for all sports and at all levels. It would limit significantly the options available to individual sports to respond to fair competition and safety issues. It would also prevent sports from taking into account the rules of international sporting bodies.
  2. Many submitters who favoured inclusion supported option 2, including one organisation.[[1071]](#footnote-1072) However, many of these submitters gave as a reason that transgender women who have undergone hormone therapy do not have any advantage when competing against cisgender women. We think the evidence on that issue is still emerging. Further, option 2 goes beyond this. It would allow all transgender athletes to compete in line with their gender identity regardless of whether they have undergone hormone therapy.

#### Option 3: adding new grounds to the current exception

* 1. As noted earlier, option 3 would permit the exclusion of athletes who are transgender or non-binary or who have an innate variation of sex characteristics where the strength, stamina or physique of competitors is relevant. It is possible this test would be interpreted to require a sport-specific assessment of available evidence to ensure that athletes are only excluded where necessary to meet the rationales of fair competition and safety. However, given the absence of case law, this is speculative at best. The test of relevance is, on its face, quite low, and the exception has been relied on historically to justify separate men’s and women’s categories without (as far as we are aware) any routine consideration of whether safety or fair competition concerns arise.
  2. Sport New Zealand did not favour using the existing test, commenting:

1. We would agree that the current wording of section 49(1) of the Act may cause confusion and is perhaps weighted towards exclusion rather than inclusion. Most sports codes could reasonably argue that ‘strength, stamina or physique of competitors is relevant’, for instance, as an explanation for excluding certain groups.
   1. The test of relevance is also insufficient to require sporting bodies to consider some other matters we consider important:
      * 1. whether any concerns about strength, stamina or physique can be addressed through mechanisms other than total exclusion;
        2. whether, at certain levels of competition, the public interest in wide community participation in sport might colour what amounts to fair competition; and
        3. the need to comply with international rules.
   2. Option 3 was supported by few individual submitters. Only one organisation supported it and, even then, only in relation to community sport.[[1072]](#footnote-1073)
   3. Although we think option 3 has advantages over some other options, it is not our preferred option.

#### Option 4: unqualified exception allowing blanket exclusion

* 1. Option 4 would enable sports to exclude or restrict people who are transgender or non-binary from competing in sports categories that do not align with their sex assigned at birth without needing any reason. It would also allow sports to exclude or restrict athletes with innate variations of sex characteristics from competing in single-sex sports categories regardless of the variation. Option 4 was supported by several individual submitters but no organisations.[[1073]](#footnote-1074)
  2. We think option 4 goes much further than is needed to respond to legitimate concerns about fair competition and safety. It might result in policies or practices that are unnecessarily exclusionary or that are not based on any consideration of competing interests. Although some sports might still develop evidence-based policies that prioritise inclusion, Te Taraipiunara Mana Tangata | Human Rights Review Tribunal would have no ability to scrutinise this.
  3. Some submitters suggested that, as a mitigating measure, there could be a special category for athletes who are transgender or non-binary or an open category alongside men’s and women’s categories. We doubt this approach is realistic as there will often be insufficient demand for these categories to enable meaningful competition. In 2023, the open category at the Swimming World Cup was cancelled after no entries were received.[[1074]](#footnote-1075) Even if an open category was uniformly made available, we do not think that would justify a blanket rule allowing sports to limit single-sex categories based on sex assigned at birth without any reason to do so.

#### Option 5: limit current exception to women’s sports only

* 1. Under option 5, sports organisations could run separate sporting events for women and could exclude people from those events based on their sex assigned at birth. Depending on how it is drafted, option 5 would have the same impact on who can compete in those events as either option 3 or option 4.[[1075]](#footnote-1076) It has the same problems as those two options.
  2. The difference is that, under option 5, transgender and non-binary athletes (as well as anyone else who wished to do so) could compete in an open category alongside cisgender men. There might be some benefits in providing a non-gendered option for athletes who identify outside the binary and for transgender women. However, these benefits do not outweigh the problems we identified with options 3 and 4.
  3. We also consider that recommending the sex exception be narrowed in this way may be beyond the scope of our review.
  4. Only a small number of submitters supported this option, including Save Women’s Sport Australasia (which preferred either option 5 or option 1) and Tri New Zealand.

#### Option 6: new exception to permit restrictions where required to meet underlying policy rationales

* 1. Under option 6, sports organisations would be allowed to place exclusions or restrictions on participation in a competitive sport activity based on gender identity or having an innate variation of sex characteristics if this is reasonably required to advance certain underlying policy objectives, which would be stated in the legislation. We explore these policy objectives below. In sum, they would reflect the policy rationales that we have identified as underlying section 49(1) as well as the desirability of enabling national sports organisations to comply with international rules.
  2. This is the option we prefer. As noted earlier, evidence on these issues is emerging and unsettled and needs sport-specific application. In these circumstances, we think it is more appropriate for the Human Rights Act to set out the underlying principles that should apply but to 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.[[1076]](#footnote-1077) As InsideOUT Kōaro said in its submission, option 6 will “best account for the details and policies of each sport, as well as the nuances of people’s bodies and transitions”.
  3. Because the policy objectives that we propose should be included in option 6 reflect the rationales of fair competition, safety and participation that underlie section 49(1), option 6 advances the key reform consideration of coherence of the Human Rights Act.
  4. Option 6 may result in the continued exclusion of some people who are transgender or non-binary (and possibly some people with innate variations of sex characteristics) from some competitive sporting activities, especially at the more elite level. We acknowledge that this has detriments for the individuals and communities involved, including to personal autonomy and to feelings of dignity and self-worth.
  5. However, in our view, this option is the one that achieves the fairest balance between the equality and participation interests of different groups in the community and so best upholds the idea of fair play and the principle of proportionality that we discussed in Chapter 3. We consider that the test of “reasonably required” more directly embodies ideas of proportionality and justification than a test of mere relevance. Case law also suggests that, where limits on freedom from discrimination are carefully tailored and tied to important underlying rationales (as here), the impact on personal dignity is lessened.[[1077]](#footnote-1078)
  6. Option 6 would require sports organisations to make evidence-based decisions. These decisions could be challenged before the Human Rights Review Tribunal, which would be able to scrutinise the decision and determine whether there was sufficient evidence to support it. As the Rainbow Support Collective said in its submission:

1. This [option] would ensure exceptions are applied fairly and based on evidence, and puts the burden of proof on those who are applying the exception. This option still allows for alignment with international sporting codes, and for code-specific decision making, while ensuring the public interest in broad community participation in sporting activities is maintained.
   1. Given the divergent views expressed on this issue, it is not possible to find an option that will be preferred by everyone. However, we think option 6 best balances submitters’ competing concerns. Option 6 was supported by seven rainbow organisations and some other submitters who favoured inclusion.[[1078]](#footnote-1079) Sport New Zealand supported a “modified version” of option 6 that referred to the rationales of safety and international rules (but not to fair competition). Although some submitters identified disadvantages of option 6, few submitters singled it out in their submissions to express direct opposition. Several submitters indicated that, while they thought another option would be more inclusive, option 6 would be the most practicable or a compromise.
   2. The main disadvantage of option 6 is that it is likely to result in more uncertainty than a blanket rule. This is because it requires sports organisations to conduct their own sports-specific assessment based on a range of relevant factors. One sports organisation told us that option 6 would place too great an evidentiary burden on national sporting organisations. [[1079]](#footnote-1080)
   3. We agree that option 6 will place some burdens on national sporting organisations. However, many sports organisations are already grappling with how to balance the competing rights and interests at stake when people who are transgender wish to participate in competitive sporting activities. Further, they are doing so in a context of legal uncertainty. The exception we recommend would provide guidance for sports organisations about how to balance the rights and interests at stake. We offer further advice about the proposed elements of the test below. Ideally, as we discuss later in the chapter, a relevant government agency will be able to provide more specific support.
   4. We consider a degree of uncertainty is unavoidable on this issue given the evidence is emergent and evolving, there are competing rights and interests at stake and the strength of these interests differs substantially depending on the particular sport. For reasons we discuss below, we also think that different considerations may apply to community sports as compared to elite sports and that a blanket rule fails to account for this difference.
   5. In sum, we think option 6 best reflects the current state of the evidence regarding sports performance of people who are transgender or non-binary or who have an innate variation of sex characteristics. It also best achieves a proportionate balance between the policy rationales underlying section 49(1) of the Human Rights Act.

#### Other options submitters identified

* 1. We received some other suggestions for reform that would go beyond the narrow scope of our review. These include suggestions that:
     + 1. men’s and women’s sport categories should be removed altogether;[[1080]](#footnote-1081)
       2. section 49(1) should clarify that it only applies when strength and body mass is an advantage;
       3. section 49(1) should apply more broadly (for example, to people under the age of 12); and
       4. “competitive sporting activity” in section 49(1) should be defined.
  2. As we discussed in Chapter 8, we do not consider it is open to us in this review to recommend the repeal of existing sex exceptions.[[1081]](#footnote-1082) We consider it would also be inappropriate for us to recommend reforms of section 49(1) that narrow or broaden the scope of the exception in its application more generally. These are matters that could be considered in a broader review of the Human Rights Act.

### Elements of the test

* 1. We recommend that, where a person seeks to participate in a single-sex competitive sporting activity that aligns with their gender identity, a sporting body can only treat them differently by reason of either of the two new grounds if the activity is otherwise lawful under section 49(1) and if the different treatment is reasonably required to do one of three things:
     + 1. secure fair competition between participants having regard to the level of the competition and the public interest in broad community participation in sporting activities;
       2. ensure the physical safety of all participants; or
       3. comply with an international rule that imposes a requirement in relation to the particular competitive sporting activity.
  2. We discuss these elements in more detail below.

#### Applies to single-sex competitive sporting activities meeting the section 49(1) criteria

* 1. We propose the exception should only apply to competitive sporting activities that are lawfully limited to one sex under section 49(1). That means that the new exception: would only apply if the competitive sporting activity is one in which the strength, stamina or physique of competitors is relevant; would not apply to activities for children under 12 years; and would not apply to coaching, umpiring, refereeing or administration.

#### Applies when a person is seeking to compete in line with their gender identity

* 1. The new exception should apply where a person seeks to participate in a competitive sporting activity that aligns with their gender identity. It should not apply to a cisgender person who wants to participate in a sports category for a different sex.

#### Applies to both new grounds

* 1. The exception should apply to both the grounds of gender identity and having an innate variation of sex characteristics.
  2. Te Aho Kawe Kaupapa Ture a ngā Wāhine | New Zealand Women’s Law Journal supported option 6 but thought the exception should expressly state that it does not enable a person to be excluded from a competitive sporting event on the basis they have an innate variation of sex characteristics. It was concerned that female athletes with innate variations could be discriminated against in sport on the basis of birth or natural, physical, genetic or biological traits.
  3. We think the circumstances in which a sporting organisation would be able to rely on the exception to exclude a person with an innate variation of sex characteristics are extremely limited. As we discussed above, there is very limited evidence available on the impact of innate variations on sporting performance. The evidence we have seen relates solely to hyperandrogenism. This evidence is focused on female runners and may not be applicable to other sports. We are not aware of any studies that specifically consider whether the participation of athletes with innate variations of sex characteristics in single-sex sports can give rise to safety concerns. We are only aware of two international sporting bodies that have specific restrictions for athletes with innate variations.
  4. Based on current evidence, we therefore think it would only be in limited circumstances that a sporting organisation could demonstrate that a restriction on an athlete with an innate variation of sex characteristics was reasonably required.

#### Applies when different treatment is reasonably required

* 1. The exception should permit different treatment (if the requirements of the test are met). Different treatment could involve being excluded from participating in a single-sex competitive sporting activity or being required to meet a particular condition to participate such as obtaining medical clearance or providing proof of undergoing gender-affirming hormone therapy.
  2. We propose the exception should only apply to the extent the different treatment is reasonably required to meet one of the specified policy objectives. For example, if, in the particular context, the objective of fair competition could be addressed through a transgender athlete providing evidence of having undergone gender-affirming hormone therapy for a certain duration, full exclusion would not be reasonably required.
  3. In its submission, Te Ngākau Kahukura suggested that, to rely on the exception, sports organisations should have to demonstrate they had considered other ways of structuring competition such as age or weight categories. We do not think this should be elevated to a freestanding criterion. We do, however, agree that the availability of other methods to address fairness and safety concerns may be relevant to whether different treatment is reasonably required.[[1082]](#footnote-1083)

#### Three circumstances in which different treatment permitted

* 1. We think the test should specify three circumstances in which exclusion or restriction could be reasonably required.

##### Fair competition having regard to level of competition and desirability of participation

* 1. First, different treatment should be lawful if it is reasonably required to secure fair competition between participants having regard to the level of the competition and the public interest in broad community participation. This limb incorporates two policy rationales that we identified as underlying section 49(1): fair competition and participation.
  2. What is fair competition is an ethical and practical question on which people can have different views. It is also likely to differ depending on the nature and level of the competition. Under our proposed exception, sports organisations would decide what is needed to secure fair competition, although their decisions could be challenged in the Human Rights Review Tribunal.
  3. If there is evidence to suggest that athletes who are transgender or who have an innate variation of sex characteristics are likely to have a performance advantage over other athletes in that sport, organisations would need to make a contextual assessment of whether the extent of any advantage might be unfair. As some submitters pointed out, everyone has biological differences, and sport is not an even playing field. Sports organisations would need to consider the point at which disparities in measures such as strength or cardiovascular fitness make competition unfair. This is sometimes referred to as disproportionate or unfair advantage.[[1083]](#footnote-1084) For example, International Olympic Committee guidance states that, when sports choose to issue eligibility criteria for men’s and women’s competition categories, they should do so with a view to:[[1084]](#footnote-1085)

1. Providing confidence that no athlete within a category has an unfair and disproportionate competitive advantage (namely an advantage gained by altering one’s body or one that disproportionately exceeds other advantages that exist at elite-level competition).
   1. We also consider that context is highly relevant when determining what is required to ensure fair competition. What is required to secure fair competition in an Olympic qualifying event is not the same as at a fun run. For this reason, we propose that, when determining whether a restriction or exclusion is required to secure fair competition, organisations must have regard to the level of the competition and the public interest in broad community participation in sport.
   2. The public interest in community participation in sport is an important part of the relevant context — especially at lower levels of competition. At lower levels of competition, there is generally more focus on participation, making social connections and community building. There are also usually greater differences in participant skill level.
   3. At higher levels such as elite sport, participants tend to be more closely matched in terms of skill. There may be significant benefits from achieving places in competitions such as qualifying for international competitions, winning prize money or being awarded scholarships. Further, competitors in elite sports are subject to a range of other requirements to secure a level playing field (such as restrictions on clothing and equipment, the presence of more highly qualified officials and anti-doping testing).
   4. Of those who submitted in favour of an inclusive approach to sports, many were particularly concerned about the possibility of people who are transgender or non-binary or who have an innate variation of sex characteristics being excluded from community sport. The Professional Association for Transgender Health Aotearoa thought the exception needed sufficient flexibility to enable transgender inclusion in competitive community sport. Rainbow Wellington referred to a transgender woman who had not been allowed to participate in a women’s darts tournament at a local club. It said everyone should be able to participate in community sport and the “very rare issue of trans women in elite sport” should be left to the International Olympic Committee and international sporting bodies.
   5. Some submitters said the exception should be restricted to high levels of a sport. For example, Countering Hate Speech Aotearoa thought the exception should apply only at the elite level and not to community or school sports. We have identified two main difficulties with tailoring an exception around this distinction. First, concerns about safety (which we discuss below) can arise at any level of a sport. Second, there is no clear way to distinguish between community level and elite sport, and it is therefore up to individual sports to define the boundary. Having an exception that only applies to elite sport could therefore lead to inconsistencies between sports. It could also lead to organisations categorising sports activities as elite in order to rely on the exception.
   6. For these reasons, we think it is better to require sports organisations to consider the level of the competition and the public interest in community participation when determining what is required for fair competition.
   7. We acknowledge that some submitters who were opposed to inclusion did not limit their concerns to elite sports. For example, Save Women’s Sport Australasia commented: “Community sports are a pipeline to elite sports and issues of fairness and safety are relevant at all sporting levels.” While we agree that issues of fairness and safety can arise in community sport, the approach we suggest enables these issues to be taken into consideration as appropriate.

##### Safety

* 1. The second circumstance in which we suggest different treatment on the basis of gender identity or having an innate variation of sex characteristics should be lawful is if it is reasonably required to ensure the physical safety of all participants. Safety is one of the key policy rationales underlying section 49(1). As Sport New Zealand commented in its submission: “Safety in sports is critical, and sports codes are typically best placed to manage the inclusion of participants appropriately and safely.”
  2. While supporting the safety limb of the test, Sport New Zealand suggested it should only apply if the exclusion or restriction is reasonable and proportionate. We think a “reasonably required” test is more accessible for sports organisations and is of similar effect.
  3. Although safety is an important objective, participation in sporting activities always involves some degree of risk, including risks that result from variation in participants’ height, weight, strength and skill. As with the fair competition limb, sports organisations will need to decide when different treatment is reasonably required based on any evidence that is available about the nature and extent of any safety risks and the availability of alternative options for managing them (such as height, weight or skill categories).
  4. We considered whether this limb of the test should refer to the “safety of all participants” or the “safety of other participants”. The first option would allow sports organisations to place restrictions on transgender men and non-binary athletes who want to participate in men’s sport if their own safety might be at risk. The second option would not. However, sports could still adopt non-discriminatory means of addressing safety concerns such as having weight classes or requiring all athletes to obtain medical clearance.
  5. The sports exception in the United Kingdom’s anti-discrimination law refers to “the safety of competitors”.[[1085]](#footnote-1086) However, the International Olympic Committee framework refers to an “unpreventable risk to the physical safety of other athletes”.[[1086]](#footnote-1087)
  6. We think the first option is preferable. Sports organisations need to have tools available to them to protect the safety of all participants. We are not sure how often different treatment of transgender men who wish to compete in men’s sport would be reasonably required to protect their safety. However, it is hard for us to conclude this will never be needed as we are aware of some contact sports in New Zealand that already have such restrictions, including Boxing New Zealand and AFL New Zealand.[[1087]](#footnote-1088) We are also aware of international sporting bodies that impose relevant restrictions such as requiring transgender men to provide written confirmation of physical ability to compete from a medical practitioner or qualified coach or to complete an assumption of risk form.[[1088]](#footnote-1089)

##### International rules

* 1. The third circumstance in which we propose different treatment on the basis of gender identity or having an innate variation of sex characteristics should be lawful is if it is reasonably required to comply with an international rule that imposes a requirement in relation to the particular competitive sporting activity.
  2. Although we have not identified compliance with international rules as a rationale underlying section 49(1), we think the new exception would need to be wide enough to serve this purpose. Without it, sports organisations may be put in an impossible position. An analogy can be drawn with the employment exception we discussed in Chapter 9 that seeks to avoid employers being unable to comply with both the Human Rights Act and an overseas law that applies in the particular context.[[1089]](#footnote-1090)
  3. Many submitters accepted that it would be appropriate to have an exception that applies at the international level. For example, in its submission, Sport New Zealand commented that, without such an exception:

1. [L]egislation in NZ may contradict the rules set by International Federations, which a sport must follow at a certain level. This may then cause a legal and procedural grey area and/or contradict messages and criteria provided to athletes when performing at the top of their discipline.
   1. While Meredith Connell’s Rainbow Alliance did not identify a preferred option, it accepted an exception would be appropriate when selecting participants for international competitions if required by international rules.
   2. An exception to facilitate compliance with international sporting rules supports the participation rationale we identified as underlying section 49(1). If a qualifying event for an international competition does not comply with applicable rules, participants in that event might be disqualified from competing at the international level.
   3. In the Issues Paper, we suggested that this limb of the exception might apply when reasonably required to “comply with international rules that apply to that sport”. Some submitters were concerned that this might allow sports to rely on international rules applicable to the sport even when the particular event was not governed by those rules.[[1090]](#footnote-1091) The rules of international sporting bodies typically only apply directly to international competitions and to domestic qualifying events for those competitions.
   4. We agree that this limb should only apply if the international rules apply directly to the particular sporting event. This limb would provide an automatic basis for restricting or excluding participation that does not need to be weighed against other considerations. Therefore, it should be limited to situations where the international rules are directly applicable. Broader issues of progression to international competition can be taken into account under the fair competition limb of the exception. For example, it may be unrealistic to expect sports organisations to manage fair competition issues through height, weight or age categories if, in all the circumstances, that would inhibit progression to international competition.

## Recommendations and wording

1. The Human Rights Act 1993 should be amended to specify that sports organisations cannot rely on section 49(1) of the Human Rights Act 1993 to treat a person differently by reason of 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 except to the extent that is reasonably required to:
   1. secure fair competition between participants having regard to the level of the competition and the public interest in broad community participation in sporting activities; or
   2. ensure the physical safety of all participants; or
   3. comply with an international rule that imposes a requirement in relation to the particular competitive sporting activity.
2. This new provision should clarify that, except in these circumstances, section 49(1) does not permit a person to be excluded from a single-sex competitive sporting activity if the person’s gender identity aligns with that sex.
   1. We recommend amendments to the Human Rights Act to specify the circumstances in which a sports organisation can rely on the exception in section 49(1) to treat people differently by reason of 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.
   2. One way to achieve the policy intent outlined in our recommendation above might be to insert a new provision along the following lines:
   3. **(49A) Application of exception to grounds of gender identity and having an innate variation of sex characteristics**
   4. (1) Where a competitive sporting activity is restricted to persons of one sex, section 44 shall only prevent a person whose gender identity aligns with that sex from being treated differently in relation to their participation in that activity by reason of their gender identity or having an innate variation of sex characteristics—
      1. (a) if the single-sex competitive sporting activity is otherwise lawful under section 49(1); and
      2. (b) to the extent the different treatment is reasonably required to:
         1. (i) secure fair competition between participants having regard to the level of the competition and the public interest in broad community participation in sporting activities; or
         2. (ii) ensure the physical safety of all participants; or
         3. (iii) comply with an international rule that imposes a requirement in relation to the particular competitive sporting activity.
   5. (2) Except in the circumstances set out in s 49A(1), section 49(1) does not permit the exclusion of a person from participation in a competitive sporting activity that is restricted to persons of one sex if the person’s gender identity aligns with that sex.
   6. (3) Except in the circumstances set out in s 49A(1), section 49(1) does not permit the exclusion of a person from participation in a competitive sporting activity because of having an innate variation of sex characteristics.
   7. (4) In this section, “being treated differently” includes—
      1. (a) being excluded from participating in a competitive sporting activity; and
      2. (b) having conditions or restrictions placed on a person’s participation.
   8. (5) For the avoidance of doubt, section 49(2) applies to this exception.

## Implementation

* 1. As noted earlier, we recognise that our recommendations may pose some challenges for sports organisations because our proposed exception will require them to consider whether a restriction or exclusion is reasonably required in the circumstances of that sport.
  2. If the sporting body is relying on either the fair competition limb or the safety limb of the test, this will likely require the sporting body to consider relevant evidence. As we have discussed above, this is an area where the evidence is developing. There is also very little sport-specific evidence that can be drawn on.
  3. Of the three limbs we propose, the fair competition limb may be the most challenging for sports to apply because it will require them to assess what amounts to fair competition, bearing in mind both the level of the sport and the public interest in broad community participation. If cases proceed to the Human Rights Review Tribunal, there may eventually be some case law on the requirements of the test, although this may take some time.
  4. It would be helpful for sports organisations to have some guidance and support to assist them to apply the new exception. It may be appropriate for Sport New Zealand to have a role in this, given that its statutory functions include providing advice and support for national, regional and local sports organisations.[[1091]](#footnote-1092)
  5. We would also expect Te Kāhui Tika Tangata | Human Rights Commission would provide information to the public on any changes to the Human Rights Act that result from our review, including in relation to competitive sports. The Human Rights Commission does currently have some information on the requirements of section 49 on its website, and we imagine it would update this information to reflect any changes to the exception.[[1092]](#footnote-1093) The Commission also has a power to prepare and publish guidelines and voluntary codes of practice about compliance with the Human Rights Act.[[1093]](#footnote-1094)
  6. If section 49 of the Act is reformed as a result of our review, Sport New Zealand and the Human Rights Commission may wish to consider whether they can provide any information or support to sports organisations on the requirements of the exception.

CHAPTER 16

# Other forms of discrimination

## Introduction

* 1. In this chapter and Chapter 17, we consider issues relating to the subpart in Part 2 of the Human Rights Act 1993 called “Other forms of discrimination”. This subpart identifies some specific types of conduct as unlawful discrimination.
  2. We focus on two issues in this chapter:
     + 1. whether amendments are desirable to a provision that relates to sexual harassment;
       2. whether a new provision should be added that prohibits harassment that is based on being transgender or non-binary or having an innate variation of sex characteristics.[[1094]](#footnote-1095)
  3. In Chapter 17, we address another issue on which we consulted: whether a new provision should be added to clarify the circumstances in which medical interventions on children and young people with innate variations of sex characteristics are allowed.
  4. We do not recommend reform of the ‘Other forms of discrimination’ subpart.

## Existing provisions in the ‘Other forms of discrimination’ subpart

* 1. The ‘Other forms of discrimination’ subpart consists of 10 provisions that prohibit certain types of conduct that do not fit neatly into the area of life subparts and that follow different rules from the main Part 2 protections.[[1095]](#footnote-1096)
  2. While we have considered the relevance of each of these provisions for our review, the only one we address in this chapter is section 62 (sexual harassment). The reasons why we do not address the other nine provisions are that:
     + 1. two fall outside our terms of reference for reasons we explained in Chapter 1;[[1096]](#footnote-1097)
       2. some apply across all areas of life and all prohibited grounds (and therefore would be difficult to recommend amendments to within the limited scope of this review);[[1097]](#footnote-1098) and
       3. some, though more specific, relate to subject matter unconnected to this review.[[1098]](#footnote-1099)
  3. Submitters did not bring to our attention any issues with these provisions that were within the scope of this review.

### Sexual harassment — section 62

* 1. Section 62 of the Human Rights Act states that it is unlawful for a person “in the course of that person’s involvement” in certain areas of life to:
     + 1. ask a person for sexual contact where there is an (implied or overt) promise of preferential treatment or a threat of detrimental treatment;[[1099]](#footnote-1100) or
       2. subject a person to language, visual material or physical behaviour of a sexual nature that is “unwelcome or offensive” and is either repeated or so significant that it has a detrimental effect on the person in the area of life in which it occurs.[[1100]](#footnote-1101)
  2. The areas of life in which section 62 applies are all those regulated more generally by Part 2 of the Human Rights Act as well as one other: “participation in fora for the exchange of ideas and information”.[[1101]](#footnote-1102)
  3. In the Issues Paper, we asked a very broad question about whether submitters had any feedback about the implications of this review for section 62.[[1102]](#footnote-1103) For reasons that follow, we do not recommend reform of this provision.

#### History, scope and rationale

* 1. Both under section 62 of the Human Rights Act and in its ordinary meaning, sexual harassment involves behaviour of a sexual nature. In other words, it involves language or behaviour that “relates to, or tends towards, or involves sexual intercourse or other forms of intimate physical contact”.[[1103]](#footnote-1104) Unless it is of a sexual nature, harassment that is motivated by someone’s sex does not fall within this definition.
  2. Anyone can bring a claim of sexual harassment regardless of their sex and gender identity or whether they have an innate variation of sex characteristics. Further, unlike many provisions in Part 2, the prohibition on sexual harassment applies to government agencies as well as to the private sector.[[1104]](#footnote-1105)
  3. The Human Rights Commission Act 1977 did not have a specific provision on sexual harassment. Although some cases had found sexual harassment to be a form of sex discrimination, in its submission on the Bill, Te Kāhui Tika Tangata | Human Rights Commission said this point was sometimes contested by respondents in complaints before the Human Rights Commission.[[1105]](#footnote-1106) The inclusion of a specific provision on sexual harassment in the Human Rights Act reflected the approach already being taken in employment statutes.[[1106]](#footnote-1107)

#### Experiences of sexual harassment

* 1. We understand that sexual harassment can be a significant issue for people who are transgender or non-binary and that it may also be for people who have an innate variation of sex characteristics.
  2. In the 2022 Counting Ourselvessurvey of people who are transgender or non-binary, respondents were asked questions about their experiences of sexual harassment over their lifetime. Seventy per cent said they had experienced “unwanted or offensive sexual comments, gestures or sexual harassment through sexual ‘jokes’ directed at [them]”.[[1107]](#footnote-1108) In addition, 62 per cent said they had experienced unwanted or offensive sexual contact and 38 per cent said they had experienced “another type of sexual harassment”.[[1108]](#footnote-1109)
  3. We do not have matching data (asking the same questions) for other groups in Aotearoa New Zealand or for the general population. Some data suggest that sexual harassment is a prevalent issue for women in areas of life such as in work and education. For example, in a 2022 survey, 38 per cent of women (and 23 per cent of men) said they had been sexually harassed in a work environment in the last five years.[[1109]](#footnote-1110)
  4. One study of tertiary students found that students of minority genders experienced higher rates of sexual harassment than women, and that women experienced higher rates of sexual harassment than men.[[1110]](#footnote-1111)
  5. We have no data about the rates of sexual harassment experienced by people in Aotearoa New Zealand who have an innate variation of sex characteristics. There is Australian data suggesting that people who are non-binary and people with innate variations of sex characteristics can experience higher rates of sexual harassment than others in workplaces although the number of respondents in these groups was small, so the results need to be approached with caution.[[1111]](#footnote-1112)
  6. In consultation, some submitters described the types of behaviour that people who are transgender or non-binary or who have an innate variation of sex characteristics experience and that they thought should be unlawful. We heard that people in these groups are commonly asked questions about, or have comments made about, their sex characteristics (including their genitals), their sex, their gender, their fertility and their sex lives (including stereotypical assumptions about transgender people engaging in sex work). Another type of behaviour we heard about was transgender men having their chests touched or hit inappropriately at work or on the sports field.

#### Analysis and conclusions

* 1. We did not receive much feedback from submitters suggesting problems with the wording of section 62. However, some submitters did propose reforms, such as:
     + 1. clarifying that unwelcome or offensive language includes asking questions or making comments about the status or appearance of someone’s sex characteristics, sex, gender or fertility;
       2. extending the section to cover harassment grounded in hostility to someone’s sex characteristics, gender or gender identity alongside behaviour of a “sexual nature”; and
       3. making the list of areas of life in which section 62 applies open-ended so that it covers sexual harassment that arises outside these settings.
  2. Some other submitters told us section 62 does not need to be amended. Speak Up for Women said section 62 already protects everyone from sexual harassment. Several other submitters also took this view. Others said section 62 probably already covers the main types of sexual harassment experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics.[[1112]](#footnote-1113)
  3. Although we acknowledge that sexual harassment is a significant issue for people who are transgender or non-binary and may also be for people who have an innate variation of sex characteristics, we do not recommend amendments to section 62 as part of this review. This is for the following reasons.
  4. First, as noted above, we did not receive much feedback identifying problems with the language of section 62.
  5. Second, many of the examples of unwelcome behaviour that submitters brought to our attention likely already fall within the scope of section 62. For example, unwelcome or offensive sexualised questions and comments about a person’s physical appearance such as comments about their sex characteristics would likely be “language … of a sexual nature”. They would therefore fall within the definition of sexual harassment if they meet the other legislative thresholds stated in section 62. The example of transgender men having their chests touched inappropriately would likely be “physical behaviour of a sexual nature”, which is also covered.
  6. Some submitters suggested reforms of the statutory thresholds in section 62. We are also aware of criticism from lawyers suggesting these thresholds are too onerous.[[1113]](#footnote-1114) However, proposing general reform of the thresholds in section 62 is not something it would be appropriate for us to recommend in this review as it would impact broadly on the protections from sexual harassment available to all people in Aotearoa New Zealand.
  7. Some submitters suggested broadening section 62 to cover any harassment relating to a person’s sex or gender.[[1114]](#footnote-1115) This would be a significant expansion to the scope of section 62 and would be inconsistent with the way “sexual harassment” is understood in ordinary life.[[1115]](#footnote-1116) A protection from harassment that relates to a person’s sex or gender would sit better as a freestanding provision (although, for reasons we discuss below, we do not recommend such a provision as part of this review).
  8. Finally, some submitters wanted amendments to section 62 to cover the specific experiences of people who are transgender or non-binary or who have an innate variation of sex characteristics. This would single out some groups in the context of a provision of general application. Given that other groups are also vulnerable to sexual harassment (for example, women), this would create issues of consistency and coherence.

#### Some other feedback we received

* 1. A submitter suggested that we list sexual orientation and gender identity alongside sexual experience and reputation in section 62(4) of the Human Rights Act. Section 62(4) controls the admissibility of sexual experience and reputation evidence and states that, where a person complains of sexual harassment, no account is to be taken of any evidence of their sexual experience or reputation. Such provisions exist because this kind of evidence can traumatise complainants, perpetuate rape myths and bias the decision maker, without serving any real probative purpose.[[1116]](#footnote-1117)
  2. Section 62(4) reflects the balance between a complainant’s interests and a respondent’s right to justice reached in the context of the general law of evidence.[[1117]](#footnote-1118) We do not consider it would be appropriate to revisit that balance in a review of the Human Rights Act. We also consider the existing reference in section 62(4) to “sexual reputation” is sufficient to address situations where a person’s gender identity is being relied on to introduce damaging stereotypes (such as those relating to transgender people and sex work). “Sexual reputation” is not defined in the Human Rights Act but is defined in the Evidence Act 2006 to include “the way in which the complainant is regarded, by others, in sexual matters (including, without limitation, as having a particular sexual disposition or experience)”.[[1118]](#footnote-1119)
  3. Some submitters raised concerns about sexual harassment of women by people who are transgender. If that occurred, it would be covered by section 62 as currently worded.
  4. Others suggested that adding new prohibited grounds to section 21 of the Human Rights Act would increase sexual harassment. For example, Women’s Declaration International NZ identified multiple scenarios that they said were sexual harassment. These included males in female changing rooms or bathrooms, males sharing the same bedroom as females in women’s refuges and males carrying out intimate searches on females or demanding to be searched by females. By males, we understand the submitter to mean any person not assigned female at birth.
  5. These scenarios only constitute sexual harassment if they involve behaviour falling within the definitions in section 62. We are not aware of any evidence substantiating the concern that adding new prohibited grounds to section 21 will increase the prevalence of sexual harassment.[[1119]](#footnote-1120) However, if sexual harassment occurred in the settings referred to by the submitter, it would be covered by existing law.

## whether to add new provisions to this subpart

* 1. In the Issues Paper, we sought feedback on whether any new provisions should be added to this subpart to address issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics.[[1120]](#footnote-1121) We identified two specific possibilities as well as asking for general feedback:
     + 1. a provision addressing harassment of people who are transgender or non-binary or who have an innate variation of sex characteristics; and
       2. a provision clarifying the circumstances in which medical interventions on children and young people with innate variations of sex characteristics are permissible.
  2. Despite consulting on these two possibilities, we expressed some reservations about whether reform through this review would be achievable.[[1121]](#footnote-1122)
  3. In this chapter, we explore the first of these possibilities, although we do not ultimately recommend reform on this issue. We also briefly discuss some other possibilities for new provisions that were suggested to us by submitters.
  4. As noted earlier, we do not discuss the possibility of a provision concerning medical interventions on children and young people with innate variations of sex characteristics in this chapter. We explore that issue separately in Chapter 17.

### Background considerations

* 1. The provisions in the ‘Other forms of discrimination’ subpart follow different rules from the main discrimination protections in Part 2. They can be a way to address issues that are unique to certain groups or to create protections that, while implicating the core values underlying the Human Rights Act, do not follow the ordinary rules of a discrimination claim.
  2. The internal coherence of the Human Rights Act is best promoted by reform recommendations that reflect the underlying logic of existing provisions as far as possible. Therefore, before considering whether new provisions should be added to the ‘Other forms of discrimination’ subpart, we have examined the legislative history of the existing provisions to identify their logic and purpose.

#### Rationale of existing provisions

* 1. Eight of the current provisions in the ‘Other forms of discrimination’ subpart were included (in some form or another) when the Human Rights Act was enacted in 1993.[[1122]](#footnote-1123) These original provisions served two main purposes:[[1123]](#footnote-1124)
     + 1. to confirm emerging case law about what constitutes discrimination;[[1124]](#footnote-1125) and
       2. to specify incidental protections that ensure the main discrimination protections in Part 2 are not undermined.[[1125]](#footnote-1126)
  2. Since its enactment in 1993, the ‘Other forms of discrimination’ subpart has been amended on multiple occasions. The new provisions added to the ‘Other forms of discrimination’ subpart have not served the same purposes as the original ones. These more recent reforms expand the scope of the subpart in idiosyncratic ways, for example, by:
     + 1. extending protection in defined circumstances to a characteristic not listed in section 21;[[1126]](#footnote-1127)
       2. regulating an entirely different area of life to those identified in Part 2;[[1127]](#footnote-1128)
       3. regulating a type of adverse treatment that, although harmful to equality in a broad sense, does not follow the ordinary rules of a discrimination;[[1128]](#footnote-1129) or
       4. extending remedies for victimisation under the Human Rights Act to victimisation of complainants under different legislation.[[1129]](#footnote-1130)
  3. These more recent reforms do, however, share some features. First, they each relate to policy issues that are closely adjacent to subject matter already regulated by the Human Rights Act or that implicate core values underlying anti-discrimination law.
  4. Second, they each arise out of a wider package of reforms relating to a complex policy issue, with amendment to the Human Rights Act being just one (and often a somewhat secondary) component of the reform. In several of these instances, the main purpose of inserting a provision in the Human Rights Act was to facilitate access to the Act’s complaints mechanisms, with primary liability in respect of the particular issue being established under other legislation.
  5. For example, the Conversion Practices Prohibition Legislation Act 2022 defines a conversion practice and establishes criminal offences. However, a provision in the ‘Other forms of discrimination’ subpart of the Human Rights Act was added to ensure access to the Human Rights Commission’s dispute resolution services and the possibility of a complaint to Te Taraipiunara Mana Tangata | Human Rights Review Tribunal in situations where criminal action may not be appropriate.[[1130]](#footnote-1131)

#### Significance of these rationales for our review

* 1. Based on this analysis, we consider that new additions to the ‘Other forms of discrimination’ subpart could be a way of addressing:
     + 1. issues that could likely be litigated under the main Part 2 discrimination protections but where the case law is still emerging and there is benefit in providing clarity; and
       2. other issues that strongly implicate the core values underlying the Human Rights Act, especially if access to the Act’s complaints mechanisms might be desirable.
  2. However, we also think there are some limits to what reforms it might be appropriate for us to propose for the ‘Other forms of discrimination’ subpart in this review. First, as we have stressed throughout this report, it is not open to us in this review to recommend broad reforms of the Human Rights Act that have significant impacts for groups with whom we have not had the opportunity to consult.
  3. Second, if an issue is of general concern to several groups protected by section 21 of the Human Rights Act, we think we should be cautious about recommending protections that would only be available to people who are transgender or non-binary or who have an innate variation of sex characteristics. That would only be appropriate if we had clear evidence that the impact on these groups of the absence of relevant protection is notably worse than for other groups protected by section 21.
  4. Third, although the ‘Other forms of discrimination’ subpart has been amended since introduction to address a variety of concerns, this has always been part of a broader package of reform (following a dedicated policy process and often widespread consultation). To recommend adding new provisions to this subpart, we would need to be satisfied that the respective issue is of pressing concern and closely implicates the core values underlying the Human Rights Act. We would also need to consider whether there has been a sufficient opportunity for consultation with key stakeholders.
  5. Finally, as noted above, a key reason for amending this subpart on previous occasions has been to take advantage of the Human Rights Act’s complaints mechanisms.[[1131]](#footnote-1132) We consider that, before recommending reform of this subpart, we should be satisfied that the Human Rights Commission and Human Rights Review Tribunal are appropriate fora in which to resolve the relevant issues.

### Harassment based on gender identity or an innate variation of sex characteristics

* 1. Against that background, we turn to consider whether there should be a provision in the Human Rights Act prohibiting harassment that is based on a person’s gender identity or their innate variation of sex characteristics. In the Issues Paper, we asked whether there should be a provision covering this type of harassment. We also asked for submitters’ views on whether there are sufficient existing legal remedies available to address this sort of harassment.
  2. For the reasons given below, we do not recommend reform on this issue.

#### Section 63 — racial harassment

* 1. There is already one provision in the ‘Other forms of discrimination’ subpart that targets harassment that is linked to certain group characteristics protected by section 21 of the Human Rights Act. Specifically, section 63 (described in the section heading as “racial harassment”) targets harassment that expresses hostility to a person on the ground of their colour, race or ethnic or national origins. A provision covering harassment based on the new grounds we propose would logically be modelled on section 63.
  2. Under section 63, it is unlawful for any person to use language, visual material or physical behaviour that:[[1132]](#footnote-1133)
     + 1. “expresses hostility against, or brings into contempt or ridicule, any other person” on one of the prohibited grounds listed in section 63;
       2. is hurtful or offensive to the person; and
       3. is either repeated or so significant that it has a detrimental effect on them in the area of life in which it occurs.
  3. Like sexual harassment, the areas of life to which section 63 applies are those regulated more generally by Part 2 of the Human Rights Act as well as one other: “participation in fora for the exchange of ideas and information”.[[1133]](#footnote-1134)
  4. There was no express protection from racial harassment in the New Zealand anti-discrimination legislation that pre-dated the Human Rights Act. However, overseas case law had held that racial harassment was a form of discrimination.[[1134]](#footnote-1135)
  5. No other provision in the Human Rights Act directly targets harassment that expresses hostility to a person based on a group characteristic listed in section 21. For example, there is no specific provision for harassment that expresses hostility based on a person’s sex, religion, political opinion, disability or sexual orientation. The departmental report in 1993 stated that the need for broader coverage had not been demonstrated.[[1135]](#footnote-1136)

#### Experiences of harassment

* 1. In the 2022 Counting Ourselvessurvey of people who are transgender or non-binary, more than half the respondents (55 per cent) reported having been verbally harassed in public services and places in the last four years for being transgender or non-binary.[[1136]](#footnote-1137) The most prevalent locations complained of were churches or places of worship, public transport, public bathrooms, retail stores, gyms or pools, sports clubs or teams and online.[[1137]](#footnote-1138)
  2. These data need to be treated with care. Personal experiences of harassment may not always meet the statutory definitions. Further, comparable data is not available for the general population. Nevertheless, the data suggest that harassment is experienced as a serious and prevalent issue by people who are transgender or non-binary. In an Australian survey, transgender and gender-diverse respondents reported significantly higher levels of harassment and abuse than their rainbow cisgender counterparts (45 to 52 per cent compared to 29 to 33 per cent).[[1138]](#footnote-1139)
  3. We are not aware of any data about experiences of harassment for people who have an innate variation of sex characteristics.
  4. In consultation, we heard that people who are transgender or non-binary or who have an innate variation of sex characteristics regularly face harassment. Submitters most often talked about online harassment, but we also heard about harassment in workplaces, public streets, on public transport, when using public toilets, in social housing, in schools and at organised rainbow events.

#### Analysis and conclusions

* 1. There are some reasons to look closely at the possibility of adding a new provision to the Human Rights Act to protect people from discrimination based on the two new grounds we propose.
  2. First, many jurisdictions that we have examined have harassment provisions in their anti-discrimination statutes that apply to most or all prohibited grounds of discrimination.[[1139]](#footnote-1140) Often, the characteristics protected from harassment include gender identity.[[1140]](#footnote-1141) In the Northern Territory and Tasmania in Australia, they also include sex characteristics.[[1141]](#footnote-1142)
  3. The Queensland Human Rights Commission has suggested that provisions prohibiting harassment on the basis of some attributes and not others might be incompatible with the right to equality underlying anti-discrimination legislation.[[1142]](#footnote-1143) The United Nations committee that monitors the International Covenant on Economic, Social and Cultural Rights has recommended that workers should be protected from harassment on broad grounds, including sex, disability, race, sexual orientation, gender identity and intersex status.[[1143]](#footnote-1144)
  4. Second, as noted above, data suggest that people who are transgender or non-binary experience harassment in many areas of their daily lives. Many submitters told us they thought the current harassment provisions in the Human Rights Act were inadequate or that reform was needed. These included Community Law Centres o Aotearoa, InsideOut Kōaro, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Outline Aotearoa, Paekākāriki Pride, Te Pūkenga Here Tikanga Mahi | Public Service Association, the Rotorua Chamber of Pride, Te Ngākau Kahukura and Rainbow Wellington.
  5. Third, some of the reasons we identified earlier for why it may be appropriate to add new forms of discrimination to the ‘Other forms of discrimination’ subpart point towards a reform of this kind. This is an issue that implicates core values underlying the Human Rights Act. A provision targeting harassment based on gender identity or having an innate variation of sex characteristics would engage similar rationales to the existing protections for sexual and racial harassment. In addition, the Act’s complaints mechanisms are likely to be suitable for addressing harassment complaints that relate to gender identity or having an innate variation of sex characteristics.
  6. We do not, however, recommend reform on this issue for two main reasons. The first is that we consider that existing provisions in the Human Rights Act and other laws will be able to respond to many situations in which people experience harassment based on their gender identity or an innate variation of sex characteristics. The second is that it would be difficult to achieve reform in a principled way within the limited scope of this review.

##### Other avenues to complain about harassment

* 1. Although a new harassment provision addressing harassment based on a person’s gender identity or innate variation of sex characteristics would make protection from harassment more secure,[[1144]](#footnote-1145) there are nevertheless legal avenues that are currently available when harassment occurs.
  2. First, harassment that occurs in the areas of life protected by Part 2 of the Human Rights Act would likely qualify as discrimination under the legal tests found in those subparts.[[1145]](#footnote-1146) If new grounds are added to section 21 of the Act as a result of our recommendations, that will clarify that a person who is transgender or non-binary or who has an innate variation of sex characteristics can bring a complaint of discrimination under these provisions based on harassment-like behaviour. For example, repeat harassment of a transgender employee in the workplace would likely amount to a “detriment” and therefore be employment discrimination.[[1146]](#footnote-1147) Singling out a transgender tenant for harassment would likely amount to treating the tenant differently from others and therefore be discrimination in the provision of land, housing or accommodation.[[1147]](#footnote-1148)
  3. Although many submitters said the current legal remedies for addressing harassment of people who are transgender or non-binary or who have an innate variation of sex characteristics are insufficient, this was sometimes because of the lack of express protection in section 21 of the Human Rights Act. This concern would be addressed by our other recommendations for reform.
  4. The major advantage of a harassment provision modelled on section 63 over reliance on other Part 2 protections is that it would cover online harassment.[[1148]](#footnote-1149) In feedback, we were told about online harassment more than any other kind. For example, we heard that some people who are transgender or non-binary or who have an innate variation of sex characteristics receive persistent offensive comments online or experience doxxing (where someone shares another person’s personal or identifying information on the internet without their consent).
  5. Online harassment would not generally fall within the area of life discrimination protections in Part 2 of the Human Rights Act. However, there are other legal avenues available to complain about online harassment, including under the Harmful Digital Communications Act 2015. This legislation sets out 10 communication principles to govern online behaviour, which include principles relating to harassment and denigration.[[1149]](#footnote-1150) People experiencing online harassment can contact Netsafe for advice and assistance in resolving the issue. In the case of repeated or serious breaches of the communication principles, proceedings can be filed in Te Kōti-ā-Rohe | District Court.
  6. The New Zealand Law Society pointed out in its submission that there are certain remedies available under the Human Rights Act that are not available under the Harmful Digital Communications Act (such as training orders and damages).[[1150]](#footnote-1151) That is correct. However, a complaint under the Harmful Digital Communications Act has its own advantages, including the ability to access advice and assistance from an agency with specialist expertise (Netsafe). Another advantage is the ability to seek orders against an online content host such as an order to take down material, publish a correction, provide the individual with a right of reply or release the identity of an anonymous author to the court.[[1151]](#footnote-1152) In very serious cases resulting in proven harm, the Harmful Digital Communications Act also enables criminal prosecution.[[1152]](#footnote-1153)
  7. Other laws also prohibit certain forms of harassment. For example:
     + 1. an employee who is being harassed in the workplace might be able to pursue a personal grievance for bullying under the Employment Relations Act 2000;
       2. the Harassment Act 1997 protects members of the public from certain types of harassment involving a pattern of relevant behaviour and provides both criminal penalties and restraining orders;[[1153]](#footnote-1154) and
       3. the Family Violence Act 2018 applies to intimidation and harassment in the context of family relationships and may result in a range of orders such as safety, protection and property orders.[[1154]](#footnote-1155)
  8. Therefore, while there would be benefits to a new provision modelled on section 63 of the Human Rights Act, in many circumstances in which people experience harassment based on their gender identity or having an innate variation of sex characteristics, a legal remedy will be available. This will be made clearer if our recommendations for reform of section 21 are implemented.

##### Consistency and coherence

* 1. The second and principal reason why we do not make a recommendation on this issue is that it would be difficult to achieve reform in a principled way within the limited scope of this review. It is beyond the scope of this review to recommend a broad protection from harassment based on all or most of the prohibited grounds in section 21. The alternative, however, is to promote a piecemeal approach by which the grounds of gender identity and having an innate variation of sex characteristics are covered alongside race, colour and ethnic and national origin, but other grounds (including sex, sexual orientation, religion and disability) are not covered.
  2. As noted earlier, if an issue is one of general concern to several groups protected by section 21 of the Human Rights Act, we think we should be cautious about recommending protections that would only be available to people who are transgender or non-binary or who have an innate variation of sex characteristics. This would only be appropriate if we had clear evidence that the impact on these groups of the absence of relevant protection is notably worse than for other groups protected by section 21.
  3. In consultation, some submitters expressed concern that there was not sufficient justification to single out the new grounds we were considering for protection from harassment.[[1155]](#footnote-1156) We know that people in Aotearoa New Zealand can experience harassment on the basis of other grounds covered by section 21 such as sexual orientation.[[1156]](#footnote-1157) There has not been an opportunity in this review to consult with all the other groups that are affected by harassment. There is also limited research that compares rates of harassment among groups.
  4. Therefore, we do not 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 in relation to harassment. 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 wider review of the Act.

##### Conclusion

* 1. In conclusion, while we acknowledge that harassment is a significant issue for some people who are transgender or non-binary or who have an innate variation of sex characteristics, we do not think the case for a specific provision is sufficiently strong to overcome the significant consistency and coherence issues that would arise from any reform that was made in the context of this review with its limited focus on the rights of only some groups. If section 21 is reformed as we recommend, people who are transgender or non-binary or who have an innate variation of sex characteristics will be able to bring harassment complaints under existing provisions in Part 2 of the Act.

#### Some other feedback we received about harassment

* 1. Some submitters suggested that a harassment provision should go further than section 63, for example, that it should cover specific issues such as misgendering and deadnaming. The issues of consistency and coherence we raised earlier would be even more pronounced if we were to recommend a harassment provision with different criteria to section 63 as part of this review. We discussed the regulation of misgendering and deadnaming in Chapter 6.
  2. The New Zealand Law Society suggested an expansion of section 61 of the Human Rights Act (racial disharmony). This is the “hate speech” provision that, as we explained in Chapter 1, the Minister of Justice has requested us not to review.
  3. Kia Rangona te Kōrero | Free Speech Union said section 63 is “hate speech legislation” and therefore not something we should consider at all. For the reasons discussed earlier, we do not recommend specific reforms relating to harassment. However, we do not agree that harassment provisions are the same as hate speech provisions. Hate speech provisions like section 61 cover hostility directed at a group. Harassment provisions cover hostility directed at a specific individual and, as we explained earlier in the chapter, are widely acknowledged to be a form of discrimination. Harassment will be covered by general discrimination provisions in the Human Rights Act regardless of whether there are specific harassment provisions.

### Other possibilities for new forms of discrimination that emerged from consultation

* 1. In the Issues Paper, we asked a broad question about whether there should be any additional provisions added to the ‘Other forms of discrimination’ subpart to address issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics. We received very little feedback on this question. In the feedback we did receive, we heard some suggestions for new provisions to be included (each of which was raised by only one submitter). The specific suggestions that we heard were that:
     + 1. the Human Rights Act should include additional provisions to address inclusive access to public services (the submitter did not specify what these should address);
       2. outing transgender people without their consent should be prohibited;
       3. where a gender non-conforming person is particularly vulnerable, they should have a right to access support systems (including professional support) that provide them with the care and feedback they require; and
       4. there should be a review or audit of education and information in areas such as health practice and medical schools to ensure guidance follows good practice.
  2. Bearing in mind the general considerations set out earlier in this chapter, we do not see a strong argument for including these in the ‘Other forms of discrimination’ subpart. With respect to (b), we addressed speech regulation more fully in Chapter 6. With respect to (c), we address the issue of education and information to accompany Human Rights Act reform in Chapter 20.

CHAPTER 17

# Medical interventions on children with innate variations

## Introduction

* 1. In this chapter, we consider whether a new provision should be added to the ‘Other forms of discrimination’ subpart in Part 2 of the Human Rights Act 1993 to restrict medical interventions on infants and children with innate variations of sex characteristics. As we discussed in Chapter 16, this subpart has some provisions that prohibit forms of adverse treatment that are harmful to equality but do not follow the ordinary rules of a discrimination claim.
  2. We sought feedback on this question in the Issues Paper because we understood it was a matter of deep concern to many people with innate variations of sex characteristics.[[1157]](#footnote-1158) Although we wanted to hear submitters’ views, we expressed some reservations about whether a reform of this kind would be achievable in the limited scope of this review.
  3. The history of unnecessary medical interventions on infants and children with innate variations of sex characteristics raises significant human rights issues.[[1158]](#footnote-1159) As we explain in this chapter, there is limited information available about the extent to which this practice continues, in part, because of disagreement about what conditions are ‘intersex conditions’ and when interventions are medically necessary.
  4. We do not, however, recommend reform of the Human Rights Act to address this issue as part of this review. Work is currently being funded by government to develop a rights-based approach to intersex health care. While a legislative response to this issue may also be appropriate at some stage (and has been called for by international bodies), it would need to involve a dedicated policy process and more wide-ranging consultation with stakeholders than we have been able to achieve in this review.

## Background

* 1. As we explained in Chapter 2, ‘innate variations of sex characteristics’ is a broad umbrella term that covers as many as 40 different variations.
  2. An innate variation of sex characteristics can be caused by chromosomal variances, by atypical levels of hormones, by reactions to hormones or by other aspects of foetal development.[[1159]](#footnote-1160) These influences can result in physical sex characteristics that do not correspond with medical norms for male and female bodies. What this means will depend on the type of variation and which sex characteristics are affected. In some cases, a person with an innate variation of sex characteristics might have external genitalia that are ambiguous or might have some sex characteristics that are more typical of a person of a different sex.
  3. In Aotearoa New Zealand and elsewhere in the Western world, there has been a history of medical interventions (including surgery) on infants and children with innate variations of sex characteristics — not always in situations that would qualify as medically necessary. In this section, we explain this history, provide some background on current law and practice and explain the nature of people’s concerns about interventions of this kind.

### Past practice

* 1. During the second half of the twentieth century, the dominant approach to infants born with genitalia outside the norms for male and female bodies was surgical correction. This approach was heavily influenced by the work of psychologist John Money, who thought a child could be nurtured into a gender assigned to them by doctors as long as their genitals were altered to conform to that gender.[[1160]](#footnote-1161) Money developed a treatment protocol about the “optimal gender of rearing”, which focused on the gender that the child could be best socialised into, with primary consideration being given to the appearance of their external genitalia.[[1161]](#footnote-1162) Surgery was then undertaken to ‘normalise’ genital appearance to ensure a child could be socialised into their assigned sex.[[1162]](#footnote-1163)
  2. Surgery was often accompanied by secrecy such as concealment of the surgery and the variation from the individual themselves even into adulthood. This was motivated by concern about shame and stigma as well as by Money’s theory that a child who was ignorant of their birth circumstances could be socialised into identifying with a particular gender.[[1163]](#footnote-1164) Secrecy was ultimately counter-productive, with many people feeling betrayed and lied to, experiencing shame and having to endure a “constant focus on their genitals”.[[1164]](#footnote-1165)
  3. As we discuss later in this chapter, surgery could (and still can) lead to negative and long-term consequences. Assigning a child a sex based on their external genitalia and undertaking surgery to align this sometimes also resulted in the child growing up and rejecting their sex assignment.[[1165]](#footnote-1166)

### Current practice

* 1. Money’s protocol has been largely discredited.[[1166]](#footnote-1167) However, the current approach taken by medical professionals to treating infants or children with an innate variation of sex characteristics is difficult to determine. Some community experts and researchers consider that medical interventions (especially surgery) still happen too often and in circumstances that are not medically necessary.[[1167]](#footnote-1168) On the other hand, clinical guidelines on treating newborns with “differences of sex development” state that surgical management is not a key focus of the early management of innate variations and will not happen unless there are compelling reasons.[[1168]](#footnote-1169) The guidelines state that circumstances that may lead to surgical intervention include procedures: that would be life-saving or organ-preserving; to achieve continence; to manage infection; to reduce risk of malignancy; or to preserve fertility potential.
  2. The guidelines also state that the whānau should be involved in collaborative discussions in any decision making on surgical interventions. With respect to the appropriate age of surgery, the guidelines state:[[1169]](#footnote-1170)

Surgical intervention should be performed at an age appropriate with achieving the desired outcome for the individual. Where the procedure can be delayed, with the same outcome achieved, then it should wait until the child/young person is old enough to be involved in the decision. Where the timing of surgery is contingent on good outcome, consent will need to be obtained from a legal guardian as per current New Zealand laws relating to informed consent.

* 1. Although these guidelines indicate a shift in mindset in relation to surgeries on infants and children with innate variations of sex characteristics, research suggests there remains a significant variance of opinion within the medical professional on when surgeries are medically necessary. For example, one international study asked medical professionals with relevant expertise to place different interventions on a line between “non-essential” and “medically essential”.[[1170]](#footnote-1171) The study found a large variation in where respondents placed interventions on the scale and how they assessed necessity. Similarly, research into the views of New Zealand medical professionals found they had different perspectives depending on the surgery and the variation, different views about the benefit in surgery occurring earlier and different views about the necessity of surgery or interventions in general.[[1171]](#footnote-1172)
  2. Some medical professionals consider there are benefits of early intervention, for example, because children will not remember, because they will start on an “unambiguous gender path” and because there are technical advantages with surgery performed at a young age such as more elastic skin and faster healing.[[1172]](#footnote-1173) Research has also indicated that some parents and medical professionals interpret necessity with reference to a child’s future mental wellbeing (or perceptions of a child’s mental wellbeing) such as concerns about children feeling isolated.[[1173]](#footnote-1174) However, other experts question the extent to which concerns about social stigma and feelings of isolation or difference are valid and whether they should be taken into account when considering a child’s best interests, with some saying the solution should be better support and social education.[[1174]](#footnote-1175)
  3. Researchers point to data from Manatū Hauora | Ministry of Health showing that, on average, 563 children under 10 years of age had surgery on their genital or reproductive organs each year between 2015 and 2019.[[1175]](#footnote-1176) These data are broken down into procedures based on the World Health Organization’s international classification system.[[1176]](#footnote-1177) However, the data do not indicate the exact nature of these procedures or the reasons for them. For example, while the data show how many children and young people had a gonadectomy (removal of ovaries or testes), they do not show whether this was due to cancer, infection, injury, an innate variation of sex characteristics or some other reason.[[1177]](#footnote-1178)
  4. It is therefore not possible to know how many surgeries were performed because a child had an innate variation of sex characteristics nor which surgeries could have been deferred until adulthood.[[1178]](#footnote-1179)
  5. In 2020, the government said seven children with an intersex condition had undergone “limited surgery” since 2014 and all these surgeries were “to resolve a specific functional problem and did not involve sex assignment or re-assignment”.[[1179]](#footnote-1180) The information does not, however, indicate which variations the government treated as an “intersex condition”. As discussed in Chapter 2, there is a lack of consensus as to which variations are considered to be intersex. For example, surgery on infants with hypospadias (a condition where the opening of the urethra is not located at the tip of the penis) is common, but there is disagreement as to whether this is as an intersex condition.[[1180]](#footnote-1181)
  6. In an Australian study of people with different congenital variations in sex characteristics, 60 per cent of participants had undergone a medical intervention related to their variation such as hormonal treatment, genital surgery or other types of surgery.[[1181]](#footnote-1182) Fifty-five per cent of the treatments occurred before the participant was 18 years old.[[1182]](#footnote-1183)

### New Zealand law

* 1. Aotearoa New Zealand does not have any specific laws restricting medical interventions on infants and children with an innate variation of sex characteristics. Beyond general rules about parental consent and exercising reasonable care and skill, current law gives little guidance on when such interventions are appropriate (for example, on when a medical intervention could be considered medically necessary).
  2. The starting point is that medical professionals who perform surgery are protected from criminal liability by two statutory exceptions. One applies if the surgery was performed with reasonable care and skill for a person’s benefit and performing the operation was reasonable in all the circumstances.[[1183]](#footnote-1184) The other applies if the surgery was performed with reasonable care and skill, for a lawful purpose and with the consent of the person.[[1184]](#footnote-1185)
  3. The Crimes Act 1961 has a specific offence relating to female genital mutilation, which specifies that the fact the person consented is not a defence.[[1185]](#footnote-1186) The offence does not, however, apply to medical or surgical procedures (including a “sexual reassignment” procedure) that are performed by a medical practitioner or nurse and are for the benefit of the person’s physical or mental health.[[1186]](#footnote-1187)
  4. Beyond these criminal law provisions, general laws and regulations governing medical practice are also relevant. Some such rules govern standards of medical treatment. For example, the Code of Health and Disability Services Consumers’ Rights entitles healthcare consumers to have services provided in a manner that minimises potential harm and optimises their quality of life.[[1187]](#footnote-1188)
  5. Others relate to patient consent. Patients have the right to make an informed choice about the health care they receive and to sufficient information about their options to provide informed consent to treatment.[[1188]](#footnote-1189)
  6. A child or young person under 16 can be assessed by a medical professional as competent to give consent, depending on the circumstances.[[1189]](#footnote-1190) Parents and guardians can generally consent to medical care on behalf of a child or young person who does not have capacity.[[1190]](#footnote-1191) The rules about consent in the Code of Health and Disability Services Consumers’ Rights also apply when a person is consenting on another’s behalf.[[1191]](#footnote-1192)
  7. The High Court of Australia has held there are limits to what a parent can consent to,[[1192]](#footnote-1193) and this rule has been applied in cases involving medical interventions for infants or children with an innate variation of sex characteristics.[[1193]](#footnote-1194) For example, one case involved a 14-year-old with congenital adrenal hyperplasia who wanted surgery to remove his ovaries and uterus (among other medical interventions). The Court considered the young person was not competent to consent to such significant surgery and that it also fell outside the scope of parental consent.[[1194]](#footnote-1195) Court authorisation was therefore required. In that case, authorisation was granted on the basis the surgery was in the best interest of the child.[[1195]](#footnote-1196)
  8. We have not identified any New Zealand cases where a court or tribunal has specifically considered the issue of consent to medical treatment relating to innate variations of sex characteristics. There are some cases where parents have sought court authorisation for a procedure on a child’s sex characteristics (not involving an innate variation). In *Re X*, Te Kōti Matua | High Court authorised a hysterectomy on a severely disabled child to prevent her from menstruating. However, the Court said authorisation was not strictly necessary and that the law enables parents to give consent if the surgery is for the benefit of the child and the doctor is satisfied of that benefit.[[1196]](#footnote-1197) The Court recognised that court authorisation could be sought and granted if there was uncertainty.[[1197]](#footnote-1198)

### Concerns we have heard about unnecessary medical interventions

* 1. Some community experts and researchers consider that medical interventions on infants and children with an innate variation of sex characteristics still happen too often and in circumstances that are not medically necessary. In 2017, intersex organisations and advocates in Australia and Aotearoa New Zealand issued a joint consensus statement calling for:[[1198]](#footnote-1199)

1. … the immediate **prohibition as a criminal act** of deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent.
   1. Since then, intersex advocates in Aotearoa New Zealand have sought legislative reform on this issue as part of other reform processes. One occasion was in 2020, when the provision in the Crimes Act that outlaws female genital mutilation was amended. In its select committee submission, Intersex Aotearoa requested that the exception to the offence of female genital mutilation for medical or surgical procedures (including a “sexual reassignment” procedure) be removed as it enables surgeries on intersex people.[[1199]](#footnote-1200) The Select Committee said this issue was outside the narrow scope of the Bill but that it was worthy of proper consideration.[[1200]](#footnote-1201) It recommended the Ministry of Health continue to work with individuals and organisations on the issue.
   2. Another occasion was when the Conversion Practices Prohibition Legislation Act was enacted in 2022. Several submitters on the Bill said practices intended to change or suppress variations of sex characteristics should be covered by the definition of conversion practices.[[1201]](#footnote-1202) The Bill’s Regulatory Impact Statement explains why such practices were not included:[[1202]](#footnote-1203)
2. … the issues and potential interventions involved in changing sex characteristics are materially different from those attempting to change or suppress sexual orientation and gender identity and expression.
3. The inclusion of variations of sex characteristics in the prohibition of conversion practices could add significant complexity to the policy and legislation. The issues for, and experiences of, intersex people are important and merit specific consideration rather than as an addition to this work. We understand that the Ministry of Health will develop a rights-based protocol to prevent unnecessary medical interventions on intersex children.
   1. Intersex advocates have also expressed their concerns about medical interventions in relation to infants and children with innate variations of sex characteristics to international treaty bodies.[[1203]](#footnote-1204)
   2. The concerns that people have about interventions of this kind can be summarised into the following (overlapping) categories.

#### Some interventions are not medically necessary

* 1. There is no real disagreement with the fact that, in some rare situations, an infant with an innate variation of sex characteristics may require immediate medical treatment because of a significant and sometimes life-threatening health risk. For example, in its submission to this review, Te Ngākau Kahukura, a rainbow organisation with intersex expertise, said medical procedures that are strictly necessary and urgent to protect the life or physical health of the person should be allowed.[[1204]](#footnote-1205)
  2. Some examples we understand to be relatively uncontroversial are cloacal exstrophy (where a child is born with an open abdominal wall requiring bladder surgery for the child to survive)[[1205]](#footnote-1206) and severe congenital adrenal hyperplasia (a condition affecting the adrenal glands and hormone levels that can be life-threatening if not treated with steroids).[[1206]](#footnote-1207)
  3. However, advocates of reform are concerned that medical interventions on infants and children (especially surgeries) continue to occur in situations where they are not strictly necessary for the health of the child. They consider that surgeries are still being done for social or ‘normalising’ reasons (as we discuss further below), to prioritise genital appearance or because of a view that penetrative heterosexual sex is “the successful sexual outcome for treated children”.[[1207]](#footnote-1208) In its submission to us, Intersex Aotearoa expressed concern about medical interventions being undertaken on pre-emptive or hypothetical medical grounds or with “emotive reference to potential social impacts for the growing child”.
  4. Some academics have criticised the clinical guidelines (discussed above) for not providing sufficient clarity on this issue, suggesting that a clear statement is needed “setting out which surgical and medical interventions on minors with variations in sex characteristics raise human rights concerns and under which conditions”.[[1208]](#footnote-1209)

#### Medical interventions can seek to reinforce social expectations of male and female bodies

* 1. A related concern we have heard is that medical responses to innate variations of sex characteristics can be motivated by social expectations of what male and female bodies should look like and how they should function. For example, surgery on infants with hypospadias may be motivated by a concern that boys need to be able to urinate standing up, while clitoral reduction surgery might be based on social ideas of what a normal clitoris should look like.[[1209]](#footnote-1210) We have read that the issue of medical interventions being motivated by societal expectations is particularly stark if the sex of an infant with an innate variation is indeterminant, reflecting the societal discomfort with those who fall outside the binary of male and female.[[1210]](#footnote-1211)

#### Interventions can have negative outcomes

* 1. Advocates of reform are concerned that surgeries on infants and children with innate variations of sex characteristics can have negative and long-term consequences. All surgery comes with inherent risk. Surgery on infants and children with innate variations of sex characteristics can have significant impacts such as affecting fertility, reducing genital sensation or pleasure, causing painful sexual intercourse in later life or causing scarring and infections.[[1211]](#footnote-1212) Some surgeries can also involve highly invasive post-surgical treatments over an extended period such as dilation of the child’s genitals with an instrument.[[1212]](#footnote-1213)
  2. Intersex Aotearoa said in its submission to us that:

1. Intersex adults often endure lifelong physical complications, including loss of the ability to have a family. They are denied the right to simply be who they were born to be, and coerced into the very gender-based paradigm that was created to erase their state-of-being.
   1. A related concern we have heard is the limited data available on the long-term effects of medical interventions on people with innate variations of sex characteristics. Some researchers have called for more investigation of the outcomes of specific treatment paths, particularly the outcomes for those who do not undergo medical interventions.[[1213]](#footnote-1214)

#### Childhood interventions can be associated with secrecy and lack of information

* 1. Another ongoing concern relates to the lack of information available to people who have had surgeries as infants or as young children about what was done to them. We understand that, historically, it was common for childhood surgeries to be kept secret from children with innate variations of sex characteristics by parents and medical professionals. Australian research found poor information sharing or secrecy was a common experience among respondents:[[1214]](#footnote-1215)

1. Doctors and surgeons believed they were ‘helping’ the infant by choosing their sex and keeping sex variation a secret, and the parents of the infant were made to feel there is something ‘wrong’ with their child such that their untreated bodily condition would be socially untenable.
   1. In its 2008 inquiry, Te Kāhui Tika Tangata | Human Rights Commission heard from intersex people about the secrecy surrounding the medical procedures performed on them and, for some, the shock of discovering they had an intersex condition.[[1215]](#footnote-1216) Some described the challenges they faced accessing their medical records as an adult, and the Human Rights Commission commented that the absence of records “compounds the invisibility, secrecy and shame felt by many”.[[1216]](#footnote-1217)

## Feedback we received in consultation

* 1. We asked submitters whether a new provision should be added to the ‘Other forms of discrimination’ subpart to clarify the circumstances in which medical interventions on infants and children with an innate variation of sex characteristics are permissible. Our preliminary conclusion was that this would not be achievable as part of this review (for reasons we explore further below). However, because we recognised this was an issue of deep concern to some community experts, people with innate variations of sex characteristics and their families, and international bodies, we wanted to seek feedback before reaching a final view.[[1217]](#footnote-1218)
  2. Among submitters, there were mixed views on whether reform was desirable, as we discuss further below. Some submitters did not express a clear view about whether they supported reform, some interpreted the question differently (for example, to relate to gender-affirming health care for transgender children) and some said they were unsure or did not feel they had the expertise to respond.
  3. We only received limited feedback from people who said they had an innate variation of sex characteristics. We did receive some feedback from organisations with community expertise in this area, and we also organised for interviews to be carried out on our behalf with some people who have an innate variation of sex characteristics. Nevertheless, we are unlikely to have heard the full range of perspectives held by people who are directly affected by this issue.
  4. Although we contacted some associations that represent people with specific variations of sex characteristics, we did not receive any feedback from organisations of this kind (and there are few such organisations in Aotearoa New Zealand). We also received very little feedback from medical professionals with expertise in this area.
  5. The feedback we did receive can be summarised as follows.

### Unnecessary medical interventions should not occur

* 1. We received strong feedback from submitters that unnecessary medical interventions on infants and children with innate variations of sex characteristics should not occur. While submitters used a variety of different words to discuss what they thought the threshold for medical intervention should be, there were common themes. Submitters used descriptions such as “necessary for safety from a strict medical need”, “necessary for the function of the body” or “medically necessary, involving urination or physical pain associated with the variation, but not to conform to social gender norms”.
  2. Participants at the interviews that were carried out on our behalf with some people who have an innate variation said there should be a difference between life-preserving health care and interventions for cosmetic or normalising purposes.
  3. Te Ngākau Kahukura acknowledged there are circumstances in which medical interventions may be appropriate such as where strictly necessary and urgent to protect the life or physical health of the person. Almost all organisations that commented on the relevant consultation question were opposed to unnecessary medical interventions or expressed support for the rights of children with an innate variation of sex characteristics.[[1218]](#footnote-1219)

### More mixed views on having a provision in the Human Rights Act

* 1. Among submitters, there was some support for a new provision to be added to Part 2 of the Human Rights Act and some opposition. As noted above, some submitters did not clearly state their position or said they were unsure. This included some organisations such as Community Law Centres o Aotearoa, Te Pūkenga Here Tikanga Mahi | Public Service Association and the Rotorua Chamber of Pride, who said they thought better protections for intersex children were needed but either did not have the expertise or did not have the resources to submit on how this should be implemented.
  2. Many submitters who commented on this issue thought the Human Rights Act was not the appropriate vehicle to address the issue.[[1219]](#footnote-1220) Some thought the solution was non-legislative (for example, through education) or should be addressed by the medical profession. Of submitters who thought the Human Rights Act was not the appropriate vehicle, many said they thought the issue was too complex and required stand-alone legislation. Te Kāhui Ture o Aotearoa | New Zealand Law Society thought the issue should be considered in stand-alone legislation because it raised significant questions of bodily integrity, the rights of minors and their parents or guardians and the ethical responsibilities of medical practitioners.
  3. We did not receive a strong call for a provision from intersex advocacy organisations or submitters who identified as having an innate variation of sex characteristics. Intersex Aotearoa said “a legal solution for unconsented surgeries could be dealt with via statute” but said addressing the issue of interventions would be addressing a symptom, not the cause, of the issue. It said a legislative solution should not happen “unless/until the ‘state of being’ Intersex is legally recognised as a legitimate biological norm and psycho-spiritual truth”. Intersex Aotearoa suggested two legal principles should be introduced to the Human Rights Act: the state of being intersex and the right to remain intersex. Intersex Aotearoa said these principles relate to a child being welcomed and raised with pride in who they are. It also suggested introducing “strengthened laws around informed consent to childhood assignment surgeries with clear guidance on what constitutes medical necessity”.
  4. Te Ngākau Kahukura said it was “worth considering whether there could be a section added that specifically addresses medical practices undertaken on people with innate variations of sex characteristics that could constitute human rights abuses”.
  5. A submission from one individual who identified as intersex said the topic was very complicated and thought change would come from educating doctors and supporting whānau. Another submitter who identified as intersex said they thought the right to bodily autonomy could be enshrined in law (affecting all medical interventions on children and young people) but they were unsure whether the Human Rights Act was the right place for this.
  6. At a consultation hui for people with an innate variation of sex characteristics, some participants accepted there was a lack of precedent for including such a provision in an anti-discrimination statute and thought that there may be a need to be practical about what can be achieved at the current moment.
  7. Some of the participants in the interviews conducted on our behalf with people with innate variations of sex characteristics thought the issue needed stand-alone consideration or that it was a complicated issue that fell outside of the review’s scope.
  8. In the feedback we received from people who supported reform, some recognised the Human Rights Act might not be the perfect vehicle but thought any opportunity for reform should be taken. We also heard frustration that this is not the first occasion on which intersex advocates have been told this issue is out of scope of a related policy process. A few thought a general provision in the Human Rights Act could support more detailed provisions elsewhere.[[1220]](#footnote-1221)

## Options for reform

* 1. In the Issues Paper, we suggested that any new provision inserted into the Human Rights Act to address this issue would need to be detailed and specific. An example is legislation in the Australian Capital Territory, which defines sex characteristics and variations in sex characteristics for the purposes of the legislation, specifies precisely which procedures are restricted and sets up a process for seeking approval for restricted treatments.[[1221]](#footnote-1222) It also contains a power to make regulations such as to exclude specific variations of sex characteristics from being covered by the legislative restrictions.[[1222]](#footnote-1223)
  2. We have also considered, as an alternative, the possibility of a more general provision. This might state in general terms that unnecessary medical interventions on children with an innate variation of sex characteristics are unlawful without specifying which procedures are prohibited. Portugal and Spain have taken this more general approach. Portugal has legislation that forbids medical interventions on intersex minors to modify their sex characteristics until their gender identity is manifested except for situations of proven risk to their health.[[1223]](#footnote-1224) In Spain, legislation prohibits “all genital modification practices” on persons under the age of 12 unless there are “medical indications” to protect a patient’s health.[[1224]](#footnote-1225)
  3. Other overseas statutes that restrict medical interventions on people with innate variations of sex characteristics sit at various places on this spectrum between general and specific.[[1225]](#footnote-1226)
  4. The other alternative is no specific reform on this issue as a result of this review. The effect of this would be that medical interventions on infants and children would continue to be governed by the general law relating to medical procedures and consent. This is the position in the United Kingdom and in most Canadian and Australian jurisdictions (the exception being the Australian Capital Territory). However, these jurisdictions do not necessarily have the same background rules as Aotearoa New Zealand about consenting to medical procedures on children. For example, in New South Wales, legislation relating to the care of children requires consent from a tribunal for any “special medical treatment” to be undertaken on a child.[[1226]](#footnote-1227) Special medical treatment is defined to include surgery that would result in permanent infertility, any treatment for contraception or menstrual regulation and any administration of addictive drugs.[[1227]](#footnote-1228)
  5. Even without specific reform of the ‘Other forms of discrimination’ subpart, it might still be possible to complain that laws, policies or practices governing medical interventions on infants and children with innate variations of sex characteristics are discriminatory, or that a specific decision or action relating to a particular child was discriminatory.[[1228]](#footnote-1229) Adding the new ground we propose of having an innate variation of sex characteristics to section 21 of the Human Rights Act will clarify that such a complaint could be made.
  6. However, whether such a complaint would succeed would depend on whether the general tests for discrimination in Part 1A or Part 2 could be established. Further, no complaint could succeed under Part 2 in relation to an act or decision that was authorised or required by other laws.[[1229]](#footnote-1230)

## Analysis and conclusions

* 1. We do not recommend reform of Part 2 of the Human Rights Act to prohibit unnecessary medical interventions on infants and children with innate variations of sex characteristics.
  2. We acknowledge that a reform of this kind is supported by some key reform considerations we identified in Chapter 3 and, relatedly, some considerations we identified in Chapter 16 as relevant when deciding whether to recommend new provisions to the ‘Other forms of discrimination’ subpart.
  3. The issue of medically unnecessary interventions on infants and children with innate variations of sex characteristics has significant human rights implications. The United Nations High Commissioner for Human Rights has said forced and coercive medical interventions in relation to intersex people violate the right to the security of the person protected by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities.[[1230]](#footnote-1231) An Australian Senate inquiry considered this issue engaged obligations under the Convention on the Rights of the Child and the international prohibition against torture and other cruel, inhuman and degrading treatment.[[1231]](#footnote-1232) The New Zealand Bill of Rights Act 1990 also has a specific right to refuse to undergo medical treatment.[[1232]](#footnote-1233)
  4. These specific rights give effect to core values that also underlie the Human Rights Act such as equality, dignity, self-worth, privacy and autonomy. For example, bodily autonomy was very important to young people with an innate variation interviewed in one study.[[1233]](#footnote-1234) Medical interventions on infants and children limit their future autonomy over decisions about their gender expression, about intimate parts of their body and, in some cases, about their ability to have children.[[1234]](#footnote-1235)
  5. Because of the significant human rights issues involved, this issue has attracted attention from several international bodies. In April 2024, the United Nations Human Rights Council adopted a resolution encouraging member states to enhance efforts to combat discrimination, violence and harmful practices against people with innate variations of sex characteristics.[[1235]](#footnote-1236) The Council expressed its concern that people with innate variations of sex characteristics face “medically unnecessary or deferrable interventions, which may be irreversible … performed without the full, free and informed consent of the person”.[[1236]](#footnote-1237)
  6. In their reports on Aotearoa New Zealand, several international committees that have responsibility for monitoring United Nations human rights treaties to which Aotearoa New Zealand is a party have called for the legislative prohibition of unnecessary medical treatments (although the exact language adopted by each committee differs slightly).[[1237]](#footnote-1238) As discussed above, some overseas jurisdictions have passed legislation prohibiting unnecessary medical interventions, including one Australian jurisdiction.
  7. Adding a provision to the Human Rights Act prohibiting unnecessary medical interventions on infants and children with innate variations of sex characteristics would also have important symbolic value.[[1238]](#footnote-1239) It would be a legislative acknowledgement that this is a significant human rights issue of concern to the New Zealand government and legislature as well as to people affected by medical interventions. We also acknowledge the view of some submitters that any opportunity should be taken to address this issue.
  8. Nonetheless, for the reasons we discuss below, we do not recommend reform on this issue as part of this review.

### Reform of Part 2 would not address many relevant acts and omissions

* 1. First, Part 2 of the Human Rights Act generally regulates private conduct rather than the public sector. As noted earlier, there is a small handful of provisions in Part 2 (including some provisions that are in the ‘Other forms of discrimination’ subpart) that apply to public sector agencies. However, all the current provisions on that list are about the treatment of employees or closely related issues (such as sexual and racial harassment). Further, they relate to issues (such as the treatment of employees) where the considerations that apply to public sector agencies are arguably no different to those that apply in the private sector.
  2. By contrast, many decisions that are relevant to when medical interventions on infants and children with innate variations of sex characteristics occur are made in the context of public institutions (such as Health New Zealand and the various health services it runs). They also seem to us to clearly involve public functions, appropriately governed by the general tests contained in Part 1A of the Human Rights Act.[[1239]](#footnote-1240)
  3. While it would be possible to add a general provision prohibiting medical interventions to the ‘Other forms of discrimination’ subpart (regardless of whether they involve the exercise of a public function), it would be a departure from the scheme of the Act. In Chapter 18, we explain that we consider it outside the scope of our review to rethink the policy decisions that underlie the general division between Part 1A and Part 2. For the same reason, we cannot recommend reform of Part 1A itself.

### Detailed and specific regulation of this issue would be inappropriate in this review

* 1. As noted above, some jurisdictions that have enacted legislative prohibitions in relation to medical interventions on infants and children with innate variations of sex characteristics have done so with detailed and specific legislation. For example, the Australian Capital Territory’s legislation contains 51 sections as well as associated regulations.[[1240]](#footnote-1241)
  2. Detailed regulation of this kind would not sit well in the ‘Other forms of discrimination’ subpart in the Human Rights Act, which currently comprises a total of 10 sections across all the subject matters it regulates.
  3. Notably, some recent amendments to the ‘Other forms of discrimination’ subpart were enacted as one component of a more detailed reform, with the main provisions sitting outside the Human Rights Act in a dedicated statute. For example, as we discussed in Chapter 16, the provision in this subpart that makes conversion practices a breach of the Human Rights Act sits alongside the Conversion Practices Prohibition Legislation Act 2022, which defines a conversion practice and establishes criminal offences. The purpose of the brief provision on conversion practices in the Human Rights Act is to ensure access to the Human Rights Act’s informal civil dispute resolution mechanisms in situations where criminal action may not be appropriate.[[1241]](#footnote-1242)
  4. It would be possible to add a new and detailed subpart to the Human Rights Act that is dedicated solely to specifying the circumstances in which medical interventions on infants and children with innate variations of sex characteristics are prohibited. However, we are not aware of any overseas precedent for detailed regulation of this kind being included in a general anti-discrimination statute, and we think it might best be accomplished through stand-alone legislation (as is the case in both the Australian Capital Territory and Germany).[[1242]](#footnote-1243)
  5. Perhaps more importantly, we think detailed regulation of this issue should be preceded by a dedicated policy process (such as took place in relation to conversion practices). This would enable consideration of the many technical issues that would arise. At minimum, these issues would include:
     + 1. which variations to cover; and
       2. which medical interventions to permit or restrict and in which circumstances.
  6. As we explained earlier in the chapter, that policy work would take place against the background of considerable variance in opinion among advocates, parents and medical professionals on when surgeries are necessary and in what circumstances. Settling the scope of new legislation would therefore require widespread consultation with stakeholders, including people who have innate variations of sex characteristics, community experts and medical professionals.
  7. Although we tried to contact interested parties and to obtain feedback from people with expertise on innate variations of sex characteristics, we were consulting in this review on 80 questions in relation to anti-discrimination issues that arise across a broad range of subject matters. We are not satisfied we have heard a sufficient range of perspectives held by people who have innate variations of sex characteristics or who have medical expertise in this area to make a recommendation in this review. We also heard that some individuals and groups with expertise in issues related to innate variations of sex characteristics found the number of reform issues in the Issues Paper challenging and chose to prioritise giving feedback on the key reform question of whether new grounds should be added to section 21 of the Human Rights Act.

### A more general provision would do little to resolve uncertainty

* 1. The alternative to detailed regulation is a general provision that does not list specific variations or procedures but sets out a general test that applies in all circumstances. For example, it might state that procedures are prohibited if they are “unnecessary”, “not medically essential”, not “for the benefit” of the patient or “not in the child’s best interests”. This approach would be more flexible and allow cases to be resolved on a case-by-case basis and according to developing medical and ethical understanding.
  2. A general provision of this kind would signal that, at least in principle, there are legal limits to the circumstances in which parents can consent to medical interventions on their child’s behalf. However, we consider it would do little to resolve uncertainty about the circumstances in which medical interventions on infants and children with innate variations of sex characteristics are appropriate. We doubt that medical professionals currently undertake interventions that they do not consider to be medically necessary or in a child’s best interests. Rather, the problem is lack of consensus about what medical necessity involves.
  3. As noted earlier, there is a considerable variance of opinion on this issue and concerns about insufficient research into long-term outcomes. The authors of a study discussed earlier in this chapter that asked medical professionals to place interventions on a line between “non-essential” and “medically essential” concluded that “medical necessity” is a flexible concept that should be treated with caution.[[1243]](#footnote-1244)
  4. Some research has suggested that, where countries have enacted general legislative prohibitions of this kind, they have not been as successful as anticipated.[[1244]](#footnote-1245) One report identifies defects with general provisions that can compromise how well the protections work such as their scope and being a “blanket, declaratory” provision.[[1245]](#footnote-1246) One advocate in Spain said their country’s legislative prohibition was problematic because it still left the door open for “whatever the doctors decide”.[[1246]](#footnote-1247)
  5. Therefore, while a general provision of this kind may have some symbolic value, we doubt it would provide legal clarity or achieve the outcome desired by advocates of reform.

### Unclear how a provision would fit in with existing laws

* 1. As we discussed above, there are other laws that regulate the medical profession and the circumstances in which medical treatment can be provided. It is unclear how a new provision might fit with these laws. None of the matters currently listed in the ‘Other forms of discrimination’ subpart are technical matters of this kind related to a professional, highly regulated sector.
  2. Further, acts or omissions are not unlawful under Part 2 of the Human Rights Act if they are authorised or required by law.[[1247]](#footnote-1248) This may further exacerbate uncertainty in the relationship between a new provision of this kind and other rules about patient consent.
  3. There is also a risk of inconsistency with the approach taken to medical procedures that do not involve innate variations of sex characteristics. As illustrated by the case law in Aotearoa New Zealand and overseas, the question of when a parent can consent to medical interventions for children is a difficult issue generally and is not limited to children with innate variations of sex characteristics.[[1248]](#footnote-1249)

### The Human Rights Act’s dispute resolution procedures may not be well suited

* 1. As we discussed in Chapter 16, a key reason for adding new provisions to the ‘Other forms of discrimination’ subpart on previous occasions has been the suitability of the Human Rights Act complaints mechanisms. This rationale does not apply here. Assisting parties to resolve complaints about medical practices is likely to be outside the Human Rights Commission’s current expertise and seems more suited to a body such as Te Toihau Hauora, Hauātanga | Health and Disability Commissioner or Te Kaunihera Rata o Aotearoa | Medical Council of New Zealand.[[1249]](#footnote-1250)

### A provision could conflict with existing government initiatives

* 1. Finally, legislative amendment at this time could cut across work that is being undertaken in government to develop a rights-based approach to intersex health care. In 2022, the government announced funding for developing such an approach, including funding for peer support initiatives and for developing updated clinical guidance. A press release to announce the funding stated that one of the goals of the new initiatives was to prevent unnecessary medical interventions.[[1250]](#footnote-1251) It said part of the reasoning was because health professionals, especially those who are not specialists in the area, “had expressed a lack of complete knowledge in how to properly care for those who are intersex”.
  2. We understand that Health New Zealand is working on these initiatives. For example, in June 2024, Tīwhanawhana Trust was awarded a three-year contract to develop best-practice guidelines, support and upskill health professionals and provide information resources to children and young people with an innate variation of sex characteristics and their whānau.[[1251]](#footnote-1252)

### Conclusion

* 1. For all these reasons, we do not make a recommendation for reform of the Human Rights Act to address concerns about unnecessary medical interventions on infants and children who have an innate variation of sex characteristics. This does not mean legislative reform on this issue is undesirable. We acknowledge the significant human rights issues at stake, the strong call for action from international human rights bodies and the view of some submitters that any opportunity should be taken to address this issue.
  2. In our view, it would be more appropriate for legislative reform on this issue to take place outside of the Human Rights Act. It should also involve a dedicated policy process that includes review of the existing laws on consent and wide-ranging consultation with stakeholders. It may also be preferable for Health New Zealand’s work on a rights-based approach to this issue, including updated clinical guidelines, to have been implemented before further consideration is given to legislative reform.
  3. Finally, we think any law reform process on this issue would be assisted by better data collection. The importance of accurate data collection for the realisation of human rights is widely recognised.[[1252]](#footnote-1253) As discussed above, there is a lack of specific data on the reasons for surgical interventions performed on children’s genital and reproductive organs. The Human Rights Commission has raised concerns about poor data collection and the implications this has for human rights monitoring and policy decisions.[[1253]](#footnote-1254) We think quantitative data would aid in assessing the policy problem, including to determine whether changes to clinical guidelines affect practices.
  4. The Ministry of Health may wish to consider ways to improve data collected on the reasons why surgical procedures are carried out.

CHAPTER 18

# Part 1A of the Human Rights Act

## Introduction

* 1. In this chapter, we consider Part 1A of the Human Rights Act 1993, which sets out the anti-discrimination rules that apply to government agencies and to other people and bodies exercising public functions. We explain the implications of reform of section 21 of the Human Rights Act for Part 1A and why we are satisfied those implications are appropriate.
  2. For reasons we discuss in this chapter, reform of Part 1A is outside the scope of our review. We make no recommendations for reform in this chapter.

## When Part 1A applies

* 1. Part 1A of the Human Rights Act came into effect on 1 January 2002.[[1254]](#footnote-1255) It was designed to ensure that the anti-discrimination rules that apply to the public sector are the same under the Human Rights Act as under the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). Part 1A also ensures that, where government agencies contravene the tests for unjustified discrimination in the NZ Bill of Rights, the complaints mechanisms in the Human Rights Act are available alongside remedies pursued under the NZ Bill of Rights.[[1255]](#footnote-1256)
  2. According to section 3 of the NZ Bill of Rights, that Act applies to acts done by the legislative, executive or judicial branches of government and by any person or body that is performing a “public function, power or duty conferred or imposed on that person or body by or pursuant to law”. Part 1A of the Human Rights Act applies, in turn, to any “act or omission of a person or body referred to in section 3” of the NZ Bill of Rights.[[1256]](#footnote-1257)
  3. An act can include an activity, condition, enactment, policy, practice or requirement.[[1257]](#footnote-1258) This covers both acts relating to specific individuals and acts that apply more generally. It is also possible to challenge laws although, where the challenge is to primary legislation, the only remedy is a non-binding declaration.[[1258]](#footnote-1259)
  4. In earlier chapters, we gave a number of examples of activities we think are likely to fall under Part 1A.[[1259]](#footnote-1260) However, we explained that the question of what constitutes a public function, power or duty is not always clear and there is limited case law on it. Therefore, it can sometimes be unclear what falls under Part 1A of the Human Rights Act and what falls under Part 2.[[1260]](#footnote-1261)
  5. A small number of provisions in Part 2 of the Human Rights Act apply to government actions. These relate to employment and some closely related areas such as harassment.[[1261]](#footnote-1262) A departmental report from 2001 explained that this departure from the general rule that government action falls under Part 1A was to recognise that “there should be no difference in law between being employed in the private or the public sector, because the Employment Relations Act 2000 concerns equality of employment everywhere”.[[1262]](#footnote-1263) It said sexual and racial harassment would also be regulated by Part 2 because they were often closely related to discrimination in employment.[[1263]](#footnote-1264)
  6. Outside of these limited circumstances, government agencies are regulated by Part 1A, not Part 2.[[1264]](#footnote-1265)

## The tests under Part 1A

* 1. As we discussed in earlier chapters, Part 2 of the Human Rights Act has detailed provisions that explain when differences in treatment that relate to specific areas of life are unlawful. By contrast, Part 1A sets out broad tests that apply to all government action. An act or omission is in breach of Part 1A if it limits the right to freedom from discrimination affirmed by section 19 of the NZ Bill of Rights and is not a justified limitation under section 5 of the NZ Bill of Rights.[[1265]](#footnote-1266)
  2. Section 19(1) of the NZ Bill of Rights states a right to “freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993”.[[1266]](#footnote-1267) The courts have said section 19 is engaged where:[[1267]](#footnote-1268)
     + 1. a person or group is treated differently from others (whether that is the intention or the result of the act or omission);
       2. the difference in treatment is based on a prohibited ground of discrimination; and
       3. the treatment results in a “material disadvantage” to the person or group when viewed in context.
  3. To prove that a difference in treatment is based on a prohibited ground, it is necessary to show that someone who does not have that characteristic but is otherwise in a similar situation has not been, or would not be, treated the same way.[[1268]](#footnote-1269) Discrimination has been described as “in essence, treating persons in comparable situations differently”.[[1269]](#footnote-1270)
  4. Cases are brought on the basis of particular facts rather than in the abstract. This means that the exact wording of a law or policy that is being challenged, or the precise circumstances of an individual claim, will often be central to the outcome of the case. The court or tribunal will decide the case on the evidence before it. Cases sometimes fail because the plaintiff has provided insufficient evidence on which to base a finding of discrimination.
  5. Under section 5 of the NZ Bill of Rights, the rights and freedoms contained in that Act “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. As we have explained in earlier chapters, this is said to give rise to a proportionality test under which the gain to society from a rights-limiting measure is weighed against the resulting intrusion on rights. There is no universal approach to deciding whether a limit on a right is justified or proportionate in this sense, but there are some common questions courts often address.[[1270]](#footnote-1271) They include:
     + 1. whether the purpose of the rights-limiting measure is important enough to justify limiting rights and freedoms;
       2. whether the law that limits the right has been designed with care so that it achieves its aim and avoids limiting rights more than necessary; and
       3. whether, on an overarching assessment, the overall gain to society from the rights-limiting measure is sufficient to justify the particular intrusion on rights that has resulted from it.
  6. The questions courts consider under section 19 and section 5 of the NZ Bill of Rights allow for a fluid and context-specific assessment of when differences in treatment by government agencies constitute unlawful discrimination. This recognises the reality that governments often need to draw distinctions between different groups to ensure that everyone’s needs are met.[[1271]](#footnote-1272) It allows for the assessment of whether a particular act or omission involves unjustified discrimination to be made in context, based on evidence and in the light of any competing rights and interests (including other rights in the NZ Bill of Rights).
  7. Although courts generally require the government to prove its need to discriminate, if evidence is disputed, unsettled or emerging, or if the agency has relevant institutional expertise the courts lack, the courts tend to allow some leeway to the agency that made the decision that is being challenged.
  8. For example, in *New Health New Zealand Inc v South Taranaki District Council*, Te Kōti Mana Nui | Supreme Court had complex and disputed scientific evidence before it about the health effects of fluoridation. The plurality opinion of O’Regan and Ellen France JJ noted that the Court was “not in a position to unpick these disputes nor is it able to determine whether particular scientific reports are scientifically robust”.[[1272]](#footnote-1273) For that reason, the judges said the decision being appealed was “right not to attempt a definitive ruling on the scientific and political issues”.[[1273]](#footnote-1274) Their Honours ultimately contented themselves with making a broad assessment of whether the agency that had made the original decision (a local council) had sufficient evidence before it to provide a “proper basis” for its conclusion.[[1274]](#footnote-1275)
  9. In *Taylor v Chief Executive of the Department of Corrections*,Te Kōti Pīra | Court of Appeal commented: “We accept that the court should be cautious in reaching a different view from the decision-maker on matters relating to the security and good order of the prison”.[[1275]](#footnote-1276) Notably, though, the Court in *Taylor* also said prison authorities would be supervised intensely where human rights were involved because they did not have special expertise in relation to human rights and there were important interests at stake.[[1276]](#footnote-1277)
  10. The Supreme Court has also said that, where a limitation on a right is well recognised in international treaties or in common law, “evidence about the reasonableness of the limit may not be required or may be minimal”.[[1277]](#footnote-1278)

## Reform of Part 1A is outside of the scope of this review

* 1. In the Issues Paper, we explained that Part 1A reflects a policy decision that the discrimination obligations imposed on government should be identical under the NZ Bill of Rights and the Human Rights Act. Since recommending any reform of the NZ Bill of Rights would be outside the scope of this review, we said it would also be difficult for us to recommend any reform of Part 1A of the Human Rights Act.[[1278]](#footnote-1279)
  2. Several submitters did suggest reform of Part 1A. Specifically, they wanted certain provisions in Part 2 of the Human Rights Act to apply to the public sector instead in certain circumstances.[[1279]](#footnote-1280) A few submitters, including the Women’s Rights Party and Resist Gender Education, thought single-sex facilities exceptions in Part 2 should apply to public facilities such as hospitals, schools and council-run facilities. Save Women’s Sport Australasia indicated that all Part 2 exceptions in the Act should apply to both public and private actors. It gave the examples of the single-sex facilities exception in section 46 and the competitive sports exception in section 49(1). Resist Gender Education thought schools should have exceptions under Part 2 to protect the right to freedom of expression and to allow sex-differentiated activities.[[1280]](#footnote-1281)
  3. One submitter said public officials should be subject to the same obligations under the Human Rights Act as other members of the public. Two submitters said there should be a stronger onus on government to protect the rights of people who are transgender or non-binary.
  4. It is outside the scope of this review to recommend reform that could change the dividing line between Part 1A and Part 2 of the Human Rights Act (such as reforms to apply particular Part 2 provisions to the public sector). Part 1A reflects a clear policy choice that the anti-discrimination obligations imposed on government should be identical under both the Human Rights Act and the NZ Bill of Rights (except for the few employment-related provisions discussed earlier).[[1281]](#footnote-1282) A broad reform applying other Part 2 provisions to the public sector would require revisiting that original policy decision, which is not something we have been asked to consider in this review.
  5. A narrower reform that only related to the new prohibited grounds we propose or only to specific issues (such as regulation of single-sex facilities) would introduce incoherence into the Human Rights Act. We cannot see a good policy reason why the government should be held to a different standard when its conduct relates to these prohibited grounds or these specific issues.
  6. In any event, because of the recommendations we make in Chapter 14 on the single-sex facilities exceptions in Part 2, we do not think applying those particular exceptions to the public sector would have the effect that some submitters wanted.
  7. As we do not think it is appropriate for us to recommend reform of Part 1A, our focus has been on understanding the implications for Part 1A of adding new grounds of discrimination and on satisfying ourselves that these implications are appropriate.

## The likely implications of reform for Part 1A

* 1. The addition of new grounds to section 21 of the Human Rights Act will have implications for Part 1A with respect to both policy development and complaints against government. However, for reasons we discuss below, we think it is unlikely to involve a significant change in practice.

### Overview of feedback

* 1. In the Issues Paper, we said we were interested to understand better the implications for Part 1A of adding new grounds of discrimination. We suggested the implications for policy development in government might be quite small given the government already believes discrimination based on a person’s gender identity or sex characteristics is unlawful.[[1282]](#footnote-1283)
  2. We suggested the reform may cause an increase in the number of complaints against public bodies made to Te Kāhui Tika Tangata | Human Rights Commission by people who are transgender or non-binary or who have an innate variation of sex characteristics. More complaints may also be pursued in Te Taraipiunara Mana Tangata | Human Rights Review Tribunal. If that happened, the broad and flexible legal tests in Part 1A would enable the outcome of any case to be determined based on evidence and on a contextual assessment of all relevant rights and interests.[[1283]](#footnote-1284)
  3. Some submitters gave us feedback on this provisional analysis. Te Kāhui Ture o Aotearoa | New Zealand Law Society said it did not think adding new grounds to section 21 would have a significant impact on Part 1A actors.
  4. Dr Eddie Clark commented:

1. The approach set out in the paper regarding the relationship between any changes to s 21 and Part 1A & the NZBORA seems accurate. It is difficult to predict the exact impact given that this is inherently a reactive area of law; the parameters of what is decided depend on the specifics of any claims that may be brought.
   1. The Wellington Pride Festival thought the Issues Paper had comprehensively considered the impact of new grounds of discrimination on the obligations of public bodies. Community Law Centres o Aotearoa said it agreed with the implications set out in the Issues Paper.
   2. Several submitters indicated it would be beneficial to have clarity that the public sector cannot discriminate against people who are transgender or non-binary or who have an innate variation of sex characteristics and that claims can be brought on this basis. Some submitters were concerned that it might be difficult to establish breaches of Part 1A in relation to some issues that were of concern to them.
   3. Other submitters expressed the opposite concern: that Part 1A could be used to bring claims they considered unmeritorious. For example, some submitters were concerned about discrimination cases being brought about gender-affirming health care. One submitter expressed concern that reform would lead to people demanding “new unmeetable and medically unjustifiable treatments”. While not opposing reform of the Human Rights Act, Professor Paul Rishworth KC referred to the potential for Part 1A claims (as well, depending on the circumstances, as Part 2 claims) to be brought about medical decisions and protocols such as those relating to the prescription of puberty blockers for children and young people. He suggested courts would need to give appropriate deference to responsible medical opinion.
   4. Kia Rangona te Kōrero | Free Speech Union said it had “grave concern” about the significant impacts and implications of reform for freedom of expression in the public sector. It had a particular concern that health professionals who expressed their professional opinions or concerns on issues of sex and gender could be deemed to be discriminating. It said any legal reforms should positively affirm the right of those providing health services to express their professional opinions regarding the health of those who are transgender or non-binary or who have an innate variation of sex characteristics. We discussed this issue in Chapter 6.
   5. Professor Claire Charters thought some Māori governance entities might fall under Part 1A. We discussed Professor Charters’ concerns about this in Chapter 5.
   6. Several submitters were concerned that the rights of other people would not be appropriately considered in the balancing exercise required by section 5 such as the rights of cisgender female prisoners.

### Analysis and conclusions

* 1. If the grounds of gender identity and having an innate variation of sex characteristics are added to section 21 of the Human Rights Act, this will clarify that public sector bodies cannot discriminate on these bases (unless the difference of treatment is justified by section 5 of the NZ Bill of Rights).
  2. This may not represent a significant change in practice. First, as we discussed in Chapter 4, the government already acts on the basis that discrimination that is linked to a person’s gender identity or sex characteristics is prohibited by the Human Rights Act under the ground of sex.[[1284]](#footnote-1285)
  3. Second, many government actors have sector-specific obligations in other legislation that would require them to take account of the needs of people who are transgender or non-binary or who have an innate variation of sex characteristics. For example, schools must take reasonable steps to eliminate stigma, bullying and other forms of discrimination, ensure the school is physically and emotionally safe for all students and ensure the school is inclusive of students with differing needs.[[1285]](#footnote-1286)
  4. We discuss below some specific implications for policy development and claims against government.

#### Implications for policy development

* 1. It is a general expectation of policy and legislative design in Aotearoa New Zealand that officials consider and advise on whether policy and legislative proposals are consistent with human rights obligations in the NZ Bill of Rights and the Human Rights Act and at international law.[[1286]](#footnote-1287) As well, when a Bill is introduced to Parliament, the NZ Bill of Rights requires the Attorney-General to alert Parliament to any provision that appears to be inconsistent with the NZ Bill of Rights.[[1287]](#footnote-1288) Officials at Te Tāhū o te Ture | Ministry of Justice and Te Tari Ture o te Karauna | Crown Law advise the Attorney-General on this.
  2. We understand that government officials already consider whether policy proposals might discriminate against people who are transgender or non-binary or who have an innate variation of sex characteristics in their human rights analysis.[[1288]](#footnote-1289) Therefore, adding more explicit protections to the Human Rights Act may not require any change to the current policy development process.
  3. Nonetheless, having express grounds in the Human Rights Act will make it more obvious to officials that they need to consider whether policy proposals discriminate on the basis of gender identity or having an innate variation of sex characteristics. Further, officials will have the precise wording of new grounds to guide them, and this may clarify the scope of protection in some cases.

#### Implications for ability to bring complaints against government

* 1. Our recommendation to add new grounds of gender identity and having an innate variation of sex characteristics to section 21 of the Human Rights Act would clarify that people can complain about public sector discrimination based on those grounds.
  2. As we explained in Chapter 4, the Human Rights Commission already interprets the ground of sex as including gender identity, gender expression and sex characteristics and accepts complaints about such discrimination.[[1289]](#footnote-1290) This means the government is already having to respond to such complaints.[[1290]](#footnote-1291) Adding the grounds of gender identity and having an innate variation of sex characteristics to section 21 would not therefore affect the willingness of the Human Rights Commission to receive complaints (although it would place its jurisdiction beyond the risk of legal challenge).
  3. It would, however, be clearer to people that they are entitled to complain about discrimination of this kind. Between 1 January 2008 and 31 December 2024, the Human Rights Commission received 102 complaints of sex discrimination from people who identified as transgender, non-binary, gender diverse or intersex and that related to government activities.[[1291]](#footnote-1292) This is an average of around six each year. As noted in Chapter 4, we would expect that an increased number of complaints to the Human Rights Commission might eventuate from the reforms we propose.
  4. One of the Human Rights Commission’s primary functions is to facilitate the resolution of disputes “in the most efficient, informal, and cost-effective manner possible”.[[1292]](#footnote-1293) We would expect that many Part 1A complaints would be resolved through these processes without the need for litigation, as occurs at present.[[1293]](#footnote-1294) Nevertheless, the reforms we propose might well result in more complaints under Part 1A being taken to the Human Rights Review Tribunal.

## These implications are appropriate

* 1. For the reasons we discuss below, we are satisfied that the implications for Part 1A of the Human Rights Act of adding new grounds to section 21 are appropriate.

### Appropriate to consider discrimination in policy development process

* 1. We consider it is appropriate that officials should be prompted to consider whether policy proposals discriminate on the basis of gender identity or having an innate variation of sex characteristics. We have not identified a good policy 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. This does not mean that policies can never draw distinctions on these bases. Rather, it requires officials to be aware of potential discrimination and to consider whether there are less discriminatory alternatives that might achieve the government’s purpose.

Appropriate to allow discrimination complaints against government

* 1. We also think it is appropriate that people who are transgender or non-binary or who have an innate variation of sex characteristics should have the same opportunity as other protected groups to question government conduct using the informal dispute resolution processes available through the Human Rights Commission.
  2. As noted earlier, based on current experience, only a small proportion of complaints that are brought to the Human Rights Commission are likely to result in litigation in the Human Rights Review Tribunal. However, if people want to pursue such a claim based on one of the new grounds we propose, we consider it is appropriate they should have the opportunity to do so.

### Part 1A test is appropriate

* 1. We also think it is appropriate that any assessment of public sector discrimination based on the new grounds we propose applies the broad tests set out in Part 1A of the Human Rights Act. These are the tests that Parliament has decided should apply to discrimination by government (other than in relation to employment).
  2. As we have discussed above, the tests in Part 1A enable a fluid and context-specific assessment of when differences in treatment by public sector agencies constitute unlawful discrimination, based on evidence and in the light of any competing rights and interests. There may well be competing interests that mean the government has a justified need to discriminate such as safety, privacy, clinical judgement or protecting freedom of expression. However, we think it is appropriate for public sector agencies to be prevented from treating people differently on prohibited grounds if that cannot be justified under section 5 of the NZ Bill of Rights. The balancing exercise required by section 5 applies not just to discrimination but in respect of many rights in the NZ Bill of Rights.[[1294]](#footnote-1295) It is how Parliament has decided that competing rights and interests should be weighed in Aotearoa New Zealand, and we can see no reason why it should not apply in this context.
  3. Some of the submissions we received indicated a concern that adding new grounds to section 21 would inevitably lead to undesirable policy outcomes. For example, some submitters appeared concerned that it would entitle transgender women in all circumstances to be housed in women’s prisons. Other submitters appeared concerned that it would create an entitlement to certain forms of gender-affirming health care (such as puberty blockers) regardless of the circumstances and the state of the evidence.
  4. Unlike Part 2 of the Human Rights Act, Part 1A does not specify that certain types of conduct are unlawful. Rather, Part 1A allows a context-specific assessment of when differences in treatment by public sector agencies constitute unlawful discrimination, based on evidence and in the light of any competing rights and interests. This means that other relevant rights and interests can be taken into consideration by the government in deciding on its policy settings and by a tribunal or court if there is litigation. We illustrate this below by reference to the issues of prison placement and access to gender-affirming health care.

#### Prison placement

* 1. A number of submitters raised issues related to prison placement. Some submitters expressed concern about ensuring the safety of transgender prisoners such as if transgender women were incarcerated in male prisons. Other submitters, including the Women’s Rights Party, were concerned about the safety of cisgender female prisoners who are housed with transgender female prisoners. Barrister Susan Shone commented that female prisoners are a particularly vulnerable group and she was not aware of them being consulted about transgender women being housed in women’s prisons.

##### Regulations and policies governing prison placement

* 1. The Corrections Regulations 2005 and the Prison Operations Manual contain detailed rules about placement of prisoners into male and female prisons. Male and female prisoners must be detained in separate prisons or in separate quarters of the same prison.[[1295]](#footnote-1296)
  2. The regulations state that, “[w]here there is doubt about whether a prisoner is male or female”, the chief executive of Ara Poutama Aotearoa | Department of Corrections must determine whether the person is a male or female prisoner for the purposes of prison placement.[[1296]](#footnote-1297) We understand that, in practice, an initial determination as to prison placement will always occur when a prisoner is transgender.
  3. The regulations set out a long and inclusive list of matters the chief executive may consider when making this determination. The list includes: the sex a prisoner has nominated; their birth certificate; any information provided by the prisoner about whether and, if so, for how long, the prisoner has lived as a person of the nominated sex; the safety and wellbeing of the transgender prisoner and other prisoners; and the security of the prison.[[1297]](#footnote-1298)
  4. Other legislative provisions provide relevant context. For example, the purpose of the corrections system is “to improve public safety and contribute to the maintenance of a just society”, including by ensuring that custodial sentences are “administered in a safe, secure, humane, and effective manner”.[[1298]](#footnote-1299) A guiding principle of the corrections system is that offenders should be treated fairly, including by taking decisions about them in a fair and reasonable way and ensuring access to an effective complaints procedure.[[1299]](#footnote-1300)
  5. Many prisoners pose safety risks to themselves and others. We understand that the Department of Corrections has numerous tools available to it to manage those risks. These include: security classification; a risk assessment process to determine whether a prisoner is suitable for cell sharing and, if so, who they may be compatible to share a cell with; and the use of segregation.
  6. In the 2023/24 year, there were a total of 91 transgender women in custody. Eleven of them were housed in a women’s prison.[[1300]](#footnote-1301) The Department of Corrections said the prison population fluctuates on a daily basis and, on average, it manages around 35 transgender women at any one time.[[1301]](#footnote-1302) As at 30 September 2023, there were four transgender men in prison who were all housed in a women’s prison.[[1302]](#footnote-1303)

##### Challenge by a transgender prisoner about prison placement

* 1. If a transgender prisoner decided to challenge their prison placement under Part 1A of the Human Rights Act, they would have to prove they were treated differently from other prisoners on the basis of their gender identity and that this caused a material disadvantage. If the prisoner could establish discrimination, the government would then have the opportunity to demonstrate this was justified.
  2. The tribunal or court would likely need to consider the balance between the right to freedom from discrimination and the need to ensure the safety and wellbeing of all prisoners. It would need to consider any evidence provided by the Department of Corrections as to why it considered the plaintiff could not be safely housed in a prison that aligned with their gender identity and whether it had considered alternative options for managing any risks that would arise. The outcome of any case would likely be very dependent on the particular facts of the case and the evidence presented.
  3. There are examples overseas of transgender prisoners bringing discrimination claims to challenge policies or decisions that required them to be housed in line with their sex assigned at birth. Factors that have been relevant to whether cases have succeeded include:
     + 1. whether the prison’s policies enabled consideration of the individual circumstances of transgender prisoners;[[1303]](#footnote-1304) and
       2. whether the decision about prison placement was justified on the basis of safety and security or the needs of cisgender female prisoners.[[1304]](#footnote-1305)
  4. Although the reforms we propose will clarify that a Part 1A complaint is available to challenge a prison placement decision in an appropriate case, other complaints mechanisms already exist. The Corrections Regulations state that a transgender prisoner can seek a review of the Department of Corrections’ determination of their placement into a male or female prison unless they:[[1305]](#footnote-1306)
     + 1. are serving a sentence or are on remand for a serious sexual offence against a person of the prisoner’s nominated sex; or
       2. have served a sentence of imprisonment for a serious sexual offence against a person of the prisoner’s nominated sex in the last seven years.
  5. Additional complaints mechanisms that would also be available would include the Department of Corrections’ internal complaints procedures,[[1306]](#footnote-1307) Te Tari Tirohia | Office of the Inspectorate[[1307]](#footnote-1308) and Tari o Te Kaitiaki Mana Tangata | Office of the Ombudsman. A prisoner might also be able to seek judicial review in Te Kōti Matua | High Court.[[1308]](#footnote-1309)

##### Challenge by a cisgender female prisoner about prison placement or safety

* 1. If a cisgender female prisoner had concerns about her prison placement or her safety such as a concern about a transgender woman being placed in the same prison, she would have the same range of complaints mechanisms available to her as a transgender prisoner. This would include utilising the prison’s internal complaints procedures or complaining to the Office of the Inspectorate or the Office of the Ombudsman.
  2. The prisoner could also bring a judicial review based on the right to be free from discrimination, other rights in the NZ Bill of Rights (such as the right to be treated with dignity while deprived of liberty) or general principles of administrative law.[[1309]](#footnote-1310) If she did so, the rights of transgender prisoners to be free from discrimination might be one factor the court or tribunal would need to consider, but it would still need to assess the claim based on all other relevant facts, law and evidence. That would include the rights of the prisoner who brought the claim and any relevant evidence about risks to safety and security.
  3. A cisgender female prisoner would also have the option of bringing a Part 1A claim alleging sex discrimination. If a court or tribunal was considering such a claim, it would likely need to assess whether cisgender female prisoners were treated differently and worse than cisgender male prisoners. We are aware of a United Kingdom case that alleged that the government’s policy on placement of transgender prisoners was indirect sex discrimination. The case was unsuccessful on the particular facts because the Court was not satisfied the policy had a disproportionate negative effect on cisgender female prisoners compared to cisgender male prisoners.[[1310]](#footnote-1311)
  4. If discrimination was proved, the court or tribunal would also need to consider whether the discrimination was justified. The rights and interests of transgender prisoners would, again, be relevant to that assessment but would need to be considered alongside all other relevant facts, law and evidence.[[1311]](#footnote-1312)
  5. In sum, adding new grounds to section 21 would not provide an automatic entitlement for transgender prisoners to be placed in a particular prison. Rather, it would provide an additional avenue by which transgender prisoners could raise concerns about prison placement. Cisgender female prisoners would have similar avenues available to raise concerns about prison placement. When considering any complaint about prison placement, a court or tribunal would need to balance all relevant rights and interests.

#### Access to gender-affirming health care

* 1. A number of people with whom we consulted had concerns about access to gender-affirming health care such as gender-affirming surgery and hormone therapy.
  2. Some referred to difficulties in accessing such care, including:
     + 1. prerequisites (such as being required to take hormones for a certain length of time before having surgery or having to undergo a psychological assessment);
       2. difficulty accessing fertility treatment as a transgender person;
       3. difficulty in accessing hormone therapy; and
       4. transgender health care being treated as elective and not urgent.
  3. Other submitters thought that gender-affirming health care is too readily available in Aotearoa New Zealand. For example, a number of submitters expressed concern about the long-term health effects of puberty blockers on children and young people.
  4. As noted earlier, some submitters seemed to be concerned that adding new grounds of discrimination to section 21 of the Human Rights Act would create an entitlement to certain forms of gender-affirming care (such as puberty blockers) regardless of the circumstances or the evidence.
  5. If a person who is transgender or non-binary or who has an innate variation of sex characteristics considers that a law or government policy regarding access to gender-affirming health care is discriminatory, they could seek to challenge that law or policy under Part 1A of the Human Rights Act.[[1312]](#footnote-1313)
  6. In some overseas jurisdictions, plaintiffs have brought discrimination cases that challenge laws restricting particular forms of gender-affirming health care or the failure to fund certain procedures. Whether cases have been successful have depended on a range of factors such as whether the person can establish that a person of a different sex or gender identity would have had treatment funded in similar circumstances.[[1313]](#footnote-1314) Overseas cases show it can be challenging to point to an appropriate comparator who is in similar circumstances except for the characteristic said to give rise to the discrimination.[[1314]](#footnote-1315)
  7. If a case about access to gender-affirming health care was brought in Aotearoa New Zealand under Part 1A, a plaintiff would need to establish they were treated differently on the basis of gender identity and that this caused disadvantage. The government would then have the opportunity to establish that any discrimination was justified under section 5 of the NZ Bill of Rights. We expect that medical evidence and clinical considerations would be central to the court or tribunal’s analysis. It may be that, as Professor Paul Rishworth KC submitted, the court or tribunal would give some deference to medical opinion.[[1315]](#footnote-1316)
  8. We are satisfied that the tests that apply under Part 1A would enable relevant rights and interests to be appropriately balanced.

CHAPTER 19

# Implications for other laws

## Introduction

* 1. In this chapter, we discuss the implications of the reforms we propose of section 21 of the Human Rights Act 1993 for other laws that rely on the prohibited grounds of discrimination in section 21 to dictate the scope of certain rights or obligations.[[1316]](#footnote-1317)
  2. Our task in this review is to consider reforms of the Human Rights Act. 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. Nevertheless, we also need to consider the implications of our review for other laws to satisfy ourselves that reform is appropriate.
  3. In this chapter, we:
     + 1. examine the Employment Relations Act 2000 and recommend one amendment to avoid incoherence and ambiguity;
       2. consider the implications of reforming section 21 of the Human Rights Act for other legislation that relies on the grounds in section 21 to dictate the scope of rights and obligations; and
       3. outline some feedback we received about the implications of the reform for other legislation that does not refer to the Human Rights Act.
  4. We do not address in this chapter laws that refer to the HumanHuman Rights Act but in ways that will not be affected by this review.[[1317]](#footnote-1318) We mentioned laws of this kind in the Issues Paper but did not receive any submissions on them.[[1318]](#footnote-1319)
  5. In the Issues Paper, we also identified some laws that contain their own list of group characteristics (similar to section 21) but do not refer to the Human Rights Act.[[1319]](#footnote-1320) The reforms we propose do not have direct implications for these laws. However, the agencies responsible for administering these statutes may wish to review them for consistency and currency in the light of our recommendations.

## Employment Relations Act 2000

* 1. The Employment Relations Act includes mechanisms to resolve employment relationship problems and for employees to take personal grievances against employers. One of the situations in which an employee can bring a personal grievance is where they have experienced discrimination.[[1320]](#footnote-1321)
  2. Section 104 says that, to be covered, discrimination must be “by reason directly or indirectly” of one of the prohibited grounds of discrimination in section 105 of the Employment Relations Act.[[1321]](#footnote-1322) Section 105(1) then begins:

1. The prohibited grounds of discrimination referred to in section 104 are the prohibited grounds of discrimination set out in section 21(1) of the Human Rights Act 1993, namely—
   1. This is followed by a list of all the grounds in section 21(1) of the Human Rights Act.
   2. The Employment Relations Act therefore provides a parallel set of remedies to the Human Rights Act for employees who experience workplace discrimination.[[1322]](#footnote-1323) Instead of complaining to Te Kāhui Tika Tangata | Human Rights Commission (and, subsequently, Te Taraipiunara Mana Tangata | Human Rights Review Tribunal), they can choose to lodge a personal grievance with Te Ratonga Ahumana Taimahi | Employment Relations Authority.[[1323]](#footnote-1324)

### Need for an amendment to section 105(1) of the Employment Relations Act

* 1. If new grounds are added to section 21 of the Human Rights Act, a consequential amendment to section 105(1) of the Employment Relations Act will be needed. Otherwise, there would be an internal inconsistency in section 105(1). It would refer to the “prohibited grounds of discrimination set out in section 21(1)” but then cite an incomplete list of grounds.
  2. In the Issues Paper, we suggested that section 105(1) could be amended by adding any new grounds of discrimination that result from this review to the list of grounds in section 105(1). We received few submissions on this point. There was general agreement that the Employment Relations Act would require amendment to avoid internal inconsistency. For example, Te Pūkenga Here Tikanga Mahi | Public Service Association said that, if section 105 was not amended, this could create issues for employees wanting to bring claims (such as in relation to standing and jurisdiction) and this could compound access to justice issues. The handful of submitters who said the Employment Relations Act should not be amended expressed general opposition to reform of the Human Rights Act rather than specific opposition to consequential amendments to the Employment Relations Act.
  3. As noted above, we would only recommend amendments to other legislation as part of this review if significant incoherence or ambiguity would otherwise result. We consider that the internal incoherence that would be introduced into section 105(1) of the Employment Relations Act by the reforms we propose meets this standard.
  4. However, adding the new grounds we propose to the list in section 105(1) is not the only way to address this internal inconsistency. Alternatives include amending section 105(1) so that it:
     + 1. refers to the prohibited grounds of discrimination in section 21 but no longer replicates the list of prohibited grounds;[[1324]](#footnote-1325) or
       2. no longer refers to the “prohibited grounds of discrimination set out in section 21 of the Human Rights Act 1993” and, instead, contains a freestanding list (in which case, it would be a policy choice whether to include the new grounds we propose in that list).
  5. Given we have not been asked to review the Employment Relations Act, how best to address the internal inconsistency in section 105(1) is a policy question that is best left to Hīkinga Whakatutuki | Ministry of Business, Innovation and Employment as the agency responsible for administering that Act. For that reason, we recommend that section 105(1) is amended to address the internal inconsistency that would result from the reforms of section 21 we propose but do not specify how that should be done.
  6. That said, we do not think an amendment that results in a discrepancy between the prohibited grounds in the Human Rights Act and the Employment Relations Act is desirable. Currently, all the prohibited grounds of discrimination in section 21 are listed in section 105, implying a conscious decision to ensure the grounds of discrimination in the two statutes match. We do not consider that anything in our proposals for reform of the Human Rights Act should result in a different approach being taken.

### Implications of reform

* 1. Assuming that section 105(1) is amended to ensure that the new prohibited grounds we propose for section 21 of the Human Rights Act are also bases for discrimination under the Employment Relations Act, this would clarify that an employee could take a personal grievance based on discrimination on these grounds. The basis for such a claim would be no different from the basis on which the person could complain to the Human Rights Commission and Human Rights Review Tribunal under the Human Rights Act. However, the personal grievance provisions in the Employment Relations Act would be available as an alternative avenue of complaint.
  2. In Chapters 9, 11 and 13, we recommend several amendments to the employment exceptions in Part 2 of the Human Rights Act. These would also flow through to the Employment Relations Act as that Act imports all but one of the Part 2 employment exceptions.[[1325]](#footnote-1326)
  3. Few submitters directly addressed the implications of importing new prohibited grounds into the Employment Relations Act. The Rainbow Support Collective submitted that an advantage of amending the Employment Relations Act to reflect new grounds in the Human Rights Act would be to send a clearer message to employers that discrimination against people who are transgender or non-binary or who have an innate variation of sex characteristics is prohibited. On the other hand, Kia Rangona te Kōrero | Free Speech Union described amendments to the Employment Relations Act as one of its “three key concerns” relating to reform of section 21 of the Human Rights Act. It was concerned that importing new grounds into the Employment Relations Act would:

1. … shut down the discourse necessary for decision making on sex and/or gender issues in the workplace and compel employers to conform to particular ideologies and belief systems, and further, to enforce this conformation to particular ideologies and belief systems on their other employees.
   1. We explored in Chapter 6 the implications of adding new grounds to section 21 of the Human Rights Act for the freedom of expression of people who have gender-critical views, including in an employment context. For the reasons explained in Chapter 6, we are satisfied that the Free Speech Union’s concerns do not make reform of section 21 inappropriate.
   2. Submitters did not identify any other reasons why the implications of reform for the Employment Relations Act are undesirable and we have not identified any from our own research. We think it is appropriate that employees who experience workplace discrimination based on the new grounds we propose should have the same avenues of complaint available to them as employees who experience discrimination on other grounds.
   3. Finally, Community Law Centres o Aotearoa and the Rainbow Support Collective expressed concerns about new provisions in the Employment Relations Act that allow employers to dismiss employees during a trial period of 90 days without reason.[[1326]](#footnote-1327) Employees in this situation are still entitled to bring a personal grievance that is based on discrimination.[[1327]](#footnote-1328) The concern of submitters was that these provisions could make it harder to prove discrimination because the employer does not need to give a reason for the termination.
   4. It is beyond the scope of our review to make recommendations for reform of the Employment Relations Act in relation to 90-day trials.

### Recommendation and wording

1. Section 105 of the Employment Relations Act 2000 should be amended to address the internal inconsistencies that result from adding new grounds to section 21 of the Human Rights Act 1993 (Recommendations 1 to 3).
   1. For reasons we outlined above, we recommend that section 105 of the Employment Relations Act 2000 should be amended to address the internal inconsistencies that result from adding the new grounds we propose to section 21. We do not make any recommendation about the way such an amendment should be worded.

## Other primary legislation that incorporates the section 21 grounds

* 1. We have identified seven other pieces of primary legislation that rely on the prohibited grounds of discrimination in section 21 of the Human Rights Act to dictate the scope of certain rights and obligations.

### Corrections Act 2004

* 1. The Corrections Act 2004 permits a prison manager to withhold a prisoner’s mail if the manager believes on reasonable grounds that the mail may promote or encourage hostility to a group on one or some of “the grounds specified in section 21 of the Human Rights Act 1993”.[[1328]](#footnote-1329)
  2. If section 21 is amended as we propose, this would clarify that a prison manager could withhold a prisoner’s mail if they believe on reasonable grounds that the mail may promote or encourage hostility to a group on the basis of their gender identity or having an innate variation of sex characteristics. As the government has stated that the ground of sex already covers discrimination on these bases, this may be how officials already interpret the relevant provision.
  3. We did not receive any feedback from submitters on this provision. We have not identified any particular implications of the review for this provision that would lead us to consider that reform of section 21 is inappropriate. Nor have we identified any incoherence or ambiguity that might result from our proposed reforms.

### Education and Training Act 2020

* 1. The Education and Training Act 2020 refers to the Human Rights Act in two places:
     + 1. Section 127 sets out the primary objectives of boards when governing state and state integrated schools. One of these objectives is to ensure that the school “gives effect to relevant student rights set out in this Act, the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993”.[[1329]](#footnote-1330)
       2. Section 218 enables the establishment of local dispute resolution panels to resolve serious disputes between students and state schools. A “serious dispute” includes a dispute about “any racism or other form of discrimination that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993 experienced by the student while at the school”.[[1330]](#footnote-1331)
  2. If section 21 of the Human Rights Act is amended as we propose, this would clarify that a board’s obligations include giving effect to students’ rights to be free from discrimination on the basis of their gender identity or having an innate variation of sex characteristics. It would also clarify that such discrimination is a “serious dispute” for the purposes of the Education and Training Act.
  3. Dispute resolution panels are not yet in operation.[[1331]](#footnote-1332) However, if they are established, this would provide an alternative mechanism for students to bring complaints about discrimination on the basis of their gender identity or having an innate variation of sex characteristics.
  4. In the Issues Paper, we said our preliminary conclusion was that amending section 21 to add new grounds of discrimination would not have significant implications for the Education and Training Act.[[1332]](#footnote-1333) This remains our view. School boards already have a clear duty to give effect to students’ rights and create inclusive environments. For example, the primary objectives of school boards include ensuring that the school is a “physically and emotionally safe place for all students and staff”, taking “all reasonable steps to eliminate racism, stigma, bullying, and other forms of discrimination within the school” and ensuring the school “is inclusive of, and caters for, students with differing needs”.[[1333]](#footnote-1334)
  5. School boards must also have particular regard to any statement of national education and learning priorities issued by the Minister of Education.[[1334]](#footnote-1335) The current Statement (which expires in November 2025) refers to creating “a safe and inclusive culture where diversity is valued and all learners/ākonga and staff, including those who identify as LGBTQIA+ … feel they belong”.[[1335]](#footnote-1336)
  6. We received very few submissions on the implications of the review for the Education and Training Act. Some submitters suggested that adding new grounds to the Human Rights Act would positively influence how the Education and Training Act operates. InsideOUT Kōaro thought amending the Human Rights Act would strengthen schools’ obligations to provide safe environments for all students. The Wellington Community Justice Project — Law Reform Team pointed to the potential for students to access dispute resolution processes under the Education and Training Act if discrimination occurred. Some submitters who responded to this question were opposed to reform of section 21 in general but did not elaborate on any implications for the Education and Training Act.
  7. In the feedback that we received in a spreadsheet forwarded to us by the Free Speech Union, one of the form text paragraphs gave reasons for opposing reform of section 21 of the Human Rights Act that related to implications for the Education and Training Act.[[1336]](#footnote-1337) The paragraph stated:

1. Refusal to use language which affirmed a person’s self-declared gender identity would amount under the Education and Training Act 2020 to discrimination. Teachers refusing to comply on the basis of individual conscience or religious belief could lose their jobs, their professional registration and even face criminal prosecution.
   1. In Chapter 6, we explained that discrimination provisions in the Human Rights Act must be interpreted and applied so as to avoid incompatibility with the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights). That analysis applies by analogy to the interpretation and application of discrimination provisions in the Education and Training Act.
   2. As we also explained in that chapter, we do not think that adding new prohibited grounds of discrimination to section 21 will add greatly to the professional and ethical obligations that teachers already have to their students. We stress that neither Act contains criminal offence provisions of the kind the Free Speech Union form text implies.
   3. For these reasons, we are satisfied that submitters’ concerns about conscience and belief do not make reform of section 21 inappropriate.
   4. We have not identified any other implications of the review for the Education and Training Act that would lead us to consider that reform of section 21 is inappropriate. Nor have we identified any incoherence or ambiguity that might result from our proposed reforms.

### Films, Videos, and Publications Classification Act 1993

* 1. The Films, Videos, and Publications Classification Act 1993 establishes a system for classifying and rating publications such as films, books and commercial video on-demand content. Publications may be classified as:
     + 1. objectionable (in which case they are illegal);
       2. restricted (in which case they may be restricted to certain ages or classes of people and receive a rating such as R16 or R18); or
       3. unrestricted (in which case they may receive a rating such as G, PG or M).
  2. A number of factors must be taken into consideration in classifying and rating publications. One of these is the extent and degree to which, and the manner in which, the publication represents certain groups as inherently inferior by reason of “a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993”.[[1337]](#footnote-1338)
  3. If new grounds are added to section 21 of the Human Rights Act, this would clarify that the characteristics of gender identity and having an innate variation of sex characteristics are relevant to this inquiry. Te Mana Whakaatu | Classification Office already believes that to be so based on the Crown Law opinion that we discussed in Chapter 4. However, the Classification Office acknowledged in its submission to us that it would have to reconsider its position if a New Zealand court were to find otherwise.
  4. In the Issues Paper, we said we were not aware of any particular implications of reform for the Films, Videos, and Publications Classification Act but we invited feedback from submitters.[[1338]](#footnote-1339)
  5. We heard from one submitter that reform of section 21 of the Human Rights Act could inhibit freedom of expression by enabling films that express gender-critical views or question gender ideology to be censored. We consider the impact of this reform on the censorship of gender-critical views under the Films, Videos, and Publications Classification Act will be very small. An additional requirement before publications can only be classified as objectionable under that Act is that they must relate to “matters such as sex, horror, crime, cruelty or violence”.[[1339]](#footnote-1340)
  6. For this reason (as well as the fact that it already interprets its legislation consistently with the Crown Law opinion), the Classification Office said in its submission that “very few, if any, additional publications would be classified as objectionable” as a result of adding new grounds to section 21.
  7. We have not identified any other implications of the review for the Films, Videos, and Publications Classification Act that would lead us to consider that reform of section 21 is inappropriate. Nor have we identified any incoherence or ambiguity that might result from of our proposed reforms.

### Integrity Sport and Recreation Act 2023

* 1. The Integrity Sport and Recreation Act 2023 established Te Kahu Raunui | Sport Integrity Commission.[[1340]](#footnote-1341) One of the Sport Integrity Commission’s objectives is preventing and responding to potential “threats to integrity” in sport and organised physical recreation.[[1341]](#footnote-1342) A threat to integrity includes “discrimination that is unlawful under Part 2 of the Human Rights Act 1993” that occurs in sport or organised physical recreation.[[1342]](#footnote-1343)
  2. The Sport Integrity Commission has developed the Code of Integrity for Sport and Recreation (Integrity Code), which sets minimum standards for sport and recreation organisations to help prevent threats to integrity.[[1343]](#footnote-1344) Minimum standard 1 requires organisations to prohibit participants from engaging or attempting to engage in behaviours that are a threat to integrity. This includes any form of discrimination that is unlawful under Part 2 of the Human Rights Act (taking into account any relevant Part 2 exceptions).[[1344]](#footnote-1345)
  3. If section 21 is amended as we propose, this would clarify that discrimination based on a person’s gender identity or having an innate variation of sex characteristics is covered by the definition of “threat to integrity”. It would allow complaints to be made through the Sport Integrity Commission’s dispute resolution process on this basis.[[1345]](#footnote-1346)
  4. We do not think this would have significant implications for the Integrity Sport and Recreation Act and the Integrity Code. We understand from its website that the Sport Integrity Commission already considers discrimination on the basis of gender identity to be unlawful.[[1346]](#footnote-1347) Further, unfair behaviour against people on the basis of their gender identity or sex characteristics is covered by other relevant provisions in the Integrity Sport and Recreation Act and the Integrity Code.[[1347]](#footnote-1348)
  5. In Chapter 15, we recommend a new competitive sports exception that applies to the new prohibited grounds we propose. If that recommendation is adopted, acts or omissions that are lawful under that new exception will not constitute discrimination under the Integrity Sport and Recreation Act or the Integrity Code. That is because, as noted, the Act and Code cover discrimination “that is unlawful under Part 2 of the Human Rights Act”.[[1348]](#footnote-1349)
  6. We have not identified any other implications of the review for the Integrity Sport and Recreation Act or Integrity Code that would lead us to consider that reform of section 21 is inappropriate. Nor have we identified any incoherence or ambiguity for the Act or Code that might result from our proposed reforms.

### New Zealand Bill of Rights Act 1990

* 1. The NZ Bill of Rights contains rights and freedoms that can be enforced against the three branches of government and against other people or bodies when they are performing a “public function, power or duty” conferred or imposed on them by law.[[1349]](#footnote-1350)
  2. Section 19(1) of the NZ Bill of Rights provides that: “Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.” If new grounds are added to section 21 of the Human Rights Act, this would clarify that discrimination that is based on a person’s gender identity or having an innate variation of sex characteristics is covered by section 19(1).
  3. As we explained in Chapter 18, discrimination that is in breach of the NZ Bill of Rights is also a breach of Part 1A of the Human Rights Act.[[1350]](#footnote-1351) A person who is a victim of such discrimination can therefore rely on Part 1A to access the Human Rights Act complaints mechanisms, being a complaint to the Human Rights Commission at first instance and, ultimately, a complaint to the Human Rights Review Tribunal. If the complaint is successful, the Human Rights Review Tribunal can award a range of statutory remedies.[[1351]](#footnote-1352) We explored the implications of the reform we propose for Part 1A of the Human Rights Act in Chapter 18 and concluded those implications were appropriate.
  4. People who experience public sector discrimination based on their gender identity or having an innate variation of sex characteristics would also be able to take proceedings in Te Kōti Matua | High Court, relying directly on the NZ Bill of Rights itself. For example, they might seek judicial review of administrative action, take a case for public law compensation[[1352]](#footnote-1353) or seek a non-binding declaration that legislation is inconsistent with the NZ Bill of Rights.[[1353]](#footnote-1354) High Court procedures may be more expensive and less accessible than the Human Rights Act complaints mechanisms but, nevertheless, some complainants may prefer to rely on them.[[1354]](#footnote-1355)
  5. We received little feedback from submitters about the impact of reform on the NZ Bill of Rights itself. A small number of submitters indicated it would be beneficial to have a choice as to how to pursue complaints of discrimination against government. Conversely, a small number of submitters expressed concern that the reform would amount to a change or amendment to the NZ Bill of Rights.
  6. We think it is appropriate that people who experience public sector discrimination based on their gender identity or having an innate variation of sex characteristics should have the same access to NZ Bill of Rights remedies as people who experience discrimination on other grounds. Submitters did not identify any particular reasons why this would be inappropriate, and we have not identified any from our own research.
  7. When the NZ Bill of Rights was enacted in 1990, the right to freedom from discrimination in section 19 contained a freestanding list of grounds of discrimination (albeit one that matched the grounds then available under New Zealand anti-discrimination statutes).[[1355]](#footnote-1356) In 1993, when the Human Rights Act was enacted, section 19 was amended to refer instead to “the grounds of discrimination in the Human Rights Act 1993”.[[1356]](#footnote-1357) The wording of section 19 therefore reflects a deliberate policy choice that its scope should expand automatically if new grounds of discrimination are added to the Human Rights Act.

### Residential Tenancies Act 1986

* 1. Section 12 of the Residential Tenancies Act 1986 prohibits the following in respect of the grant, continuance, extension, variation, termination or renewal of a tenancy agreement where done “in contravention of the Human Rights Act”:
     + 1. discriminating against any person;
       2. as a landlord, instructing a person to discriminate; and
       3. as a landlord, stating an intention to discriminate.
  2. A person who has experienced discrimination under the Residential Tenancies Act can bring a claim to the Tenancy Tribunal.[[1357]](#footnote-1358)
  3. If new grounds are added to section 21 of the Human Rights Act, this would clarify that a person who is discriminated against in a residential tenancy in breach of section 53 of the Human Rights Act on the basis of their gender identity or having an innate variation of sex characteristics can make a complaint to the Tenancy Tribunal. We are not recommending any reform of section 53 of the Human Rights Act itself.[[1358]](#footnote-1359) Therefore, the only implication of reform for the Residential Tenancies Act is the availability of new grounds.
  4. We do not consider this is a significant implication. Because the conduct would be unlawful under section 53 of the Human Rights Act, a complaint to the Human Rights Commission and Human Rights Review Tribunal would be available in any event.[[1359]](#footnote-1360)
  5. In feedback, some submitters said reform of the Human Rights Act would have positive implications for the Residential Tenancies Act. For example, some submitters, including InsideOUT Kōaro, told us that the ability to choose between two complaints mechanisms would be positive.
  6. A small number of submitters who opposed reform of the Human Rights Act also opposed any reform that would affect the Residential Tenancies Act. However, none provided specific reasons for this.
  7. We consider it appropriate that people who experience discrimination in residential tenancies based on their gender identity or having an innate variation of sex characteristics should have the same avenues of complaint available to them as people who experience discrimination on other grounds prohibited by the Human Rights Act.
  8. We have not identified any other implications of the review for the Residential Tenancies Act that would lead us to consider that reform is inappropriate. Nor have we identified any incoherence or ambiguity that might result from our proposed reforms.
  9. In Chapter 11, we recommend amendments to the accommodation exception in section 55 of the Human Rights Act. There are no implications of reform for the Residential Tenancies Act flowing from this recommendation as the types of accommodation to which this exception applies are not covered by the Residential Tenancies Act.
  10. Finally, some submitters, including Community Law, InsideOUT Kōaro and the Rainbow Support Collective, expressed concern about proposed amendments to the Residential Tenancies Act (that have since been passed into law) that allow landlords to terminate a periodic tenancy of any length with ‘no cause’ by providing 90 days’ notice.[[1360]](#footnote-1361) Submitters were worried that these powers could be used by landlords to evict people on the basis of a prohibited ground of discrimination. Some submitters thought that allowing 90-day ‘no cause’ termination of tenancies would undermine discrimination protections in the Human Rights Act.
  11. As with the issue of 90-day notice periods in employment (which we discussed above), this issue is out of scope of this review.

### Terrorism Suppression (Control Orders) Act 2019

* 1. Under the Terrorism Suppression (Control Orders) Act 2019, the High Court can make control orders placing restrictions on people to prevent terrorism and uphold public safety. Generally, no one can publish identifying details about a person who is subject to a control order or an application for a control order.[[1361]](#footnote-1362) However, a court can make an order permitting publication. When deciding whether to permit publication, the court must consider whether this may may lead to the publicising of views that would promote or encourage hostility towards a group on one or some of “the grounds specified in section 21 of the Human Rights Act”.[[1362]](#footnote-1363) This is because of a risk that publishing a person’s name or identifying details could encourage criminal acts or promote terrorism.[[1363]](#footnote-1364)
  2. If section 21 is amended as we propose, this would clarify that a judge could consider whether publishing the name of someone subject to a control order would promote or encourage hostility towards a group on the basis of their gender identity or having an innate variation of sex characteristics.
  3. We did not receive any feedback from submitters on the Terrorism Suppression (Control Orders) Act. We have not identified any particular implications of the review for this legislation that would lead us to consider that reform is inappropriate. Nor have we identified any incoherence or ambiguity that might result from our proposed reforms.

## Secondary legislation that incorporates the section 21 grounds

* 1. We have identified two pieces of secondary legislation that rely on the prohibited grounds of discrimination in section 21 of the Human Rights Act to dictate the scope of certain rights and obligations.

### Code of Health and Disability Services Consumers’ Rights

* 1. The Code of Health and Disability Services Consumers’ Rights (the Code) states the right of health and disability consumers to be free from discrimination that is unlawful under Part 2 of the Human Rights Act.[[1364]](#footnote-1365)
  2. If new grounds are added to section 21 of the Human Rights Act as we propose, this would clarify that consumers have a right under the Code not to be discriminated against when using health and disability services on the basis of their gender identity or because they have an innate variation of sex characteristics. Consumers would have this right under Part 2 of the Human Rights Act in any event, but the Code would enable consumers to access a different complaints mechanism.[[1365]](#footnote-1366)
  3. In practice, we doubt that clarifying that consumers have a right under the Code to be free from discrimination based on their gender identity or having an innate variation of sex characteristics would represent a significant change. This is because the Code already contains many other rights that require consumers to be treated with dignity and respect and in an ethical and professional manner.[[1366]](#footnote-1367)
  4. We received a small number of submissions about the implications of reform for the Code. One submitter suggested that amending section 21 would mean that people cannot choose a healthcare provider of their own sex for intimate procedures. Another submitter said there would be a conflict between sex-based and gender identity-based rights. They gave the example of a transgender woman wanting to be accommodated on a women’s ward in a hospital and another woman not wanting to share a ward with them. They pointed to the rights to privacy and to have services provided in a manner that respects the consumer’s dignity and independence,[[1367]](#footnote-1368) and queried whose rights would take precedence.
  5. We do not think amending the Human Rights Act would affect consumers’ rights under the Code because the Code places obligations and duties on providers, not consumers. Under the Code, consumers have the right to have services provided in a manner that respects their dignity and is consistent with their needs.[[1368]](#footnote-1369) Every consumer has the right to express a preference as to who will provide services and to have that preference met where practicable.[[1369]](#footnote-1370) A consumer can refuse services or withdraw consent to services at any time.[[1370]](#footnote-1371) Amending the Human Rights Act will not affect these rights.
  6. In Chapter 11, we discussed issues relating to accommodation, including shared accommodation such as hospitals. As we noted in that chapter, issues relating to hospital accommodation will often fall under Part 1A. To the extent they do not, they would fall under the shared accommodation exception that we discussed in that chapter. Differences of treatment that are permitted by that exception would not be in breach of the Code.
  7. We have recommended amendments to the Human Rights Act to clarify the circumstances in which the shared accommodation exception can be relied on to discriminate against a person based on their sex assigned at birth. We can see no separate implications for the Code relating to that recommendation (beyond those discussed in Chapter 11) that would make reform inappropriate.

### Lawyers’ Conduct and Client Care Rules

* 1. The Lawyers’ Conduct and Client Care Rules specify that lawyers must not engage in discrimination that is unlawful under the Human Rights Act or any other enactment.[[1371]](#footnote-1372) This simply restates obligations lawyers have under Part 2 of the Human Rights Act, but makes it clear these obligations are part of the expectations of professional conduct for lawyers. This would potentially open up different complaints mechanisms, for example, by allowing a person to complain about a lawyer’s conduct to Te Kāhui Ture o Aotearoa | New Zealand Law Society. The Rules also create some related procedural obligations.[[1372]](#footnote-1373)
  2. In the Issues Paper, we said we doubted adding new grounds to section 21 of the Human Rights Act would make much difference to lawyers’ obligations under the Rules. Lawyers are already prohibited from refusing instructions from someone based on their personal attributes, are required to treat people with respect and courtesy and are required to exercise their professional judgement solely for the benefit of their clients.[[1373]](#footnote-1374)
  3. In consultation, one submitter said lawyers should not be compelled to use preferred pronouns in cases where the sex of an involved party is relevant. In Chapter 6, we explored the circumstances in which a person might be held to be in breach of the Human Rights Act for refusing to use a person’s preferred pronouns. That same analysis applies in this context. For the reasons explained in Chapter 6, we are satisfied that this concern does not make reform of section 21 inappropriate.

## Feedback on implications for other laws

* 1. In the Issues Paper, some submitters raised with us potential implications of reform for other laws that do not make any reference to the Human Rights Act. We address these only briefly as none raise issues that we can address in this review.

### Care of Children Act 2004

* 1. One submitter said the Care of Children Act 2004 may be affected by the review. They said a child may “choose to leave” family members who accidentally deadname them or a parent may sever a relationship they have with a child or co-parent by forcing an expectation that the child or co-parent is not comfortable with.
  2. The reforms we propose would not have that effect. Family relationships are not covered by the Human Rights Act (except in the limited context of conversion practices, which is already part of New Zealand law). The Care of Children Act does not refer to the Human Rights Act, and we do not consider that the amendments we propose are likely to have any implications for the Care of Children Act.

### Harmful Digital Communications Act 2015

* 1. The Law Association of New Zealand submitted that the Harmful Digital Communications Act 2015 “does not cover the full scope of online harm that gender diverse individuals regularly experience”. This is because that Act focuses on digital communications that relate to and cause harm to individuals rather than content that is harmful to certain groups. The Law Association was concerned that the Harmful Digital Communications Act does not impose obligations on online platforms to proactively prevent online harm. It called for stronger regulation of online platforms “to better protect gender minorities from online harassment, misinformation, and hate speech”.
  2. We understand this was intended more as a comment on the Harmful Digital Communications Act than as a call for reform as part of this review. General review of other legislation is out of scope of this review.

### Legislation based on the gender binary

* 1. Some submitters said laws based on the “gender binary” should be amended to be gender neutral and more inclusive. This, too, is outside the scope of our review.[[1374]](#footnote-1375)

CHAPTER 20

# Other matters

## Introduction

* 1. In this final chapter, we discuss some other matters on which we sought or received feedback:
     + 1. whether reforms are needed of the provisions in the Human Rights Act 1993 that address the membership, powers and functions of Te Kāhui Tika Tangata | Human Rights Commission and the resolution of disputes under the Act;
       2. whether public education is needed alongside Human Rights Act reform;
       3. the use of gendered pronouns in the Human Rights Act; and
       4. the wording of a provision relating to pregnancy or childbirth.
  2. We recommend gendered pronouns be removed from the Human Rights Act. We also recommend minor changes to the wording of the provision relating to pregnancy and childbirth to ensure it applies to anyone who is pregnant or who is giving birth.
  3. We make no recommendations in relation to the other matters discussed in this chapter.

## Membership, powers and functions of the Human Rights Commission

* 1. Part 1 of the Human Rights Act outlines the membership, powers and functions of the Human Rights Commission (and of some associated officers). In the Issues Paper, we asked submitters whether these provisions are sufficient to protect the rights of people who are transgender or non-binary or who have an innate variation of sex characteristics. We said our preliminary research and engagement had not identified any specific provisions that required consideration in our review.
  2. Relatively few submitters commented on this point. Of those that did, some, including Community Law Centres o Aotearoa and Te Kāhui Ture o Aotearoa | New Zealand Law Society, said the membership, powers and functions of the Human Rights Commission were sufficient or that they were not aware of any issues. Some said the Part 1 provisions were insufficient but few identified any specific issues.
  3. We have not identified any law reform issues relating to the membership, powers and functions of the Human Rights Commission that could be addressed in this review. We discuss below some specific feedback we received.

### Functions of the Human Rights Commission

* 1. InsideOUT Kōaro suggested the primary functions of the Human Rights Commission should include a reference to rainbow populations.
  2. The Human Rights Commission’s statutory functions are expressed in relatively general terms.[[1375]](#footnote-1376) However, three subject matter areas are singled out for attention in section 5(1) of the Human Rights Act, which sets out the Human Rights Commission’s primary functions. They are: “racial equality and cultural diversity”; “equal employment opportunities”; and the rights of “persons with disabilities”.[[1376]](#footnote-1377)
  3. These areas of focus were added to the Human Rights Commission’s statutory functions in 2016 and reflect specific portfolios listed in section 8 of the Human Rights Act, which we discuss below. According to a departmental briefing on the amending legislation, the references to racial equality and cultural diversity and equal employment opportunities were added to reflect an existing statutory focus on these areas. Disability was added to recognise the Human Rights Commission’s formal role in monitoring implementation of the Convention on the Rights of Persons with Disabilities.[[1377]](#footnote-1378) The subsequent departmental report on the Bill observed these three areas also generate the most complaints.[[1378]](#footnote-1379)
  4. We are not in a position to determine that the new grounds we propose should be singled out in the Human Rights Commission’s statutory functions when other grounds have not been. The issue of which grounds should be reflected in the Human Rights Commission’s statutory functions would be better considered as part of a broader review of the Act.
  5. In the meantime, the Human Rights Commission’s statutory functions are sufficiently broad to allow it to address issues of concern to people who are transgender or non-binary or who have an innate variation of sex characteristics and it already carries out work on these issues.[[1379]](#footnote-1380) In its submission to us, the Human Rights Commission said its work on rainbow rights includes responsive policy work, advocacy, interventions in legal cases and work in relation to the Conversion Practices Prohibition Legislation Act 2022. It did not suggest any amendments were required to its functions to enable it to promote the rights of people who are transgender or non-binary or who have an innate variation of sex characteristics.

### Appointment process for human rights commissioners

* 1. Some submitters raised issues about the appointment of human rights commissioners. Some were concerned that people with anti-transgender views could be appointed as human rights commissioners and said people who are transgender or non-binary or who have an innate variation of sex characteristics needed to have confidence in the Human Rights Commission. One said there should be a requirement for people at the Human Rights Commission to understand the issues facing these communities.
  2. Speak Up for Women expressed concern about the direction of the Human Rights Commission. It said “members should be impartial and free of any conflicts of interest and should not be promoting or protecting one group at the expense of another”.
  3. Human rights commissioners are appointed by the Governor-General on the recommendation of the Minister of Justice.[[1380]](#footnote-1381) Section 11 of the Human Rights Act sets out the matters that the Minister must have regard to when making a recommendation, including the need for commissioners to have knowledge of or experience in:
     + 1. the different matters likely to come before the Human Rights Commission;
       2. cultural issues and the needs and aspirations (including life experiences) of different communities of interest; and
       3. human rights law.
  4. There are requirements in the Crown Entities Act 2004 and in public sector guidance that apply to commissioner appointments, including requirements about conflicts of interest.[[1381]](#footnote-1382) For the Human Rights Commission to remain accredited as a national human rights institution, the appointment process must also comply with international standards.[[1382]](#footnote-1383) These standards include guarantees of independence and pluralism.[[1383]](#footnote-1384)
  5. We have not identified any specific issues with the law on Human Rights Commission appointments that could be addressed in this review. The law already addresses conflicts of interest and the desirability of having relevant expertise. A specific requirement for expertise in relation to people who are transgender or non-binary or who have an innate variation of sex characteristics would be out of step with current provisions.

### Human Rights Commission portfolio areas

* 1. Some submitters, including InsideOUT Kōaro, Qtopia, Te Ngākau Kahukura and the Rainbow Support Collective, suggested the Human Rights Act should require the appointment of a designated human rights commissioner for rainbow communities.
  2. Section 8 of the Human Rights Act covers membership of the Human Rights Commission. It states the Human Rights Commission consists of a Chief Commissioner and three or four other commissioners. It says a commissioner must be appointed to lead the Human Rights Commission’s work in three priority areas: disability rights, equal employment opportunities and race relations. The Chief Commissioner can designate commissioners to lead work in other priority areas following consultation with the Minister of Justice and other commissioners. The intention of these provisions is to provide the Human Rights Commission with flexibility in allocating portfolio responsibilities while recognising the three areas that generate the most complaints.[[1384]](#footnote-1385)
  3. In its submission, the Human Rights Commission said it previously had a separate part-time commissioner whose main focus was the rights of rainbow people. More recently, a commissioner with other portfolios was designated to lead the Human Rights Commission’s work on rainbow rights, including the rights of people who are transgender or non-binary or who have an innate variation of sex characteristics. The Human Rights Commission did not comment in its submission on whether the Act should require a designated commissioner for rainbow communities.
  4. We do not make any recommendation for reform of section 8 of the Human Rights Act as it relates to commissioners’ portfolio responsibilities. The provision was intended to give the Human Rights Commission flexibility in deciding which issues to designate as priority areas. We do not think we are in a position to determine that the new prohibited grounds of discrimination we propose should be priority areas over and above other grounds that have not been singled out.

## Access to justice and dispute resolution

* 1. Parts 3 and 4 of the Human Rights Act establish processes for resolving complaints about breaches of the Act. People can complain about a breach of the Human Rights Act to the Human Rights Commission, which will help the parties to resolve the dispute such as by providing mediation services. If the complaint cannot be resolved, a person may choose to bring proceedings in Te Taraipiunara Mana Tangata | Human Rights Review Tribunal. Te Tari Whakatau Take Tika Tangata | Office of Human Rights Proceedings can provide free legal representation in some cases.[[1385]](#footnote-1386)
  2. The Tribunal can order a range of remedies, including damages, an order that the defendant take certain action or stop doing something and an order that the defendant undergo training.[[1386]](#footnote-1387)
  3. In the Issues Paper, we commented on how few complaints had been made to the Human Rights Commission by people who are transgender or non-binary or who have an innate variation of sex characteristics.[[1387]](#footnote-1388) We asked submitters whether they had any feedback on the implications of this review for the dispute resolution processes in Parts 3 and 4 of the Act.
  4. Several submitters said the lack of express protection for people who are transgender or non-binary or who have an innate variation of sex characteristics may be a barrier to making a complaint of discrimination. We agree for the reasons discussed in Chapter 4.
  5. Some submitters pointed to other barriers to making a complaint such as difficulties in proving discrimination, concerns about lack of privacy, inaccessible legal pathways, fear of retaliation and distrust of formal institutions. One submitter suggested complainants may not trust the Human Rights Commission or may want other avenues for redress.
  6. A few submitters said legislative change was needed to ensure the dispute resolution process is inclusive but generally did not provide specific suggestions for amendment.
  7. Some submitters made specific suggestions related to dispute resolution and access to justice. Te Ngākau Kahukura suggested there could be a review of the Human Rights Commission’s complaints and dispute resolution processes to ensure there are adequate and accessible pathways for people who are transgender or non-binary or who have an innate variation of sex characteristics. One submitter thought the existing remedies were insufficient for addressing the harm caused by discrimination.
  8. We have not identified any specific issues with the Human Rights Act’s complaints mechanisms that could be addressed in this review. The issues raised by submitters were either general ones (applying to all prohibited grounds) that would need to be considered on a broader review of the Act, issues inherent in the legal system or issues on which the Human Rights Act already has mechanisms or provisions.[[1388]](#footnote-1389)
  9. There may well continue to be barriers to making a complaint for people who are transgender or non-binary or who have an innate variation of sex characteristics, but we have not identified reforms of the Human Rights Act that could address these.
  10. The Human Rights Commission may wish to give further consideration to these issues and to whether there are specific barriers that could be addressed through its own processes.

## Education

* 1. Many submitters told us that public education would be an important part of any reform of section 21 of the Human Rights Act, with some suggesting the Human Rights Commission could have a role in this. For example, Te Ngākau Kahukura referred to the work of the Human Rights Commission following the Conversion Practices Prohibition Legislation Act 2022 in developing educational resources, providing specific complaints and disputes pathways and providing dedicated staffing to work with survivors, communities and community organisations.[[1389]](#footnote-1390)
  2. Some submitters made suggestions about particular types of education or guidance they thought would be important. For example:
     + 1. Gender Minorities Aotearoa said public understanding is needed of what harassment and sexual harassment against transgender people looks like and how to address it.
       2. Te Ngākau Kahukura said there is a need for ongoing social change, public education and professional development to support a shift among medical practitioners working with intersex people. It thought the Human Rights Commission should be resourced to support this.
       3. The Professional Association for Transgender Health Aotearoa said there should be national anti-discrimination initiatives to recognise gender diversity and reduce stigma, marginalisation and discrimination against transgender people.
       4. The Wellington Pride Festival thought there should be practical support and clear guidance for employers and service providers on their obligations.
       5. Speak Up for Women said a national education and awareness campaign is needed to inform the general public about sex-based rights and exceptions in law.
       6. Resist Gender Education said any amendments to the Human Rights Act and their implications should be widely advertised and explained to the general public.
  3. If the Human Rights Act is reformed as we recommend, we agree that it will be important to ensure members of the public are aware of these changes and understand their rights and obligations. The Human Rights Commission and other agencies with monitoring and enforcement roles in relation to discrimination may wish to consider what steps they can take to provide guidance and education.
  4. The Human Rights Commission is well placed to take a lead role. Its functions include promoting and protecting the observance of human rights and respect for human rights through education and publicity.[[1390]](#footnote-1391) Notably, it is also empowered to prepare and publish guidelines and voluntary codes of practice for compliance with the Human Rights Act.[[1391]](#footnote-1392) The Human Rights Commission may wish to consider whether the reforms generally, or any particular aspects of them, would benefit from such guidelines or voluntary codes. It may also wish to consider the list of suggestions from submitters set out above.
  5. Other agencies also have relevant responsibilities. As we discussed in Chapter 19, there are other laws that refer to the Human Rights Act, including the Employment Relations Act 2000 and the Residential Tenancies Act 1986. The agencies responsible for these laws, and other government agencies with a broader supporting role, may also wish to consider what public guidance and education they are able to provide.

## Gendered pronouns in the Human Rights Act

* 1. Some provisions in the Human Rights Act use the male and female gendered pronouns “him or her”, “his or her” or “he or she”.[[1392]](#footnote-1393) Some people who are transgender or non-binary or who have an innate variation of sex characteristics use different pronouns such as “they” or “them”.[[1393]](#footnote-1394) For that reason among others, we have considered whether it would be desirable to replace gendered pronouns in the Human Rights Act with gender-neutral language. There are already many provisions in the Act that use gender-neutral terms such as “applicant”, “complainant”, “party” or “aggrieved person”.[[1394]](#footnote-1395)
  2. We sought feedback from submitters on this issue. Feedback was divided, with some submitters supporting the use of gender-neutral language in the Human Rights Act and others opposing it.[[1395]](#footnote-1396) Submitters who supported the use of gender-neutral language said it would be more inclusive, would enhance accessibility, would make the Act more readable and would be consistent with our other recommendations. Submitters who opposed the use of gender-neutral language said the use of “they” and “them” to refer to a single person is confusing, that gendered pronouns reflect biological reality and that using gender-neutral language would undermine women’s rights,[[1396]](#footnote-1397) is ideological or virtue signalling or would violate the right to freedom of expression.[[1397]](#footnote-1398)

### Analysis and recommendations

* 1. We recommend that gendered pronouns in the Human Rights Act be replaced with gender-neutral language. This is consistent with the overall objective of this proposed reform, 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.
  2. Removing gendered pronouns from the Act is not strictly necessary to ensure legal coverage. Section 16(1) of the Legislation Act 2019 provides that: “Words denoting a gender include every other gender.”
  3. However, we agree with Associate Professor Selene Mize and Dr Eddie Clark, who said in their submissions that it would be incongruent for an Act that extends anti-discrimination protection to people who identify outside the gender binary to use binary pronouns that do not include them. Gender-neutral language is more inclusive and accessible, and this is particularly important in the context of human rights law — a point made by some submitters.[[1398]](#footnote-1399)
  4. Replacing gendered pronouns in the Human Rights Act with gender-neutral language would not result in any substantive change to the scope of respective provisions. We do not agree with the view expressed by some submitters that using gender-neutral language in the Human Rights Act will hurt women. It would simply signal more clearly that the Act’s protections extend to everyone. In order for the Human Rights Act to be effective, its language needs to clearly communicate who it applies to.[[1399]](#footnote-1400)

### Recommendation and wording

1. Male and female gendered pronouns “him or her”, “his or her” or “he or she” in the Human Rights Act 1993 should be replaced with gender-neutral language.
   1. For reasons we outlined above, we recommend that provisions in the Human Rights Act that use male and female gendered pronouns “him or her”, “his or her” or “he or she” should be amended to replace those pronouns with gender-neutral language. The technique or techniques that should be used to make the language in the Human Rights Act gender neutral is appropriately a matter for Te Tari Tohutohu Pāremata | Parliamentary Counsel Office to advise on. Therefore, while we recommend that gendered pronouns in the Act should be removed, we make no recommendation on how that should be achieved.
   2. Some submitters objected to “they” or “them” being used to describe singular persons on the basis that it causes confusion. Using “they” or “them” to describe singular persons is only one of a number of techniques that are available to ensure statutory language is gender neutral. Where it would cause ambiguity in the context of the particular provision, it can be avoided.[[1400]](#footnote-1401)
   3. We are aware that some people use gender-neutral pronouns other than they/them, sometimes known as neopronouns.[[1401]](#footnote-1402) However, we did not receive any submissions on this issue and its relevance for the wording of provisions in the Human Rights Act.

## Measures relating to pregnancy and childbirth — section 74

* 1. Section 74 of the Human Rights Act states:

1. **74** **Measures relating to pregnancy, childbirth, or family responsibilities**
   * 1. For the avoidance of doubt it is hereby declared that preferential treatment granted by reason of—
     2. (a) a woman’s pregnancy or childbirth; or
     3. (b) a person’s responsibility for part-time care or full-time care of children or other dependants—
     4. shall not constitute a breach of this Part.
   1. Although section 74(b) refers to “a person’s” responsibility for the care of children or dependants, section 74(a) refers to “a woman’s” pregnancy or childbirth. Most people who become pregnant and give birth are women. However, not all are. For example, the 2022 Counting Ourselves survey of people who are transgender or non-binary found that 3 per cent of transgender men and non-binary people assigned female at birth had been pregnant since identifying as transgender or non-binary.[[1402]](#footnote-1403)
   2. In the Issues Paper, we asked whether section 74 should be reworded to clarify that it applies to anybody who is pregnant or who is giving birth. For the reasons we set out below, we recommend this should occur.

### History, scope and rationale

* 1. Section 74 is based on a provision in the Human Rights Commission Act 1977 that enabled preferential treatment “by reason of a woman’s pregnancy or childbirth”.[[1403]](#footnote-1404) In the 1993 Act, this protection was extended to cover people who care for children or other dependants, possibly reflecting the addition of “family status” as a prohibited ground of discrimination.
  2. It is clear from its wording, its location in the Act and its legislative history that the rationale of section 74 is to facilitate positive discrimination.[[1404]](#footnote-1405)
  3. The types of preferential treatment that section 74 covers might include allowing a pregnant employee to work from home and to have time off for medical appointments, offering flexible working hours or a designated car park, parental leave entitlements, breastfeeding rooms in workplaces or malls, or providing bassinet seats on aeroplanes.
  4. There is nothing in the legislative history to explain the selection of the term ‘woman’ in the 1977 or 1993 Acts. At the time of the 1977 legislation (and perhaps also the 1993 legislation), the possibility of people who do not consider themselves women becoming pregnant may not have been contemplated.
  5. There is no case law that establishes whether section 74(a) enables preferential treatment of people who are pregnant other than women such as transgender men, people who identify outside the gender binary and men with innate variations of sex characteristics who are able to get pregnant.[[1405]](#footnote-1406) There is a strong argument that section 74(a) should be interpreted broadly and purposively to protect people in this situation.[[1406]](#footnote-1407) However, in the absence of case law, the position is not beyond doubt.

### Analysis and conclusions

* 1. Feedback on this issue was divided, with some submitters supporting reform of section 74 and others opposing it.[[1407]](#footnote-1408)
  2. Many submitters felt strongly that section 74(a) should only refer to a woman’s pregnancy or childbirth. Submitters were concerned that removing sex-based language erases women, their experiences and their rights. Speak Up for Women said it is concerned about the “loss of language that reflects women’s lived experiences” and that pregnancy “is in the domain of women, no matter how you identify”. Feminist Older Women Lobbyists said that “[r]efusing to use the word ‘woman’ in this context is a form of gross discrimination against the female body” and that “[b]lurring language in this way also obscures a more general derogation of women's bodies as the ‘producers’ of new life.”
  3. Some submitters thought that using gender-neutral language to describe women is demeaning and reduces women to their anatomy or bodily functions. For example, Feminist Older Women Lobbyists said that, while “women are often reduced to body parts”, men seldom are. One submitter said using gender-neutral language in relation to pregnancy could be potentially “dangerous” for women who have English as a second language.
  4. Some submitters suggested that amending section 74(a) is unnecessary because, as a matter of reality, pregnancy is a biological phenomenon that only women can experience. For example, Lesbian Resistance New Zealand said “only women get pregnant, only women give birth – regardless of what they call themselves.”[[1408]](#footnote-1409)
  5. We are aware of similar concerns being expressed in other contexts. For example, the Associate Health Minister has directed Te Whatu Ora | Health New Zealand to use “sex-specific language” when communicating about health issues and to avoid expressions such as “pregnant people”, “people with a cervix” or “individuals capable of childbearing”.[[1409]](#footnote-1410)
  6. We also received many submissions from people who wanted the language of section 74(a) to be more inclusive. Submitters said some transgender men, people who identify outside the gender binary and men with innate variations of sex characteristics can and do give birth. They said it is the capacity for pregnancy that is relevant, not sex or gender, and that people in this situation should be entitled to preferential treatment. The Professional Association for Transgender Health Aotearoa said this section is important in health care, where a person who is pregnant may need to be prioritised over others. It said all people who are pregnant should have the ability to access care.
  7. For the reasons outlined below, we have concluded that the language of section 74 should be amended.

#### Amendment does not remove protection for cisgender women

* 1. Women make up the majority of people who give birth. 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.[[1410]](#footnote-1411) Matters relating to pregnancy directly engage women’s human rights and raise issues that relate to the structural inequities that women face. It is important that the Human Rights Act continues to provide protections for women who are pregnant or giving birth.
  2. If section 74 is amended as we recommend, the provision will continue to apply to cisgender women. Part 2 obligation holders will still be able to provide cisgender women with preferential treatment by reason of their pregnancy or childbirth without breaching the Act. The amendment will simply ensure that preferential treatment can also be provided to others who are pregnant or giving birth.
  3. As noted above, some submitters said they particularly disliked gender-neutral language that refers to body parts such as “people with uteruses” or “people with a cervix”. Law reform on this issue can be achieved without using language of this kind. For example, the law could simply read:

1. For the avoidance of doubt, it is hereby declared that preferential treatment granted by reason of a person’s pregnancy, childbirth or responsibility for part-time care or full-time care of children or other dependants shall not constitute a breach of this Part.

#### Amendment would improve accessibility and certainty

* 1. Clarifying section 74 will enhance the accessibility of the Human Rights Act and provide greater certainty. While we think it is likely that section 74(a) would be interpreted to protect any pregnant person if the issue were to be litigated, this is not beyond doubt. Further, the fact the protection extends to people who are not women may not be obvious (for example) to an employer who is considering whether to give preferential treatment to a pregnant employee or to an employee who is wondering whether to ask for it.
  2. In a law about human rights, it is particularly important for people to know they are protected. The need for certainty and accessibility of the law on this issue is further accentuated by the fact that pregnant people who are transgender or non-binary experience particular barriers in accessing health care. One New Zealand report found that people who are transgender and who are pregnant had low expectations of care and sought to minimise contact with health services because of being misgendered and facing intrusive questions.[[1411]](#footnote-1412) A multi-country systematic review that analysed the pregnancy experiences of transgender and gender-diverse people found they often faced discrimination, and their poor mental health and wellbeing was exacerbated by negative experiences in health care and elsewhere.[[1412]](#footnote-1413)

#### Amendment would be consistent with the rationale underlying the provision

* 1. The rationale underlying section 74(a) is positive discrimination. Its central concern is to allow preferential treatment that is needed because a person is pregnant or giving birth. Clarifying that section 74(a) protects all people who are pregnant would be consistent with this positive discrimination rationale.
  2. The Human Rights Review Tribunal has said “the symptoms of pregnancy are fundamental to why protections have been put in place to protect pregnant women”.[[1413]](#footnote-1414) Many submitters told us that everyone who is pregnant and gives birth needs protection, regardless of their gender identity. We agree. Needs associated with pregnancy or childbirth exist whether or not the person who is pregnant identifies as a woman.

### Recommendation and wording

1. Section 74 of the Human Rights Act 1993 should be amended to clarify that it applies to anyone who is pregnant or who is giving birth.
   1. For reasons we outlined above, we recommend that section 74 be amended to clarify that it applies to anybody who is pregnant or who is giving birth. While the Parliamentary Counsel Office will be best placed to advise on wording to achieve this policy intent, we suggest it would be desirable, if possible, to avoid expressions that some people in the community find particularly offensive. We suggested earlier some possible wording that avoids those expressions.

APPENDIX 1

# List of organisations that submitted

1. Amnesty International Aotearoa New Zealand
2. Association of Proprietors of Integrated Schools
3. Backbone Collective
4. Burnett Foundation Aotearoa
5. Centre 401 Trust
6. Chinese Pride New Zealand
7. COMmunity
8. Community Law Centres o Aotearoa
9. Countering Hate Speech Aotearoa
10. DLA Piper New Zealand
11. Ethnic Rainbow Alliance
12. Ethos
13. Exercise New Zealand
14. Feminist Older Women Lobbyists
15. Financial Services Council of New Zealand
16. Gay Men's Sexual Health Research Group
17. Gender Minorities Aotearoa
18. Hohou Te Rongo Kahukura
19. Howick Ratepayers and Residents Association
20. ICONIQ Legal Advocates
21. Identify Survey
22. Ihi Aotearoa | Sport New Zealand
23. InsideOUT Kōaro
24. Intersex Aotearoa
25. Kia Rangona te Kōrero | Free Speech Union
26. Law Association of New Zealand
27. Lesbian Action for Visibility Aotearoa
28. Lesbian Resistance New Zealand
29. LGB Alliance
30. Mana Wāhine Kōrero
31. Mental Health Foundation of New Zealand
32. Meredith Connell's Rainbow Alliance
33. National Collective of Independent Women’s Refuges
34. Netball New Zealand
35. New Conservatives Party
36. New Zealand Council for Civil Liberties
37. New Zealand Ice Figure Skating Association
38. OutLine Aotearoa
39. Paekākāriki Pride
40. Professional Association for Transgender Health Aotearoa
41. Qtopia
42. Rainbow Greens
43. Rainbow Path
44. Rainbow Support Collective
45. Rainbow Wellington
46. Reality Check Radio
47. Resist Gender Education
48. Rotorua Chamber of Pride
49. Save Women's Sports Australasia
50. Sexual Wellbeing Aotearoa
51. Shine
52. Speak Up for Women
53. St Peter’s on Willis Social Justice Group
54. Te Aho Kawe Kaupapa Ture a ngā Wāhine | New Zealand Women's Law Journal
55. Te Ara Ahunga Ora | Retirement Commission
56. Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand
57. Te Kāhui Tika Tangata | Human Rights Commission
58. Te Kāhui Ture o Aotearoa | New Zealand Law Society
59. Te Kaunihera Wāhine o Aotearoa | National Council of Women of New Zealand
60. Te Mana Whakaatu | Classification Office
61. Te Ngākau Kahukura
62. Te Pūkenga Here Tikanga Mahi | Public Service Association
63. Te Tāhuhu o te Mātauranga | Ministry of Education
64. Te Whare Āwhina Mō Ngā Wāhine Puawai | Nelson Women's Centre
65. Tīwhanawhana Trust
66. Triathlon New Zealand
67. Violet Spoon
68. Voices for Freedom
69. Wellington Community Justice Project — Law Reform Team
70. Wellington Pride Festival
71. Whānau Tahi Aotearoa | Family First New Zealand
72. Women's Declaration International NZ
73. Women's Health Action
74. Women's Rights Party

APPENDIX 2

# Amended terms of reference

## Scope of the Review

The Law Commission will examine whether the current wording of the Human Rights Act 1993 adequately protects people who are transgender, people who are non-binary and people with innate variations of sex characteristics and, if not, what amendments should be made. The Law Commission’s review will include, but not be limited to, consideration of the following matters:

* Whether to extend, modify or further define the prohibited grounds of discrimination in section 21 of the Human Rights Act;
* In the light of any amendments the Law Commission may recommend to section 21, whether the techniques used in the Human Rights Act to distinguish between justified and unjustified discrimination remain adequate to protect the rights of all New Zealanders. In particular, the review will consider the various exceptions in the Human Rights Act that outline when differences in treatment are permissible;
* Whether any amendments are desirable to the sub-part in the Human Rights Act named “Other forms of discrimination”;
* Whether the law is consistent with Te Tiriti o Waitangi | the Treaty of Waitangi and ngā tikanga Māori, and whether it is responsive to the needs and concerns of Māori;
* Whether any consequential amendments to other legislation are desirable and/or whether any reforms we propose to the Human Rights Act may have consequential implications for other legislation.

## Matters that will not be included in the Review

There are several limitations on the scope of this review.

First, the Law Commission has only been asked to examine the adequacy of protections in the Human Rights Act. This project will not involve an independent review of any other New Zealand laws (although we may recommend consequential amendments to other legislation and/or consider the consequential implications for other legislation of any proposals for reform). For example, the project will not involve an independent review of references to sex or gender in other New Zealand legislation.

Second, this also means the Law Commission will not be directly reviewing the human rights protections found in other human rights statutes (such as the New Zealand Bill of Rights Act 1990) or at international law. The New Zealand Bill of Rights Act protects a range of rights such as fair trial rights and the freedoms of opinion and belief, expression, religion and association. By contrast, the Human Rights Act primarily relates to anti-discrimination law.

Third, the Law Commission has not been asked to review the Human Rights Act as a whole. The focus of this review is specifically on protections in the Human Rights Act for people who are transgender, non-binary and/or have innate variations of sex characteristics.

Finally, the Law Commission has decided that, in this project, it will not review:

* Sections 61 and 131 of the Human Rights Act, which relate to the incitement of racial disharmony. This follows a request from the Minister of Justice that the Commission withdraw issues relating to hate speech from its work programme.
* Section 63A of the Human Rights Act, which relates to conversion practices. This provision was enacted in 2022 after extensive consultation. It is too soon to reconsider the policy on which it was based or to evaluate how it is working in practice.

## Process and Timing

The Law Commission expects to publish an Issues Paper in mid-2024 and to provide opportunities for public engagement, including submissions.

The Law Commission anticipates there may be wide interest in this review. Those with a particular interest may include people from the following (overlapping) groups: those who are transgender, non-binary and/or have innate variations of sex characteristics; experts; Māori; women’s groups; rangatahi/young people; and people from Aotearoa New Zealand’s ethnic minority communities.

The Law Commission intends to report to the Minister responsible for the Law Commission by the end of June 2025. It will then be up to the Government whether to accept any recommendations the Commission makes for reform of the law.

The Terms of Reference were originally published on 2 August 2023. They were updated on 25 June 2024 following receipt of a letter from the Minister of Justice requesting that the Commission withdraw issues relating to hate speech from its work programme.

1. A picture containing logo

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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.

   [↑](#footnote-ref-2)
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. [↑](#footnote-ref-3)
3. The total of 6,013 was reached after a process of deduplication. [↑](#footnote-ref-4)
4. *Bullock v Department of Corrections* [2008] NZHRRT 4. [↑](#footnote-ref-5)
5. Human Rights Commission Act 1977. [↑](#footnote-ref-6)
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. [↑](#footnote-ref-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. [↑](#footnote-ref-8)
8. See Human Rights Act 1993, s 35. [↑](#footnote-ref-9)
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. [↑](#footnote-ref-10)
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. [↑](#footnote-ref-11)
11. We discuss another education exception relating to provision of courses and group counselling in Chapter 13. [↑](#footnote-ref-12)
12. We explore evidence on these issues more fully in Chapter 14. [↑](#footnote-ref-13)
13. It does not, however, apply to sporting activities by children under the age of 12. [↑](#footnote-ref-14)
14. We explain these terms more fully in Chapter 2. 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.

    [↑](#footnote-ref-15)
15. We recommend that gender identity should be defined to include gender expression, as well as the relationship between a person’s gender identity and their sex assigned at birth. [↑](#footnote-ref-16)
16. This position has not, however, been confirmed by a court or tribunal as we discuss further below. [↑](#footnote-ref-17)
17. Ipsos *LGBT+ Pride 2023: A 30-Country Ipsos Global Advisor Survey* (2023) at 35 (showing that 84 per cent of New Zealand respondents agreed that transgender people should be protected from discrimination in employment, housing and access to businesses such as restaurants and stores). There is no equivalent survey evidence about attitudes of New Zealanders to discrimination against people who have an innate variation of sex characteristics. [↑](#footnote-ref-18)
18. For example, Ipsos *LGBT+ Pride 2023: A 30-Country Ipsos Global Advisor Survey* (2023) at 35 (showing that 8 percent of New Zealand respondents disagreed that transgender people should be protected from discrimination in employment, housing and access to businesses such as restaurants and stores). In addition, 63 per cent of New Zealand respondents said that transgender people faced a great deal or a fair amount of discrimination in society (at 32). [↑](#footnote-ref-19)
19. The approach to discrimination by government actors is different, as we explain in Chapter 18. [↑](#footnote-ref-20)
20. The current grounds are sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation. [↑](#footnote-ref-21)
21. The link with the prohibited ground can either be direct (where a person is treated differently from others because they have a particular trait or are believed to have that trait) or indirect (where a policy or practice is the same for everyone but has a disproportionate impact on people with a particular trait). [↑](#footnote-ref-22)
22. We discuss the implications of this review for those statutes in Chapter 19. [↑](#footnote-ref-23)
23. The grounds of sex, marital status and religious or ethical belief were included when the Human Rights Commission Act 1977 was enacted. The ground of age was added by the Human Rights Commission Amendment Act 1992. [↑](#footnote-ref-24)
24. New grounds of disability, political opinion, employment status, family status and sexual orientation were added and the ground of religious and ethical belief was separated into two grounds. [↑](#footnote-ref-25)
25. See Human Rights Commission Amendment Bill 1990 (58-1), cl 14F(1)(j). For a discussion of more recent attempts to amend the Human Rights Act 1993, see Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) at ch 1. [↑](#footnote-ref-26)
26. Letter from Cheryl Gwyn (Acting Solicitor-General) to the Attorney-General regarding the Human Rights (Gender Identity) Amendment Bill (2 August 2006). [↑](#footnote-ref-27)
27. We discuss these in Chapter 4. [↑](#footnote-ref-28)
28. See, for example, Jack L Byrne and others “Perceived legal protection and institutional trust predict a lower psychological distress level for transgender people in Aotearoa/New Zealand” (2024) Int J Transgend Health 1 at 6; and Te Kāhui Tika Tangata | Human Rights Commission *Prism: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 14. [↑](#footnote-ref-29)
29. Te Tāhū o te Ture | Ministry of Justice *Proposals against incitement of hatred and discrimination* (2021) at 5 and 23. [↑](#footnote-ref-30)
30. Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill 2023 (275-1). [↑](#footnote-ref-31)
31. Business Committee “Determinations of the Business Committee for Wednesday 12 February 2025” Pāremata Aotearoa | New Zealand Parliament (12 February 2025) <[selectcommittees.parliament.nz](https://selectcommittees.parliament.nz/v/8/b0923080-3f52-4132-763d-08dd4ad36c70)>. [↑](#footnote-ref-32)
32. Human Rights Act 1993, s 20J(1) read together with New Zealand Bill of Rights Act 1990, s 3. We explain more precisely which actions are covered by Part 1A and which by Part 2 in Chapter 8. [↑](#footnote-ref-33)
33. Human Rights Act 1993, s 20L. [↑](#footnote-ref-34)
34. There are some limited circumstances in which Part 2 applies to government, which we identify in later chapters. [↑](#footnote-ref-35)
35. There are a small number of departures from this rule but they are not relevant to this review. [↑](#footnote-ref-36)
36. See, for example, Human Rights Act 1993, s 54. This exception applies to situations such as choosing flatmates in accommodation that is being shared with the person disposing of the accommodation. [↑](#footnote-ref-37)
37. Human Rights Act 1993, s 48. [↑](#footnote-ref-38)
38. Human Rights Act 1993, pt 3. [↑](#footnote-ref-39)
39. Human Rights Act 1993, s 76(1)(b). [↑](#footnote-ref-40)
40. Human Rights Act 1993, s 76(2)(c). [↑](#footnote-ref-41)
41. For limited circumstances in which attending mediation is not voluntary, see Human Rights Act 1993, s 84(4). [↑](#footnote-ref-42)
42. Te Kāhui Tika Tangata | Human Rights Commission *Pūrongo-ā-tau: Annual Report* (2024)at 39. [↑](#footnote-ref-43)
43. See *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 at [61]; and Human Rights Act 1993, s 75. [↑](#footnote-ref-44)
44. Human Rights Act 1993, ss 92I and 92J. [↑](#footnote-ref-45)
45. Human Rights Act 1993, pts 1 and 4. See, also, Human Rights Review Tribunal Regulations 2002. [↑](#footnote-ref-46)
46. We explain why other exceptions are less relevant in Chapter 8. [↑](#footnote-ref-47)
47. If the discrimination is authorised by primary legislation, the only remedy is a non-binding declaration that the legislation is inconsistent with the New Zealand Bill of Rights Act 1990: Human Rights Act 1993, s 92J. [↑](#footnote-ref-48)
48. For example, in Chapter 6, we consider the implications for the review of rights in the New Zealand Bill of Rights Act 1990 to freedom of thought, conscience, religion, belief, expression and association. [↑](#footnote-ref-49)
49. See Te Tāhū o te Ture | Ministry of Justice *Discussion Paper: Re-evaluation of the Human Rights Protections in New Zealand* (October 2000) at [85] and recommendation iv, advising such a review should occur. A package of amendments in 2001 addressed the role of the Human Rights Act 1993 in regulating government agencies and functions, and the role of monitoring and enforcement bodies, but left large parts of the Act untouched: Human Rights Amendment Act 2001. [↑](#footnote-ref-50)
50. We discuss this issue in Chapter 8. [↑](#footnote-ref-51)
51. We later reissued amended terms of reference to reflect the request from the Minister of Justice that Te Aka Matua o te Ture | Law Commission withdraw issues relating to hate speech from its work programme. The amended terms of reference are set out in Appendix 2. [↑](#footnote-ref-52)
52. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024). [↑](#footnote-ref-53)
53. This count excludes duplicate submissions or subsequent submissions from the same person. If subsequent submissions contained new information, we added the new information into the first submission. [↑](#footnote-ref-54)
54. The total of 6,013 does not count duplicate feedback from identical email addresses but includes feedback from people with the same first and last names. [↑](#footnote-ref-55)
55. We also received many online submissions based on this form text. [↑](#footnote-ref-56)
56. We also read around a third of the emails we had received as a result of the Voices for Freedom campaign (even though we had directed these emailers to submit through our website). Given these emails were mainly based on form text, we were confident after reviewing this sample that we had a good understanding of the perspectives held by people in this cohort. We received and considered a submission from Voices for Freedom itself. [↑](#footnote-ref-57)
57. See Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025); and Tatauranga Aotearoa | Stats NZ *LGBTIQ+ population of Aotearoa New Zealand: 2023: findings from the 2023 Census – supplemented by data from the Household Economic Survey and General Social Survey* (2025). [↑](#footnote-ref-58)
58. Being gender fluid means having a gender identity that changes over time. Being bi-gender means having two different genders simultaneously. See Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 13. [↑](#footnote-ref-59)
59. See Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 8. [↑](#footnote-ref-60)
60. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 9. [↑](#footnote-ref-61)
61. See Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 4. [↑](#footnote-ref-62)
62. It defined transgender as referring to a person whose gender is different from the sex recorded at their birth. “Transgender status” was derived from a person’s responses to questions about gender and sex at birth: Tatauranga Aotearoa | Stats NZ “2023 Census shows 1 in 20 adults belong to Aotearoa New Zealand’s LGBTIQ+ population (corrected)” (3 October 2024) <[www.stats.govt.nz](https://www.stats.govt.nz/news/2023-census-shows-1-in-20-adults-belong-to-aotearoa-new-zealands-lgbtiq-population)>; and Tatauranga Aotearoa | Stats NZ “Quality Statement: Cisgender and transgender status – 2023 Census: Information by concept” (September 2024) <[datainfoplus.stats.govt.nz](https://datainfoplus.stats.govt.nz/item/nz.govt.stats/2aabd5d2-ae7b-4354-a76b-d36e365cc06f/5)>. [↑](#footnote-ref-63)
63. The “another gender” category included all genders that were not reported as exclusively male or female: Tatauranga Aotearoa | Stats NZ “2023 Census shows 1 in 20 adults belong to Aotearoa New Zealand’s LGBTIQ+ population (corrected)” (3 October 2024) <[www.stats.govt.nz](https://www.stats.govt.nz/news/2023-census-shows-1-in-20-adults-belong-to-aotearoa-new-zealands-lgbtiq-population)>. [↑](#footnote-ref-64)
64. Tatauranga Aotearoa | Stats NZ “2023 Census shows 1 in 20 adults belong to Aotearoa New Zealand’s LGBTIQ+ population (corrected)” (3 October 2024) <[www.stats.govt.nz](https://www.stats.govt.nz/news/2023-census-shows-1-in-20-adults-belong-to-aotearoa-new-zealands-lgbtiq-population)>. [↑](#footnote-ref-65)
65. National Library of Medicine “DSM-5 Criteria for Gender Dysphoria” <[www.ncbi.nlm.nih.gov](https://www.ncbi.nlm.nih.gov/books/NBK577212/table/pediat_transgender.T.dsm5_criteria_for_g/)>; and World Health Organization “ICD-11 for Mortality and Morbidity Statistics” (2019) <[icd.who.int](https://icd.who.int/browse/2024-01/mms/en#411470068)> at 17 (gender incongruence). [↑](#footnote-ref-66)
66. The term ‘gender incongruence’ is used by the World Health Organization: World Health Organization “ICD-11 for Mortality and Morbidity Statistics” (2019) <[icd.who.int](https://icd.who.int/browse/2024-01/mms/en#411470068)> at 17. [↑](#footnote-ref-67)
67. Cross Agency Rainbow Network *Transitioning and Gender Affirmation in the New Zealand Public Service* | *Te Tauwhiro Ira Tangata i roto i te Ratonga Tūmatanui o Aotearoa* (June 2023) <[www.publicservice.govt.nz](https://www.publicservice.govt.nz/assets/DirectoryFile/Transitioning-and-Gender-Affirmation-in-the-New-Zealand-Public-Service-V1-Optimised.pdf)> at 8–9. [↑](#footnote-ref-68)
68. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 11. [↑](#footnote-ref-69)
69. For example, Speak Up for Women and the Women’s Rights Party. [↑](#footnote-ref-70)
70. InterACT *Intersex Variations Glossary: People-centered definitions of intersex traits & variations in sex characteristics* <[interactadvocates.org](https://interactadvocates.org/wp-content/uploads/2022/10/Intersex-Variations-Glossary.pdf)> at 3. [↑](#footnote-ref-71)
71. See Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 13–14; and InterACT *Intersex Variations Glossary: People-centered definitions of intersex traits & variations in sex characteristics* <[interactadvocates.org](https://interactadvocates.org/wp-content/uploads/2022/10/Intersex-Variations-Glossary.pdf)>. [↑](#footnote-ref-72)
72. See Intersex Aotearoa “All About Intersex” <[www.intersexaotearoa.org](https://www.intersexaotearoa.org/all-about-intersex)>. [↑](#footnote-ref-73)
73. See Rodolfo A Rey and Nathalie Josso “Diagnoses and Treatment of Disorders of Sexual Development” in J Larry Jameson and others (eds) *Endocrinology: Adult and Pediatric* (7th ed, Elsevier Saunders, Philadelphia, 2016) vol 2 at 2088–2118. [↑](#footnote-ref-74)
74. Starship “Differences of sex development – Atawhai Taihemahema” (9 October 2020) <[www.starship.org.nz](https://starship.org.nz/guidelines/differences-of-sex-development-atawhai-taihemahema/)>. [↑](#footnote-ref-75)
75. See Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD Thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 69. [↑](#footnote-ref-76)
76. See Starship “Differences of sex development – Atawhai Taihemahema” (9 October 2020) <[www.starship.org.nz](https://starship.org.nz/guidelines/differences-of-sex-development-atawhai-taihemahema/)>. [↑](#footnote-ref-77)
77. For a classification of differences of sex development, see Martine Cools and others “Caring for individuals with a difference of sex development (DSD): a Consensus Statement” (2018) 14 Nat Rev Endocrinol 415 at 417. [↑](#footnote-ref-78)
78. Tatauranga Aotearoa | Stats NZ “2023 Census shows 1 in 20 adults belong to Aotearoa New Zealand’s LGBTIQ+ population (corrected)” (3 October 2024) <[www.stats.govt.nz](https://www.stats.govt.nz/news/2023-census-shows-1-in-20-adults-belong-to-aotearoa-new-zealands-lgbtiq-population)>. Tatauranga Aotearoa | Stats NZ defines variations of sex characteristics as “people born with innate genetic, hormonal, or physical sex characteristics that do not conform to medical norms for female or male bodies”. [↑](#footnote-ref-79)
79. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 13. [↑](#footnote-ref-80)
80. See Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 74, 76 and 172. [↑](#footnote-ref-81)
81. Tatauranga Aotearoa | Stats NZ *LGBTIQ+ population of Aotearoa New Zealand: 2023: findings from the 2023 Census* – *supplemented by data from the Household Economic Survey and General Social Survey* (2025) at 16. [↑](#footnote-ref-82)
82. See Elena Bennecke and others “Disorders or Differences of Sex Development? Views of Affected Individuals on DSD Terminology” (2020) 58 The Journal of Sex Research 522 at 528. [↑](#footnote-ref-83)
83. See Elizabeth Reis “Divergence or Disorder? The politics of naming intersex” (2007) 50 Perspectives in Biology and Medicine 535 at 536–537; and Intersex Aotearoa “All About Intersex” <[www.intersexaotearoa.org](https://www.intersexaotearoa.org/all-about-intersex)>. [↑](#footnote-ref-84)
84. See Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 96–97. [↑](#footnote-ref-85)
85. See Surya Monro and others “Intersex: cultural and social perspectives” (2021) 23 Culture, Health & Sexuality 431 at 437. [↑](#footnote-ref-86)
86. Te Aka Matua o Te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (IP53, 2024) [Issues Paper] at ch 3. [↑](#footnote-ref-87)
87. Law Commission Act 1985, s 5(2)(a). The statute translates te ao Māori as “the Māori dimension”. [↑](#footnote-ref-88)
88. Issues Paper at ch 5. [↑](#footnote-ref-89)
89. Tatauranga Aotearoa | Stats NZ “Place and ethnic group summaries: Māori” <[tools.summaries.stats.govt.nz](https://tools.summaries.stats.govt.nz/ethnic-group/maori#rainbow---lgbtiq+-indicator)>. [↑](#footnote-ref-90)
90. Transgender Health Research Lab *Counting Ourselves: Summary of findings for Māori from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 1. [↑](#footnote-ref-91)
91. For data quality reasons, Stats NZ has not published ethnic group comparisons for “persons who know they were born with a variation of sex characteristics”: Tatauranga Aotearoa | Stats NZ “Variations of sex characteristics – 2023 Census: Information by concept” <[datainfoplus.stats.govt.nz](https://datainfoplus.stats.govt.nz/item/nz.govt.stats/72b1a7da-38d9-4359-8be8-fbe35956f94d)>.  [↑](#footnote-ref-92)
92. Ngahuia Te Awekotuku “He Reka Anō – same-sex lust and loving in the ancient Māori world” in Alison J Laurie and Linda Evans (eds) *Outlines: Lesbian & Gay Histories of Aotearoa* (Lesbian & Gay Archives of New Zealand, Wellington, 2005) 6 at 8; and Te Aka Māori Dictionary (online ed) <[maoridictionary.co.nz](https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=takatapui)>. [↑](#footnote-ref-93)
93. Elizabeth Kerekere “Part of The Whānau: The Emergence of Takatāpui Identity – *He Whāriki Takatāpui*” (PhD Thesis, Te Herenga Waka | Victoria University of Wellington, 2017) at 25. [↑](#footnote-ref-94)
94. Other less common words that Māori respondents used to describe themselves included: iratere, irarere, whakatāne, tangata ira-kore, irahuri, tangata, tāhine, irakore, tangata ira wahine and wahine: Transgender Health Research Lab *Counting Ourselves: Summary of findings for Māori from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 2. We discussed the meanings of some of these terms in the Issues Paper at [2.26]. [↑](#footnote-ref-95)
95. Issues Paper at ch 5. See, also, Maioha Panapa “New Zealand First Bill defining ‘Woman’ and ‘Man’ in law a step backwards, says intersex advocate” (30 April 2025) <[www.teaonews.co.nz](https://www.teaonews.co.nz/2025/04/30/new-zealand-first-bill-defining-woman-and-man-in-law-a-step-backwards-says-intersex-advocate/)>, in which Tu Chapman, a Māori non-binary intersex advocate, said: “It is the added value that I am intersex, but the primary value is that I am Māori. So, if we are connected to te ao Māori and to our whakapapa, nothing else matters.” [↑](#footnote-ref-96)
96. We held one consultation hui in conjunction with a takatāpui organisation and some participants at other hui were also Māori. [↑](#footnote-ref-97)
97. Other submitters objected to this characterisation of pre-colonial Māori society. We explore this disagreement further in Chapter 5. [↑](#footnote-ref-98)
98. Transgender Health Research Lab *Counting Ourselves: Summary of findings for Māori from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 3 (emphasis in original). [↑](#footnote-ref-99)
99. Transgender Health Research Lab *Counting Ourselves: Summary of findings for Māori from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 4. [↑](#footnote-ref-100)
100. Transgender Health Research Lab *Counting Ourselves: Summary of findings for Māori from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 4. [↑](#footnote-ref-101)
101. See Chapter 5 for further discussion. [↑](#footnote-ref-102)
102. This is consistent with scholarship suggesting that pre-colonial understandings of sexual and gender fluidity in te ao Māori have morphed or been erased: see, for example, Elizabeth Kerekere “Part of The Whānau: The Emergence of Takatāpui Identity – *He Whāriki Takatāpui*” (PhD Thesis, Te Herenga Waka | Victoria University of Wellington, 2017) at 63; and Clive Aspin and Jessica Hutchings “Reclaiming the past to inform the future: Contemporary views of Maori sexuality” (2007) 9 Culture, Health & Sexuality 415 at 419. [↑](#footnote-ref-103)
103. Issues Paper at [5.9]–[5.17]. [↑](#footnote-ref-104)
104. See Elizabeth Kerekere “Te Whare Takatāpui – Reclaiming the Spaces of Our Ancestors” in Alison Green and Leonie Pihama (eds) *Honouring Our Ancestors: Takatāpui, Two-Spirit and Indigenous LGBTQI+ Well-being* (Te Herenga Waka University Press, Wellington, 2023). [↑](#footnote-ref-105)
105. Law Commission Act 1985, s 5(2)(a). [↑](#footnote-ref-106)
106. Issues Paper at [2.46]–[2.52]. [↑](#footnote-ref-107)
107. Phylesha Brown-Acton “Movement building for change” (speech to Asia Pacific Outgames, third plenary session, Wellington, 18 March 2011). [↑](#footnote-ref-108)
108. Issues Paper at [2.49]. [↑](#footnote-ref-109)
109. We discussed some other terms used in other cultures around the world in the Issues Paper at [2.50]. [↑](#footnote-ref-110)
110. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 10. [↑](#footnote-ref-111)
111. As explained earlier, the census data on transgender people included transgender men, transgender women and people of another gender. [↑](#footnote-ref-112)
112. Tatauranga Aotearoa | Stats NZ “Place and ethnic group summaries: Asian” <[tools.summaries.stats.govt.nz](https://tools.summaries.stats.govt.nz/ethnic-group/asian)>. [↑](#footnote-ref-113)
113. Tatauranga Aotearoa | Stats NZ “Place and ethnic group summaries: Pacific Peoples” <[tools.summaries.stats.govt.nz](https://tools.summaries.stats.govt.nz/ethnic-group/pacific-peoples)>. [↑](#footnote-ref-114)
114. Tatauranga Aotearoa | Stats NZ “Place and ethnic group summaries: Middle Eastern/Latin American/African” [<tools.summaries.stats.govt.nz>.](https://tools.summaries.stats.govt.nz/ethnic-group/middle-eastern-latin-american-african) [↑](#footnote-ref-115)
115. For discussion of the quality of data relating to gender and ethnicity and the limitations when combining these data, see Tatauranga Aotearoa | Stats NZ “Quality Statement: Cisgender and transgender status – 2023 Census: Information by concept” (September 2024) <[datainfoplus.stats.govt.nz](https://datainfoplus.stats.govt.nz/item/nz.govt.stats/2aabd5d2-ae7b-4354-a76b-d36e365cc06f/5)>; and Tatauranga Aotearoa | Stats NZ “Quality Statement: Ethnicity – 2023 Census: Information by concept” (June 2024) <[datainfoplus.stats.govt.nz](https://datainfoplus.stats.govt.nz/item/nz.govt.stats/1f1ca131-a9aa-483b-98ab-d22bf84ae944/81)>. [↑](#footnote-ref-116)
116. See Tatauranga Aotearoa | Stats NZ “Variations of sex characteristics – 2023 Census: Information by concept” <[datainfoplus.stats.govt.nz](https://datainfoplus.stats.govt.nz/item/nz.govt.stats/72b1a7da-38d9-4359-8be8-fbe35956f94d)>. [↑](#footnote-ref-117)
117. Patrick Thomsen and others *The Manalagi Survey Community Report: Examining the Health and Wellbeing of Pacific Rainbow+ Peoples in Aotearoa-New Zealand* (2023) at 26. [↑](#footnote-ref-118)
118. At 27. [↑](#footnote-ref-119)
119. At 29. [↑](#footnote-ref-120)
120. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 111. [↑](#footnote-ref-121)
121. Burnett Foundation Aotearoa, Chinese Pride New Zealand, ICONIQ Legal Advocates, Rainbow Path, Sexual Wellbeing Aotearoa, Te Ngākau Kahukura, Backbone Collective, Professional Association for Transgender Health Aotearoa, Wellington Pride Festival and Women’s Health Action. Intersectionality is a term coined by Kimberlé Crenshaw to describe the multiple and overlapping forms of discrimination those with minority identities face: see Kimberlé Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 1 University of Chicago Legal Forum 139. [↑](#footnote-ref-122)
122. We discuss the administrative mechanisms that people born in Aotearoa New Zealand can access in Chapter 3. [↑](#footnote-ref-123)
123. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 17. The report counted respondents as disabled if they either identified as disabled and/or deaf or met the criteria of not being able to do, or having a lot of difficulty in doing, certain activities. The general population figure was from the 2021 General Social Survey. [↑](#footnote-ref-124)
124. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 18. [↑](#footnote-ref-125)
125. At 18. [↑](#footnote-ref-126)
126. Julia de Bres and ia Morrison-Young *To Be Ourselves: Trans and Non-Binary Disabled People in Aotearoa* (2025) at 3. [↑](#footnote-ref-127)
127. Tatauranga Aotearoa | Stats NZ *Household Disability Survey 2023 – findings, definitions and design summary* (February 2025) at 12. [↑](#footnote-ref-128)
128. Tatauranga Aotearoa | Stats NZ *LGBTIQ+ population of Aotearoa New Zealand: 2023: findings from the 2023 Census – supplemented by data from the Household Economic Survey and General Social Survey* (2025) at 63. Stats NZ uses the term ‘LGBTIQ+’ to mean adults who reported any of the following in the 2023 Census: a gender that was not male or female, a sexual identity that was not heterosexual, a gender that was different to what was recorded at birth and a variation of sex characteristics. [↑](#footnote-ref-129)
129. Tatauranga Aotearoa | Stats NZ *LGBTIQ+ population of Aotearoa New Zealand: 2023: findings from the 2023 Census – supplemented by data from the Household Economic Survey and General Social Survey* (2025) at 65. In a national study of Australians with congenital variations in sex characteristics, 27 per cent of respondents identified as having one or more disabilities: Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 77. [↑](#footnote-ref-130)
130. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 111. [↑](#footnote-ref-131)
131. At 111 and 116. [↑](#footnote-ref-132)
132. Julia de Bres and ia Morrison-Young *To Be Ourselves: Trans and Non-Binary Disabled People in Aotearoa* (2025) at 36. [↑](#footnote-ref-133)
133. For further discussion, see Issues Paper at [2.53]–[2.56]. [↑](#footnote-ref-134)
134. See, for example, Speak Up for Women “Gender Critical Groups in Aotearoa New Zealand” <[www.speakupforwomen.nz](https://www.speakupforwomen.nz/gc-groups)>. [↑](#footnote-ref-135)
135. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at ch 4. [↑](#footnote-ref-136)
136. A smaller number of submitters indicated they agreed in part. [↑](#footnote-ref-137)
137. These included Te Kāhui Ture o Aotearoa | New Zealand Law Society, Community Law Centres o Aotearoa, DLA Piper New Zealand, Gender Minorities Aotearoa, Mental Health Foundation of New Zealand, New Zealand Council for Civil Liberties, Te Aho Kawe Kaupapa Ture a ngā Wāhine | New Zealand Women’s Law Journal, Te Whare Āwhina Mō Ngā Wāhine Puawai | Nelson Women’s Centre, Paekākāriki Pride, Rainbow Greens, Sexual Wellbeing Aotearoa, Tīwhanawhana Trust and Women’s Declaration International NZ (although this organisation did not agree with how we had applied the key reform considerations in the Issues Paper). This list does not include organisations that indicated they agreed in part. [↑](#footnote-ref-138)
138. See, for example, *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [13], [160] and [175]. [↑](#footnote-ref-139)
139. Issues Paper at [4.9]–[4.30]. [↑](#footnote-ref-140)
140. For example, Professor Dean Knight, Dr Eddie Clark, Paulette Benton-Greig and Victoria Casey KC. [↑](#footnote-ref-141)
141. See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [116], citing *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 573 per Tipping J; and Charlie Cox “The Majestic Equality of Disenfranchisement: Assessing the Right to Freedom from Discrimination in Light of the *Ngaronoa* Litigation” (2020) 51 VUWLR 27 at 27, citing Louis P Pojman and Robert Westmoreland (eds) *Equality* (Oxford University Press, New York, 1997) at 1. [↑](#footnote-ref-142)
142. Issues Paper at [4.13]. [↑](#footnote-ref-143)
143. At [4.15]. [↑](#footnote-ref-144)
144. Issues Paper at [4.15]. Another example is the many provisions in the Act requiring reasonable accommodations for disabled people: Human Rights Act 1993, ss 29, 36, 37, 39, 41, 43, 52, 56 and 60. See, also, *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [153] (explaining the role of exceptions in allowing for differentiated application of anti-discrimination norms to support the unique needs of particular groups). [↑](#footnote-ref-145)
145. Issues Paper at [4.16]–[4.18]. [↑](#footnote-ref-146)
146. Jill Marshall *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff, Leiden, 2009) at 21. [↑](#footnote-ref-147)
147. Issues Paper at [4.22]. [↑](#footnote-ref-148)
148. At [4.23]–[4.24]. [↑](#footnote-ref-149)
149. See *Universal Declaration of Human Rights* GA Res 217A (1948), preamble and art 1. [↑](#footnote-ref-150)
150. Issues Paper at [4.25]–[4.26]. [↑](#footnote-ref-151)
151. *R v Goldstein* [1983] 1 WLR 151 (HL) at 436. [↑](#footnote-ref-152)
152. Issues Paper at [4.26]. [↑](#footnote-ref-153)
153. See *R v Oakes* [1986] 1 SCR 103 at [69]–[70]; and *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [103]–[104] per Tipping J. [↑](#footnote-ref-154)
154. Issues Paper at [4.28]. [↑](#footnote-ref-155)
155. See, for example, Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* | *Review of succession law: rights to a person’s property on death* (NZLC R145, 2021) at [2.127] in which the Law Commission recommended weaving together tikanga Māori with other values to make new law for all New Zealanders. [↑](#footnote-ref-156)
156. Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [3.4] and [5.3]; Law Commission Act 1985, s 5(2)(a); and *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007). [↑](#footnote-ref-157)
157. Helen Keller and Geir Ulfstein “Introduction” in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, Cambridge, 2012) at 4. [↑](#footnote-ref-158)
158. Select Committee on Women’s Rights “The Role of Women in New Zealand Society” [1975] AJHR I13. [↑](#footnote-ref-159)
159. At 100–101. [↑](#footnote-ref-160)
160. Issues Paper at [4.25]. [↑](#footnote-ref-161)
161. As we discuss in Chapter 6, however, the right to freedom of thought, conscience, religion and belief in section 13 of the New Zealand Bill of Rights Act 1990 is absolute. [↑](#footnote-ref-162)
162. See, for example, Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [17]; and Cabinet Office Circular “Impact Analysis Requirements” (16 December 2024) CO 24/7 at [22]. [↑](#footnote-ref-163)
163. For example, Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025). [↑](#footnote-ref-164)
164. For example, Women’s Rights Party *Curia Women’s Issues Poll* (September 2023); Marc Daalder “Race relations among most divisive issues in election – poll” (3 November 2023) Newsroom <[newsroom.co.nz](https://newsroom.co.nz/2023/11/03/race-relations-among-most-divisive-issues-in-election-poll/)>; and Te Kaunihera Wahine o Aotearoa | National Council of Women of New Zealand *Aotearoa New Zealand Gender Attitudes Survey 2023* (July 2023). [↑](#footnote-ref-165)
165. See Te Manatū Waeture | Ministry for Regulation *Regulatory Impact Statement (RIS) template* at 7. [↑](#footnote-ref-166)
166. Issues Paper at [4.50], citing Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021). [↑](#footnote-ref-167)
167. See Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at ch 1. [↑](#footnote-ref-168)
168. Law Commission Act 1985, s 5(1)(d). See, also, Law Commission Act 1985, s 5(2)(b) (concerning the desirability of simplifying the content and expression of law where possible). [↑](#footnote-ref-169)
169. See Lord Sales, Justice of the Supreme Court of the United Kingdom “Certainty and Flexibility in the Law” (speech to Aston University, Birmingham, 30 January 2025). [↑](#footnote-ref-170)
170. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [152]. [↑](#footnote-ref-171)
171. At [13] and [175]. [↑](#footnote-ref-172)
172. Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [2.3]. [↑](#footnote-ref-173)
173. At ch 1. [↑](#footnote-ref-174)
174. We have less data about the experience of people with innate variations of sex characteristics. [↑](#footnote-ref-175)
175. Sentencing Act 2002, s 9(1)(h). Te Aka Matua o te Ture | Law Commission is currently reviewing the law relating to hate crime in a separate project. [↑](#footnote-ref-176)
176. See Adeno Addis “Justice Kennedy on Dignity” (2023) 60 Houston L Rev 519 at 602; and JM Bernstein *Torture and Dignity* (University of Chicago Press, 2015) at 259. [↑](#footnote-ref-177)
177. These included Feminist Older Women Lobbyists, Lesbian Action for Visibility Aotearoa, LGB Alliance, Save Women’s Sport Australasia, Violet Spoon, Women’s Declaration International NZ and Women’s Rights Party. [↑](#footnote-ref-178)
178. In Chapter 7, we discuss submitters’ feedback on whether the ground of sex should be defined to mean biological sex. [↑](#footnote-ref-179)
179. See Paul E Griffiths “What are biological sexes?”(preprint, University of Sydney, 2021) at 6; and Lawrence S Mayer and Paul R McHugh “Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences” (2016) 50 The New Atlantis 10 at 90. [↑](#footnote-ref-180)
180. See Aditi Bhargava and others “Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement” (2021) 42 Endocrine Reviews 219 at 221. [↑](#footnote-ref-181)
181. See Wolfgang Goymann, Henrik Brumm and Peter M Kappeler “Biological sex is binary, even though there is a rainbow of sex roles” (2023) 45 BioEssays e2200173 at 2 and 5. [↑](#footnote-ref-182)
182. Paul E Griffiths “What are biological sexes?”(preprint, University of Sydney, 2021) at 6. [↑](#footnote-ref-183)
183. See, for example, Christoph Rehmann-Sutter and others “Is sex still binary?” (2023) 35 medizinische genetik 173 at 173–175. [↑](#footnote-ref-184)
184. For example, Claire Ainsworth “Sex redefined” (2015) 518 Nature 288 at 288; and Letter from Dr Hopi Hoekstra, Dr Sharon Strauss and Dr Susana Magallón to Alex Azar (Secretary, Department of Health and Human Services) regarding the Scientific Understanding of Sex and Gender (30 October 2018). [↑](#footnote-ref-185)
185. For example, Christoph Rehmann-Sutter and others “Is sex still binary?” (2023) 35 medizinische genetik 173 at 173; Claire Ainsworth “Sex redefined” (2015) 518 Nature 288 at 289; and Anne Fausto-Sterling “Why Sex Is Not Binary*” The New York Times* (online ed, New York, 25 October 2018). [↑](#footnote-ref-186)
186. See, for example, descriptions of sex in Te Whatu Ora | Health New Zealand *Interim guidance – collection and transmission of gender and sex related information in the health system* (October 2024); World Health Organization “Gender and health” <[www.who.int](http://www.who.int/health-topics/gender#tab=tab_1)>; and National Academies of Sciences, Engineering, and Medicine *Measuring Sex, Gender Identity, and Sexual Orientation* (The National Academies Press, Washington DC, 2022) at 20. [↑](#footnote-ref-187)
187. See National Academies of Sciences, Engineering, and Medicine *Measuring Sex, Gender Identity, and Sexual Orientation* (The National Academies Press, Washington DC, 2022) at 20; and Aditi Bhargava and others “Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement” (2021) 42 Endocrine Reviews 219 at 226. [↑](#footnote-ref-188)
188. See Martine Cools and others “Caring for individuals with a difference of sex development (DSD): a Consensus Statement” (2018) 14 Nat Rev Endocrinol 415 at 418; and National Academies of Sciences, Engineering, and Medicine *Measuring Sex, Gender Identity and Sexual Orientation* (The National Academies Press, Washington DC, 2022) at 40–41. [↑](#footnote-ref-189)
189. Te Whatu Ora | Health New Zealand *Interim guidance – collection and transmission of gender and sex related information in the health system* (October 2024). [↑](#footnote-ref-190)
190. Some of these are not relevant as they use sex in a different sense such as sex work, sex offending or the sex of animals. [↑](#footnote-ref-191)
191. Section 4 of the Births, Deaths, Marriages, and Relationships Registration Act 2021 does define “nominated sex” and “registered sex” (for the purpose of obtaining a birth certificate). [↑](#footnote-ref-192)
192. For example, Corrections Act 2004, s 11(6), which refers to staff members of each “gender”, while other sections of the Act and regulations refer to “sex”: Corrections Act 2004, ss 92D(2)(a) and 94(1); and Corrections Regulations 2005, regs 134(2) and 143F(5). [↑](#footnote-ref-193)
193. For example, Human Assisted Reproductive Technology Act 2004, ss 11(1), 47(1)(b), 53(1)(a)(ii) and 63(2)(b), which refer to the “gender” of donors but the “sex” of offspring or embryos. [↑](#footnote-ref-194)
194. Contraception, Sterilisation, and Abortion Act 1977, s 21(2). Another example is the Human Assisted Reproductive Technology Order 2005, sch, pt 2, cl 6(b), which refers to “sex determination” and a “familial sex-linked disorder”. [↑](#footnote-ref-195)
195. For example, Land Transport (Infringement and Reminder Notices) Regulations 2012, sch 1. [↑](#footnote-ref-196)
196. Corrections Regulations 2005, regs 65(1)–65(2). [↑](#footnote-ref-197)
197. Corrections Regulations 2005, regs 65(2A) and 65C(3). We discuss prison placement in more detail in Chapter 18. [↑](#footnote-ref-198)
198. See Births, Deaths, Marriages and Relationships Registration Act 2021, ss 23–27; and Births, Deaths, Marriages, and Relationships Registration (Registering Nominated Sex) Regulations 2023, reg 5. [↑](#footnote-ref-199)
199. Births, Deaths, Marriages, and Relationships Registration Act 2021, s 79(2). [↑](#footnote-ref-200)
200. Gender Recognition Act 2004 (UK), s 9. [↑](#footnote-ref-201)
201. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [264]. [↑](#footnote-ref-202)
202. At [100] and [108]. [↑](#footnote-ref-203)
203. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296. This statute has since been repealed. [↑](#footnote-ref-204)
204. At [62]. [↑](#footnote-ref-205)
205. *M v M* (1991) 8 FRNZ 208 (FC) at 219; and *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 (HC) at 607. [↑](#footnote-ref-206)
206. *Michael v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 (FC) at [72]. [↑](#footnote-ref-207)
207. Section 21(1)(a) of the Human Rights Act 1993 states that the prohibited ground of sex includes pregnancy and childbirth but otherwise does not define it. [↑](#footnote-ref-208)
208. See Select Committee on Women’s Rights “The Role of Women in New Zealand Society” [1975] AJHR I13 at 17, 34, 45–46, 96–97 and 103. [↑](#footnote-ref-209)
209. (17 August 1977) 412 NZPD 2291 (Barry Brill MP). [↑](#footnote-ref-210)
210. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [2]. See, also, *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, in which the House of Lords held that it was required as a matter of statutory interpretation to give the terms ‘male’ and ‘female’ a narrow biological meaning (at [36]–[37] and [78]) but made a declaration of incompatibility between the Matrimonial Causes Act 1973 (UK) and the European Convention on Human Rights (at [55]). [↑](#footnote-ref-211)
211. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296 at [62]. [↑](#footnote-ref-212)
212. Speak Up for Women did support some reform of the Human Rights Act 1993 but not as proposed in the Issues Paper. [↑](#footnote-ref-213)
213. Human Rights Act 1993, s 63A. This imports the meaning of “conversion practice” in the Conversion Practices Prohibition Legislation Act 2022, s 5. [↑](#footnote-ref-214)
214. Births, Deaths, Marriages, and Relationships Registration Act 2021, ss 23–27. [↑](#footnote-ref-215)
215. Integrity Sport and Recreation Act 2023, s 14. [↑](#footnote-ref-216)
216. Legislation Act 2019, s 14. Section 2 of the Marriage Act 1955 defines marriage the same way. [↑](#footnote-ref-217)
217. Oranga Tamariki Act 1989, s 5. [↑](#footnote-ref-218)
218. Sentencing Act 2002, s 9(1)(h). [↑](#footnote-ref-219)
219. See, for example, *G v Australia* UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) (UNHRC) at [7.2] and [7.12]; *Savolaynen v Russian Federation* UN Doc CCPR/C/135/D/2830/2016 (UNHRC) (23 January 2023) at [7.15]; United Nations Committee on Economic, Social and Cultural Rights *General Comment No 20: Non-discrimination in economic, social and cultural rights* UN Doc E/C.12/GC/20 (2 July 2009) at [32]; and United Nations Committee on the Rights of the Child *General Comment No 20 (2016): on the implementation of the rights of the child during adolescence* UN Doc CRC/C/GC/20 (6 December 2016) at [34]. [↑](#footnote-ref-220)
220. See, for example, World Health Organization *Frequently asked questions on sexual and gender diversity, health and human rights – an introduction to key concepts* (2nd ed, 2024) at 2. [↑](#footnote-ref-221)
221. See, for example, Royal Australian & New Zealand College of Psychiatrists *The role of psychiatrists in working with Trans and Gender Diverse people* (PS #103, December 2023); British Medical Association “Inclusive care of trans and non-binary patients”(28 June 2024) <[www.bma.org.uk](https://www.bma.org.uk/advice-and-support/equality-and-diversity-guidance/lgbtplus-equality-in-medicine/inclusive-care-of-trans-and-non-binary-patients)>; Australian Medical Association *Position Statement: LGBTQIASB+ Health* (2023); and World Medical Association *WMA Statement on Transgender People* (October 2015).  [↑](#footnote-ref-222)
222. Hilary Cass *Independent review of gender identity services for children and young people: Final report* (April 2024) at 21. See, also, Hilary Cass “Editorial: The Cass Review – implications and reassurance for practitioners” (2024) 29 Child and Adolescent Mental Health 311 at 312. [↑](#footnote-ref-223)
223. Hilary Cass *Independent review of gender identity services for children and young people: Final report* (April 2024) at 12. [↑](#footnote-ref-224)
224. New Zealand Bill of Rights Act 1990, s 19. In Chapter 19, we discuss other laws that rely on the prohibited grounds of discrimination in section 21 of the Human Rights Act. [↑](#footnote-ref-225)
225. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at [6.6]–[6.45]. [↑](#footnote-ref-226)
226. Amnesty International Aotearoa New Zealand, Association of Proprietors of Integrated Schools, Backbone Collective, Burnett Foundation Aotearoa, Centre 401 Trust, Chinese Pride New Zealand, COMmunity, Community Law Centres o Aotearoa, Countering Hate Speech Aotearoa, DLA Piper New Zealand, Gay Men’s Sexual Health Research Group, Gender Minorities Aotearoa, Hohou Te Rongo Kahukura, ICONIQ Legal Advocates, Identify Survey, InsideOUT Kōaro, Law Association of New Zealand, Mental Health Foundation of New Zealand, Meredith Connell’s Rainbow Alliance, National Collective of Independent Women’s Refuges, New Zealand Council for Civil Liberties, OutLine Aotearoa, Paekākāriki Pride, Professional Association for Transgender Health Aotearoa, Qtopia, Rainbow Greens, Rainbow Path, Rainbow Support Collective, Rainbow Wellington, Rotorua Chamber of Pride, Sexual Wellbeing Aotearoa, Shine, St Peter’s on Willis Social Justice Group, Te Aho Kawe Kaupapa Ture a ngā Wāhine | New Zealand Women’s Law Journal, Te Kāhui Tika Tangata | Human Rights Commission, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Ngākau Kahukura, Te Pūkenga Here Tikanga Mahi | Public Service Association, Tīwhanawhana Trust, Wellington Community Justice Project — Law Reform Team, Wellington Pride Festival and Women’s Health Action. Some organisations did not comment on this question or did not express a clear enough view for us to be sure of their position. [↑](#footnote-ref-227)
227. Ethos, Feminist Older Women Lobbyists, LGB Alliance, Resist Gender Education, Save Women’s Sport Australasia, Speak Up for Women, Women’s Declaration International NZ and Women’s Rights Party. [↑](#footnote-ref-228)
228. Howick Ratepayers and Residents Association, Kia Rangona te Kōrero | Free Speech Union, Lesbian Action for Visibility Aotearoa, Lesbian Resistance New Zealand, Mana Wāhine Kōrero, New Conservatives Party, Reality Check Radio, Violet Spoon, Voices for Freedom, and Whānau Tahi Aotearoa | Family First New Zealand. [↑](#footnote-ref-229)
229. For further explanation, see Chapters 1 and 6. [↑](#footnote-ref-230)
230. For further explanation, see Chapter 1. [↑](#footnote-ref-231)
231. We have derived these rationales from New Zealand and overseas case law, legislative debates and commentaries. The case law we rely on is mainly from overseas because the Human Rights Act has a closed list of grounds of discrimination, which means that courts are not required to consider when to extend protection from discrimination to new groups. [↑](#footnote-ref-232)
232. For example, *Egan v Canada* [1995] 2 SCR 513 at [173]–[175] per Cory J; *San Antonio Independent School District v Rodriguez* 411 US 1 (1973) at 28; *Harksen v Lane NO* [1997] ZACC 12, 1997 (11) BCLR 1489 at [49]. We discuss international treaty bodies below. For discussion, see Law Reform Commission of Western Australia *Review of the Equal Opportunity Act 1984 (WA): Project 111 Final Report* (May 2022) at [4.2]; Sandra Fredman *Discrimination Law* (3rd ed, Oxford University Press, Oxford, 2022) at 210–218; and Tarunabh Khaitan *A Theory of Discrimination Law* (Oxford University Press, Oxford, 2015) at [3.1.1]. [↑](#footnote-ref-233)
233. United Nations Committee on Economic, Social and Cultural Rights *General comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C12/GC/20 (2 July 2009) at [27]. The Committee takes the view that gender identity is protected as an “other status” (at [32]) and gives the example of harassment of people who are “transgender, transsexual or intersex”. [↑](#footnote-ref-234)
234. For example, (17 August 1977) 412 NZPD 2291 (Barry Brill MP); (22 July 1993) 536 NZPD 16744 (Lianne Dalziel MP); (27 July 1993) 537 NZPD 16907 (Lianne Dalziel MP); (27 July 1993) 537 NZPD 16932–16933 (Hon Katherine O’Regan MP); (27 July 1993) 537 NZPD 16913–16914 and 16965 (Steve Maharey MP); (27 July 1993) 537 NZPD 16943 (Clem Simich MP); and (27 July 1993) 537 NZPD 16919 (Christopher Laidlaw MP). [↑](#footnote-ref-235)
235. Issues Paper at ch 3. [↑](#footnote-ref-236)
236. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025). In the Issues Paper, we relied on data from the earlier 2018 survey. [↑](#footnote-ref-237)
237. At 111–112. [↑](#footnote-ref-238)
238. At 113–114. [↑](#footnote-ref-239)
239. At 113. The exception was at work, where rates were 9 per cent for the general population and 13 per cent for transgender and non-binary people. [↑](#footnote-ref-240)
240. At 125. [↑](#footnote-ref-241)
241. At 87. [↑](#footnote-ref-242)
242. The *Counting Ourselves* report stated that 3 per cent of respondents reported they had an intersex variation, but it did not provide standalone discrimination data for this group. [↑](#footnote-ref-243)
243. The 2022 Counting Ourselves survey used some of the same questions as general New Zealand population surveys so that experiences could be better compared: see Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 3. [↑](#footnote-ref-244)
244. For example, *Corbiere v Canada* [1999] 2 SCR 203 at [13] per McLachlin and Bastarache JJ for the majority; *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 at [26] per Lady Hale; and *Khosa v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 at [71] per Mokgoro J. For discussion, see Sandra Fredman *Discrimination Law* (3rd ed, Oxford University Press, Oxford, 2022) at 206–210; and Tarunabh Khaitan *A Theory of Discrimination Law (*Oxford University Press, Oxford, 2015) at [3.1.2]. [↑](#footnote-ref-245)
245. *Corbiere v Canada* [1999] 2 SCR 203 at [13]. There are also academic critiques of immutability. See, for example, Sandra Fredman *Discrimination Law* (3rd ed, Oxford University Press, Oxford, 2022) at 210. [↑](#footnote-ref-246)
246. Issues Paper at [6.20]. [↑](#footnote-ref-247)
247. See Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 12–13. [↑](#footnote-ref-248)
248. For example, Case C-4/23*MAA v Direcţia de Evidență a Persoanelor Cluj* ECLI:EU:C:2024:845at [64]; *R (on the application of C) v Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] WLR 4127 at [1]; and *Centre for Gender Advocacy v Attorney-General of Québec* 2021 QCCS 191, 481 CRR (2d) 273 at [106]–[109]. [↑](#footnote-ref-249)
249. *SV v Italy* ECHR 55216/08, 11 October 2018 at [62]. [↑](#footnote-ref-250)
250. *YY v Turkey* ECHR 14793/08, 10 June 2015 at [102]. See, similarly, *G v Australia* UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) (UNHRC) at [7.2]. [↑](#footnote-ref-251)
251. Some case law says gender identity is immutable, for example, *Grimm v Gloucester County School Board* 972 F 3d 586 (4th Cir 2020) at 612–613; and *Centre for Gender Advocacy v Attorney-General of Québec* 2021 QCCS 191, 481 CRR (2d) 273 at [106]. Commentators’ views vary, for example, Kevin M Barry and others “A Bare Desire to Harm: Transgender People and the Equal Protection Clause” (2016) 57 BCL Rev 507 at 560–562; Katie Eyer “Transgender Constitutional Law” (2023) 171 U Pa L Rev 1405 at 1429; Jessica Clarke “Against Immutability” (2015) 125 Yale LJ 2 at 31; and Tia Powell, Sophia Shapiro and Ed Stein “Transgender Rights as Human Rights” (2016) 18 AMA Journal of Ethics 1126 at 1127–1129. [↑](#footnote-ref-252)
252. *Egan v Canada* [1995] 2 SCR 513 at [171].The Canadian Supreme Court no longer uses dignity as a freestanding test for deciding which grounds to protect but still refers to dignity in its reasons. [↑](#footnote-ref-253)
253. *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 at [55] and [57]–[58]. [↑](#footnote-ref-254)
254. For example, *Harksen v Lane NO* [1997] ZACC 12, 1997 (11) BCLR 1489 at [46]. [↑](#footnote-ref-255)
255. (20 July 1977) 411 NZPD 1474 (Hon David Thomson MP); and (23 August 1977) 413 NZPD 2387 (Ian Shearer MP). [↑](#footnote-ref-256)
256. Human Rights Act 1993, s 92M(1)(c). [↑](#footnote-ref-257)
257. See *Harksen v Lane NO* [1997] ZACC 12, 1997 (11) BCLR 1489 at [49]. [↑](#footnote-ref-258)
258. Case C-13/94 *P v S* [1996] ECR I-2143 at [22]. The term ‘transsexual’ is the one used in the judgment. See, also, *Centre for Gender Advocacy v Attorney General of Québec* 2021 QCCS 191, 481 CRR (2d) 273 at [328]. [↑](#footnote-ref-259)
259. International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), arts 2(1) and 26; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976), art 2(2); and Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 2(1). [↑](#footnote-ref-260)
260. For example, United Nations Human Rights Committee *General comment No 36: Article 6 – right to life* UN Doc CCPR/C/GC/36 (3 September 2019) at [23] and [61]; United Nations Committee on Economic, Social and Cultural Rights *General comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C12/GC/20 (2 July 2009) at [32]; and United Nations Committee on the Rights of the Child *General comment No 15: on the right of the child to the enjoyment of the highest attainable standard of health* UN Doc CRC/C/GC/15 (17 April 2013) at [8] (although only discussing gender identity). The treaty bodies do not mention explicitly people who are non-binary. [↑](#footnote-ref-261)
261. *G v Australia* UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) (UNHRC); and *Savolaynen v Russian Federation* UN Doc CCPR/C/135/D/2830/2016 (23 July 2023) (UNHRC). [↑](#footnote-ref-262)
262. *Semenya v Switzerland* [2023] ECHR 582; and *Semenya v Switzerland* [2025] ECHR 175 (Grand Chamber). The Grand Chamber shall accept a request for referral if a case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance: Convention for the Protection of Human Rights and Fundamental Freedoms CETS 5 (open for signature 4 November 1950, entered into force 3 September 1953), art 43(2).  [↑](#footnote-ref-263)
263. For example, United Nations Human Rights Committee *General comment No 36: Article 6 – right to life* UN Doc CCPR/C/GC/36 (3 September 2019) at [23]; United Nations Committee on Economic, Social and Cultural Rights *General comment No 20: Non-discrimination in economic, social and cultural rights* *(art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C12/GC/20 (2 July 2009) at [32]; United Nations Committee on the Rights of the Child *General comment No 20 (2016) on the implementation of the rights of the child during adolescence* UN Doc CRC/C/GC/20 (6 December 2016) at [33]; United Nations Committee on the Elimination of Discrimination against Women *General recommendation No 36 (2017) on the right of girls and women to education* UN Doc CEDAW/C/GC/36(27 November 2017) at [45] and [66]; United Nations Committee against Torture *General comment No 2: Implementation of article 2 by States parties* UN Doc CAT/C/GC/2 (24 January 2008) at [21] (although only discussing “transgender identity”); and United Nations Committee on the Rights of Persons with Disabilities *General comment No 8 (2022) on the right of persons with disabilities to work and employment* UN Doc CRPD/C/GC/8 (7 October 2022) at [22]–[23] (although only discussing gender identity). [↑](#footnote-ref-264)
264. United Nations Committee on the Elimination of Discrimination against Women *Concluding observations on the eighth periodic report of New Zealand* UN Doc CEDAW/C/NZL/CO/8 (25 July 2018) at [11(a)] and [12(a)]; United Nations Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of New Zealand* UN Doc CRPD/C/NZL/CO/2-3 (26 September 2022) at [8(b)]; United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: New Zealand* UN Doc A/HRC/41/4 (1 April 2019) at [10], [122.51] and [122.52]; and United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: New Zealand* UN Doc A/HRC/57/4 (11 June 2024) at [132.34] and [132.35]. [↑](#footnote-ref-265)
265. Women’s Declaration International “Declaration on Women’s Sex Based Rights” <[www.womensdeclaration.com](https://www.womensdeclaration.com/en/declaration-womens-sex-based-rights-full-text/)>. [↑](#footnote-ref-266)
266. Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 1 March 1980, entered into force 3 September 1981), art 2. [↑](#footnote-ref-267)
267. Reem Alsalem *Position paper on the definition of “woman” in international human rights treaties, in particular the Convention on the Elimination of All Forms of Discrimination Against Women* (4 April 2024). See, also, Letter from Reem Alsalem (Special Rapporteur on violence against women and girls) to the United Kingdom Government regarding the Gender Recognition Reform (Scotland) Bill (ref: OL GBR 14/2022) (29 November 2022); and *Statement by Ms Reem Alsalem, Special Rapporteur on violence against women and girls* (2023). [↑](#footnote-ref-268)
268. *Flamer-Caldera* *v Sri Lanka* UN Doc CEDAW/C/81/D/134/2018 (24 March 2022) (UNCEDAW) at [9.7]; United Nations Committee on the Elimination of Discrimination against Women *General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women* UN Doc CEDAW/C/GC/32 (14 November 2014) at [6] and [16]; United Nations Committee on the Elimination of Discrimination against Women *General recommendation No 33 on women’s access to justice* UN Doc CEDAW/C/GC/33 (3 August 2015) at [8]; United Nations Committee on the Elimination of Discrimination against Women *General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19* UN Doc CEDAW/C/GC/35 (26 July 2017) at [12]; United Nations Committee on the Elimination of Discrimination against Women *General Recommendation No 39 (2022) on the rights of indigenous women and girls* UN Doc CEDAW/C/GC/39 (31 October 2022) at [22]–[23]; and United Nations Committee on the Elimination of Discrimination against Women *General recommendation No 40 (2024) on the equal and inclusive representation of women in decision-making systems* UN Doc CEDAW/C/GC/40 (25 October 2024) at [27]. [↑](#footnote-ref-269)
269. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296 at [176]. This decision has been appealed. See, also, Elise Meyer “Designing Women: The Definition of ‘Woman’ in the Convention on the Elimination of All Forms of Discrimination Against Women” (2016) 16 Chicago Journal of International Law 553. [↑](#footnote-ref-270)
270. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296. [↑](#footnote-ref-271)
271. See Te Manatū Waeture | Ministry for Regulation *Regulatory Impact Statement (RIS) template* at 7. [↑](#footnote-ref-272)
272. (15 December 1992) 532 NZPD 13208­–13209 (Hon Katherine O’Regan MP); and (22 July 1993) 536 NZPD 16742 (Graeme Reeves MP, presenting the report of the Justice and Law Reform Committee). See, also, Te Kāhui Tika Tangata | Human Rights Commission “Submission to the Justice and Law Reform Committee on the Human Rights Bill” at appendix 4, 11–12; and Queensland Human Rights Commission *Building belonging: Review of Queensland’s Anti-Discrimination Act 1991* (July 2022) at 261. [↑](#footnote-ref-273)
273. (27 July 1993) 537 NZPD 16904 (Hon Douglas Graham MP). [↑](#footnote-ref-274)
274. Sex Discrimination (Gender Reassignment) Regulations 1999 (UK); and Equality Act 2010 (UK), s 7. See, also, Sex Discrimination Act 1975 (UK), s 2A. [↑](#footnote-ref-275)
275. Equal Status Act 2000 (Ireland), s 3(2)(a); and Employment Equality Act 1998 (Ireland), s 6(2)(a). [↑](#footnote-ref-276)
276. Irish Human Rights and Equality Commission “Services & Gender” <[www.ihrec.ie](https://www.ihrec.ie/your-rights/services/gender/)>; and *Hannon v First Direct Logistics Ltd* Equality Tribunal (Ireland) DEC-S2011-066, 29 March 2011 at [4.3], citing Case C-13/94 *P v S* [1996] ECR I-2143. [↑](#footnote-ref-277)
277. *Bostock v Clayton County* 590 US 644 (2020). In 2025, a differently constituted United States Supreme Court held that an Equal Protection Clause claim about denying access to puberty blockers to children with gender dysphoria was not discrimination on the basis of sex or transgender status but the majority did not consider its decision inconsistent with *Bostock*: *United States v Skrmetti* 605 US \_\_\_ (2025) at 18–21. [↑](#footnote-ref-278)
278. See Movement Advancement Project “Employment Nondiscrimination” (2 July 2025) <[www.lgbtmap.org](https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws)>. [↑](#footnote-ref-279)
279. See Movement Advancement Project *Nondiscrimination: Regulating Gender to Allow Discrimination Against Transgender and Nonbinary People* (17 March 2025).  [↑](#footnote-ref-280)
280. (27 July 1993) 537 NZPD 16912. [↑](#footnote-ref-281)
281. Te Kaunihera Wahine o Aotearoa | National Council of Women of New Zealand *Aotearoa New Zealand Gender Attitudes Survey 2023* (July 2023) at 75–80. [↑](#footnote-ref-282)
282. Ipsos *LGBT+ Pride 2023: A 30-Country Ipsos Global Advisor Survey* (2023) at 35. A more recent Ipsos survey in 2024 did not include Aotearoa New Zealand. [↑](#footnote-ref-283)
283. ILGA World *Intersex Legal Mapping Report: Global Survey on Legal Protections for People Born with Variations in Sex Characteristics*(December 2023) at 43. [↑](#footnote-ref-284)
284. Human Rights Act 1993, s 21(1)(a). [↑](#footnote-ref-285)
285. Letter from Cheryl Gwyn (Acting Solicitor-General) to the Attorney-General regarding the Human Rights (Gender Identity) Amendment Bill (2 August 2006). [↑](#footnote-ref-286)
286. Te Tāhū o te Ture | Ministry of Justice *Proposals against incitement of hatred and discrimination* (2021) at 23. See, also, Hon Mark Mitchell “*Government response to the Petition of Rainbow Labour Christchurch Branch: Protect trans athletes’ right to compete in publicly funded sports* (J22, 26 February 2025) at [14]–[15] and [24]. [↑](#footnote-ref-287)
287. See Te Kāhui Tika Tangata | Human Rights Commission *Prism: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 14. [↑](#footnote-ref-288)
288. Te Mana Whakaatu | Classification Office communicated its approach on this issue to us in its submission. See, also, Te Kahu Raunui | Sport Integrity Commission “Racism and unlawful discrimination” [<sportintegrity.nz>](https://sportintegrity.nz/integrity/participant-protection-and-safeguarding/participant-protection/racism-and-unlawful-discrimination); Te Mana Whanonga Kaipāho | Broadcasting Standards Authority *BSA Guidance: Complaints Concerning Gender Identity Issues* (June 2023);and *Adam v Radio New Zealand Ltd* BSA 2022-067, 27 February 2023 at [35]. [↑](#footnote-ref-289)
289. For example, Case C-13/94 *P v S* [1996] ECR I-2143; *Chief Constable of West Yorkshire Police v A* [2004] UKHL 21, [2005] 1 AC 51; *Vancouver Rape Relief Society v Nixon* 2003 BCSC 1936, (2003] 48 CHRR D/123; *Vancouver Rape Relief Society v Nixon* 2005 BCCA 601, 55 CHRR D/67; and *Bostock v Clayton County* 590 US 644 (2020). [↑](#footnote-ref-290)
290. For example, *Sheridan v Sanctuary Investments Ltd (No 3)* 1999 BCHRT 4, (1999) 33 CHRR D/467; and *Hannon v First Direct Logistics Ltd* Equality Tribunal (Ireland) DEC-S2011-066, 29 March 2011. We are unaware of overseas cases in which a complainant with an innate variation of sex characteristics has relied on a prohibited ground of disability, although there is commentary that raises this possibility: Tia Frances Koonse “‘There is No There, There’: How Anti-Discrimination Successes for Trans Litigants Under the Categories of Sex and Disability Can Further the Intersex Rights Movement” (2009) 8 The Dukeminier Awards: Best Sexual Orientation and Gender Identity Law Review Articles 333. [↑](#footnote-ref-291)
291. The definition of disability includes “any … loss or abnormality of psychological, physiological, or anatomical structure or function”: Human Rights Act 1993, s 21(1)(h)(v). We understand the Human Rights Commission has received complaints from transgender people on the ground of disability in the past: Te Kāhui Tika Tangata | Human Rights Commission *Human Rights in New Zealand Today* | *Ngā Tika Tangata o Te Motu* (September 2004) at 360. [↑](#footnote-ref-292)
292. For example, Elisabeth McDonald “Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993” (2007) 5 NZJPIL 301. See, also, Annabel Markham “Transgender Ideology and the law” [2019] NZLJ 14 at 16–17. [↑](#footnote-ref-293)
293. Elisabeth McDonald “Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993” (2007) 5 NZJPIL 301 at 307. [↑](#footnote-ref-294)
294. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [264]. [↑](#footnote-ref-295)
295. For example, A Russell “*Bostock v Clayton County*: The Implications of a Binary Bias” (2021) 106 Cornell L Rev 1601 at 1603; and Sam Parry “Sex Trait Discrimination: Intersex People and Title VII After Bostock v Clayton County” (2022) 97 Wash L Rev 1149 at 1150. [↑](#footnote-ref-296)
296. Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuitanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008) at 90. [↑](#footnote-ref-297)
297. *B v Waitemata District Health Board* [2013] NZHC 1702, [2013] NZAR 937 at [65]. [↑](#footnote-ref-298)
298. Human Rights Act 1993, s 76(1)(b). [↑](#footnote-ref-299)
299. For example, in the financial year ending June 2024, the Human Rights Commission received 887 complaints alleging unlawful discrimination: Te Kāhui Tika Tangata | Human Rights Commission *Pūrongo-ā-tau: Annual Report* (2024) at 42. In the same period, Te Taraipiunara Mana Tangata | Human Rights Review Tribunal issued seven substantive decisions under the Human Rights Act 1993 (mainly claims of discrimination but some of harassment). [↑](#footnote-ref-300)
300. For example, these exceptions allow for single-sex bathrooms, separate competitive sporting events for men and women, and single-sex group counselling sessions on highly intimate matters such as sexual violence. [↑](#footnote-ref-301)
301. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [189]–[195]. [↑](#footnote-ref-302)
302. At [2]. [↑](#footnote-ref-303)
303. See *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [49], stating the question is whether the prohibited ground is a “material ingredient” in the decision about how to treat the complainant. [↑](#footnote-ref-304)
304. See *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296 at [78]; and *Winther v Housing New Zealand Corporation* [2011] NZHRRT 18 at [53]. Indirect discrimination operates differently but is not relevant to the one-off kind of interactions these submitters had in mind. [↑](#footnote-ref-305)
305. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296 at [186]–[188]. [↑](#footnote-ref-306)
306. To the extent there are grey areas with existing grounds, the courts and tribunals determine the bounds of protection: see *Butcher v New Zealand Transport Agency* [2022] NZHRRT 21, (2022) 13 HRNZ 631; and *BHP New Zealand Steel Ltd v O’Dea* [1997] ERNZ 667 (HC). [↑](#footnote-ref-307)
307. Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 9. [↑](#footnote-ref-308)
308. In the Issues Paper, we reported on data from the Human Rights Commission for the 16 years from 1 January 2008 to 31 December 2023. In that time, the Human Rights Commission received just 192 complaints about discrimination from people who identified as transgender, gender diverse or intersex on the ground of sex (an average of 12 per year): Letter from Te Kāhui Tika Tangata | Human Rights Commission to Te Aka Matua o te Ture | Law Commission regarding complaints data (1 March 2024). Data provided by the Human Rights Commission for the 2024 calendar year indicate an increase, with 20 complaints of discrimination on the ground of sex from people who identified as transgender, non-binary or intersex: Email from Te Kāhui Tika Tangata | Human Rights Commission to Te Aka Matua o te Ture | Law Commission regarding further complaints data (14 April 2025). [↑](#footnote-ref-309)
309. Te Kāhui Tika Tangata | Human Rights Commission *Prism: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 14–15. See, also, Jack L Byrne and others “Perceived legal protection and institutional trust predict a lower psychological distress level for transgender people in Aotearoa/New Zealand” (2024) Int J Transgend Health 1 at 2–3 and 6–8. [↑](#footnote-ref-310)
310. As we discuss in Chapter 7, some submitters did suggest a combined ‘sex and gender’ ground because they did not consider sex and gender to be distinct concepts. [↑](#footnote-ref-311)
311. See Department of Justice Canada “Gender Identity and Gender Expression: Questions and Answers” (1 September 2021) <[www.justice.gc.ca](https://www.justice.gc.ca/eng/csj-sjc/pl/identity-identite/faq.html)>; and (18 October 2016) 148 Canada Parliamentary Debates HC at 5753–5754. [↑](#footnote-ref-312)
312. (18 October 2016) 148 Canada Parliamentary Debates HC at 5751. See, similarly, (29 August 2000) 2 Victoria Parliamentary Debates Legislative Assembly 256 (stating similar logic for adding a specific ground of sexual orientation to Victorian anti-discrimination law). [↑](#footnote-ref-313)
313. (28 July 1993) 537 NZPD 16907 (Lianne Dalziel MP). Dalziel sat on the Select Committee that considered the Bill. [↑](#footnote-ref-314)
314. See Kyle Kirkup and others “The Aftermath of Human Rights Protections: Gender Identity, Gender Expression, and the Socio-Legal Regulation of School Boards” (2020) 35 CJLS 245 at 250; and Peter Dunne “Framing Equality: Debating Protected Grounds in the Field of Trans and Non-Binary Rights” in Eva Brems, Pieter Cannoot and Toon Moonen (eds) *Protecting Trans Rights in the Age of Gender Self-Determination* (Intersentia, Cambridge, 2020) 121 at 138–139. [↑](#footnote-ref-315)
315. For example, (27 July 1993) 537 NZPD 16941–16942 (Hon Richard Prebble MP). [↑](#footnote-ref-316)
316. (27 July 1993) 537 NZPD 16961 (Hon Douglas Graham MP). See, similarly, (31 May 2012) LXIV Legislative Assembly of Manitoba Debates and Proceedings 2055 (Minister of Justice, Hon Andrew Swan); and (18 October 2016) 148 Canada Parliamentary Debates HC at 5755, 5765, 5775 and 5780 (making similar points, specifically about the addition of gender identity grounds to Canadian anti-discrimination statutes). [↑](#footnote-ref-317)
317. See, for example, Jaclyn M W Hughto and others “Uncertainty and Confusion Regarding Transgender Non-discrimination Policies: Implications for the Mental Health of Transgender Americans” (2022) 19 Sexuality Research and Social Policy 1069; Ana Rabasco and Margaret Andover “The Influence of State Policies on the Relationship Between Minority Stressors and Suicide Attempts Among Transgender and Gender-Diverse Adults” (2020) 7 LGBT Health 457; and Jack L Byrne and others “Perceived legal protection and institutional trust predict a lower psychological distress level for transgender people in Aotearoa/New Zealand” (2024) Int J Transgend Health 1 at 2–3 and 6–8. [↑](#footnote-ref-318)
318. In the Issues Paper, we sought feedback on whether the Treaty of Waitangi might be a seventh reason (alongside the six historical rationales discussed above) to add new prohibited grounds to section 21 of the Human Rights Act. In this report, we discuss the Treaty of Waitangi (alongside tikanga) in a separate chapter. [↑](#footnote-ref-319)
319. For example, we discuss the implications of reform for access to single-sex facilities in Chapter 14. [↑](#footnote-ref-320)
320. See, for example, Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [4.1]. [↑](#footnote-ref-321)
321. See, for example, Damen Ward, Kevin Hille and Carwyn Jones *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, 2023) at [6.2], which describes how “the language of protection pervades the Treaty text”. [↑](#footnote-ref-322)
322. We rely in this report on Sir Hugh Kawharu’s English translation of the Treaty as appended to the Cabinet Office *Cabinet Manual 2023* at 156–159. [↑](#footnote-ref-323)
323. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal has explained that taonga or treasures “encompasses all those things which Māori consider important to their way of life”: *Te Whanau o Waipareira Report* (Wai 414, 1998) at 26. [↑](#footnote-ref-324)
324. In its submission, Te Ngākau Kahukura defined takatāpuitanga as mātauranga or practices and ways of being takatāpui. [↑](#footnote-ref-325)
325. Elizabeth Kerekere, Tīwhanawhana Trust and RainbowYOUTH “Growing Up Takatāpui: Whānau Journeys” <[takatapui.nz](https://takatapui.nz/growing-up-takatapui)>. See, also, Elizabeth Kerekere “Part of The Whānau: The Emergence of Takatāpui Identity – *He Whāriki Takatāpui*” (PhD Thesis, Te Herenga Waka | Victoria University of Wellington, 2017).  [↑](#footnote-ref-326)
326. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of The Waitangi Tribunal on The Te Reo Māori Claim* (Wai 11, 1986) at 20. See, similarly, Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22. For further discussion, see Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* | *Review of succession law: rights to a person’s property on death* (NZLC R145, 2021) at ch 3. [↑](#footnote-ref-327)
327. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua* | *Report of Waitangi Tribunal on the Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 56. [↑](#footnote-ref-328)
328. At 104. [↑](#footnote-ref-329)
329. See, in particular, Ahi Wihongi, *Statement of Claim* (1 October 2018) filed in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Mana Wāhine Kaupapa Inquiry (Wai 2700, 2021, #1.1.111). [↑](#footnote-ref-330)
330. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at [5.23]. [↑](#footnote-ref-331)
331. See, for example, Clive Aspin and Jessica Hutchings “Reclaiming the past to inform the future: Contemporary views of Maori sexuality” (2007) 9 Culture, Health & Sexuality 415 at 419. [↑](#footnote-ref-332)
332. See, for example, Ella Yvette Henry *Brief of Evidence* (29 June 2021) filed in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Mana Wāhine Kaupapa Inquiry (Wai 2700, 2021, #A63) at [17] and [20]; Heeni Meretini Collins *Brief of Evidence* (21 July 2022) filed in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Mana Wāhine Kaupapa Inquiry (Wai 2700, 2022, #A63) at [25]; Pei Te Hurinui Jones *King Pōtatau: An account of the life of Pōtatau Te Wherowhero the first Māori King* (The Polynesian Society, Wellington, 1959) at 247–253; Elizabeth Kerekere “Part of The Whānau: The Emergence of Takatāpui Identity – *He Whāriki Takatāpui*” (PhD Thesis, Te Herenga Waka | Victoria University of Wellington, 2017) at 65; and Ngahuia Te Awekotuku “He Reka Anō – same-sex lust and loving in the ancient Māori world” in Alison J Laurie and Linda Evans (eds) *Outlines: Lesbian & Gay Histories of Aotearoa* (Lesbian & Gay Archives of New Zealand, Wellington, 2005) 6 at 7. [↑](#footnote-ref-333)
333. IH Kawharu “Translation of Maori text” in IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319. [↑](#footnote-ref-334)
334. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 26. [↑](#footnote-ref-335)
335. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 28. [↑](#footnote-ref-336)
336. Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 54. [↑](#footnote-ref-337)
337. See, for example, Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 33–34. [↑](#footnote-ref-338)
338. See, for example, Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22. [↑](#footnote-ref-339)
339. See, for example, Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 54–55. [↑](#footnote-ref-340)
340. Tatauranga Aotearoa | Stats NZ “Place and ethnic group summaries: Māori” <[tools.summaries.stats.govt.nz](https://tools.summaries.stats.govt.nz/ethnic-group/maori#rainbow---lgbtiq+-indicator)>. The rate of Māori who were transgender was: slightly higher than in the “European”, “Pacific Peoples” and “Asian” ethnic groups (0.8 per cent, 0.8 per cent and 0.5 per cent, respectively); the same as in the “Middle Eastern/Latin American/African” ethnic group (1 per cent); and less than in the ‘other ethnicity’ group (1.4 per cent): Tatauranga Aotearoa | Stats NZ “Place and ethnic group summaries” <[tools.summaries.stats.govt.nz](https://tools.summaries.stats.govt.nz/)>. [↑](#footnote-ref-341)
341. For discussion of the quality of data relating to gender and ethnicity and the limitations when combining these data, see Tatauranga Aotearoa | Stats NZ “Place and ethnic group summaries: Māori” <[tools.summaries.stats.govt.nz](https://tools.summaries.stats.govt.nz/ethnic-group/maori#rainbow---lgbtiq+-indicator)>; Tatauranga Aotearoa | Stats NZ “Quality Statement: Rainbow/LGBTIQ+ indicator – 2023 Census: Information by concept” (September 2024) [<datainfoplus.stats.govt.nz>](https://datainfoplus.stats.govt.nz/item/nz.govt.stats/1dd7227f-6199-415a-92fb-5803b2906c4f); and Tatauranga Aotearoa | Stats NZ “Quality Statement: Ethnicity – 2023 Census: Information by concept” (June 2024) <[datainfoplus.stats.govt.nz](https://datainfoplus.stats.govt.nz/item/nz.govt.stats/1f1ca131-a9aa-483b-98ab-d22bf84ae944/81)>. [↑](#footnote-ref-342)
342. Tatauranga Aotearoa | Stats NZ “Variations of sex characteristics – 2023 Census: Information by concept” <[datainfoplus.stats.govt.nz](https://datainfoplus.stats.govt.nz/item/nz.govt.stats/72b1a7da-38d9-4359-8be8-fbe35956f94d)>. [↑](#footnote-ref-343)
343. Several organisations, including InsideOUT Kōaro, OutLine Aotearoa and the Wellington Pride Festival, highlighted the issue of intersectional discrimination experienced by Māori. Other submitters raised broader concerns about intersectional discrimination, including Te Aho Kawe Kaupapa Ture a ngā Wāhine | New Zealand Women’s Law Journal, Burnett Foundation Aotearoa, ICONIQ Legal Advocates, Rainbow Path and Professional Association for Transgender Health Aotearoa. [↑](#footnote-ref-344)
344. See, for example, Claire Breen and Margaret Bedggood (eds) *International Human Rights Law in Aotearoa New Zealand* (online looseleaf ed, Thomson Reuters, 2017) at [7.5]; Rosslyn Noonan (ed) *Brookers Human Rights Law* (online looseleaf ed, Thomson Reuters, 2018) at [HR21.09]; and Council of Europe “Intersectionality and Multiple Discrimination” <[www.coe.int](https://www.coe.int/en/web/gender-matters/intersectionality-and-multiple-discrimination)>. [↑](#footnote-ref-345)
345. See, for example, Mai Chen *The Diversity Matrix: Updating What Diversity Means for Discrimination Laws in the 21st Century* (Superdiversity Centre for Law, Policy and Business, 2017); and Amaani Batra “An intersectional race and gender analysis: an Aotearoa New Zealand lens on anti-discrimination law” (2023) 8 NZWLJ 202. [↑](#footnote-ref-346)
346. Transgender Health Research Lab *Counting Ourselves: Summary of findings for Māori from the 2022 Aotearoa New Zealand Trans and Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 5. [↑](#footnote-ref-347)
347. At 6. [↑](#footnote-ref-348)
348. At 7. [↑](#footnote-ref-349)
349. We are not aware of any research that compares the levels of discrimination experienced by Māori and non-Māori who have an innate variation of sex characteristics. [↑](#footnote-ref-350)
350. See Transgender Health Research Lab *Counting Ourselves: Summary of findings for Māori from the 2022 Aotearoa New Zealand Trans and Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 1. [↑](#footnote-ref-351)
351. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at ch 11. [↑](#footnote-ref-352)
352. Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [3.4] and [5.3]. See, also, Cabinet Office Circular “Te Tiriti o Waitangi/Treaty of Waitangi guidance” (22 October 2019) CO 19/5 at [74]–[76]. [↑](#footnote-ref-353)
353. Our use of the term ‘sex-differentiated’ to describe these tikanga activities is not intended to suggest otherwise. [↑](#footnote-ref-354)
354. For example, while the role of kaikōrero is typically held by males, among some iwi, including Ngāti Porou, Ngāpuhi and Ngāti Kahungunu, women are also kaikōrero: see Poia Rewi *Whaikōrero: The World of Māori Oratory* (Auckland University Press, Auckland, 2010) at 74. [↑](#footnote-ref-355)
355. See, for example, Rawinia Higgins and Paul Meredith “Te Mana o te wāhine – Māori women: Waiata, karanga and whaikōrero” (1 June 2017) Te Ara Encyclopedia of New Zealand <[teara.govt.nz](https://teara.govt.nz/en/te-mana-o-te-wahine-maori-women/page-4)>. [↑](#footnote-ref-356)
356. See, for example, Poia Rewi *Whaikōrero: The World of Māori Oratory* (Auckland University Press, Auckland, 2010) at 71. Rewi refers to the practices of Mātaatua and Te Arawa. [↑](#footnote-ref-357)
357. See, for example, Poia Rewi *Whaikōrero: The World of Māori Oratory* (Auckland University Press, Auckland, 2010) at 71–72. Rewi refers to Ngāti Porou, Te Whānau-a-Apanui and Ngāti Kahungunu. [↑](#footnote-ref-358)
358. See, for example, Ngāhuia Te Awekotuku and others *Mau Moko: The World of Māori Tattoo* (Penguin Group, North Shore, 2007) at 101; Jordan Harris *Takatāpui – A Place of Standing* (Oratia Books, Auckland, 2016) at 47; and Whakaata Māori | Māori Television “Karanga: The First Voice, Series 2 Episode 11” <[www.maoriplus.co.nz](https://www.maoriplus.co.nz/show/karanga-the-first-voice/play/6306555530112)>. [↑](#footnote-ref-359)
359. See, for example, Whatitiri Te Wake “Where do I stand? Takatāpui and the traditions of competitive haka | Kia Wiri! Episode 2” (22 February 2025) <[www.teaonews.co.nz](https://www.teaonews.co.nz/2025/02/22/where-do-i-stand-takatapui-and-the-traditions-of-competitive-haka-kia-wiri-episode-2/?fbclid=IwY2xjawI3MjlleHRuA2FlbQIxMAABHdLQsbLItsyzZuwRlKvb4aBhJW_MniGJMp_SKxlWK3Yp-Tzt2YqgAXi99Q_aem_Yj4BjNLcngNr_dSjyOCzQQ)>. [↑](#footnote-ref-360)
360. See, for example, Te Hiku Media “Angitu Challenge Gender Roles In Te Matatini 2023” (3 March 2023) <[tehiku.nz](https://tehiku.nz/te-hiku-radio/tautinei/33912/angitu-challenge-gender-roles-in-te-matatini-2023)>. [↑](#footnote-ref-361)
361. *Bullock v Department of Corrections* [2008] NZHRRT 4. [↑](#footnote-ref-362)
362. The poroporoaki was the graduation ceremony for a course for Māori offenders. [↑](#footnote-ref-363)
363. *Bullock v Department of Corrections* [2008] NZHRRT 4 at [90]. [↑](#footnote-ref-364)
364. See, for example, Natalie Coates “A consideration of the place of pōwhiri in the state sector” (2012) 1 JSPL 5; G Raumati Hook “Bullock versus the Department of Corrections: Did the Human Rights Review Tribunal get it wrong?” (2009) 2 MAI Review 3; and Claire Charters “Finding the Rights Balance: A Methodology to Balance Indigenous Peoples’ Rights and Human Rights in Decision-Making” [2017] NZ L Rev 553. [↑](#footnote-ref-365)
365. See, for example, *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; and *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239. [↑](#footnote-ref-366)
366. See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at ch 7. [↑](#footnote-ref-367)
367. See, for example, *Tutaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [35]–[37]; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46]. [↑](#footnote-ref-368)
368. New Zealand Bill of Rights Act 1990, s 20. [↑](#footnote-ref-369)
369. *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), arts 3 and 4. The *Bullock* decision was handed down before Aotearoa New Zealand affirmed the Declaration in 2010. [↑](#footnote-ref-370)
370. Human Rights Act 1993, ss 57(1)(d) (relating to education) and 44(1)(b) (relating to provision of goods and services). In some areas of life regulated by Part 2, the Tribunal can also declare that something is not unlawful because there is “a genuine justification”: Human Rights Act 1993, s 97(2)(b). However, it is difficult to predict whether this argument would be successful as section 97 has not been much utilised. [↑](#footnote-ref-371)
371. Human Rights Act 1993, s 20L read together with New Zealand Bill of Rights Act 1990, ss 5 and 19; and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [135]–[136] and [143]. We explore these tests in Chapter 18. [↑](#footnote-ref-372)
372. Issues Paper at [17.11]. [↑](#footnote-ref-373)
373. New Zealand Bill of Rights Act 1990, s 3(b); and Human Rights Act 1993, ss 20J and 21A. We discuss Part 1A in more detail in Chapter 18. [↑](#footnote-ref-374)
374. Professor Charters has written several articles that explore similar issues: Claire Charters “BORA and Māori: the fundamental issues” [2003] NZLJ 459; Claire Charters “Te Tiriti o Waitangi, the United Nations Declaration on the Rights of Indigenous Peoples, and constitutional issues” [2021] 8 Te Tai Haruru Journal of Māori and Indigenous Issues 30; and Claire Charters “Finding the Rights Balance: A Methodology to Balance Indigenous Peoples’ Rights and Human Rights in Decision-making” [2017] NZ L Rev 553. [↑](#footnote-ref-375)
375. Issues Paper at [17.23]–[17.35]. [↑](#footnote-ref-376)
376. At [17.36]–[17.39]. [↑](#footnote-ref-377)
377. For example, Professor Claire Charters. [↑](#footnote-ref-378)
378. For example, InsideOUT Kōaro, Qtopia and Rainbow Support Collective. [↑](#footnote-ref-379)
379. For example, International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 18–19 and 22. [↑](#footnote-ref-380)
380. United Nations Human Rights Committee *General Comment No 22: Article 18 (Freedom of Thought, Conscience and Religion)* UN Doc CCPR/C/21/Rev1/Add4 (27 September 1993) at [1]. [↑](#footnote-ref-381)
381. See, for example, *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510, (2021) 12 HRNZ 693 at [70], [72] and [86]; and *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 at [16] per Lord Nicholls. [↑](#footnote-ref-382)
382. *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15]. [↑](#footnote-ref-383)
383. See *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510, (2021) 12 HRNZ 693 at [129]; and *RJR-MacDonald Inc v Attorney-General* (1995) 127 DLR (4th). [↑](#footnote-ref-384)
384. See *Hopkinson v Police* [2004] 3 NZLR 704 (HC). [↑](#footnote-ref-385)
385. Examples include: the law of defamation; summary offences relating to threatening, insulting or obscene language; regulation of broadcasting standards; and regulation of harmful digital communications. [↑](#footnote-ref-386)
386. See, for example, *R v Oakes* [1986] 1 SCR 103 at [69]–[70]; and *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J. We discuss some specific elements of this proportionality test in Chapter 18. [↑](#footnote-ref-387)
387. *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [235]. [↑](#footnote-ref-388)
388. For example, *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [114] per McGrath J and [244] per Thomas J; and *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [178] per Keith J and [233] per Tipping J. Other rationales are sometimes stated but the three mentioned here are the ones on which there is the most agreement. [↑](#footnote-ref-389)
389. *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [148] per Baroness Hale. See, also, *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 460–462. [↑](#footnote-ref-390)
390. *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [233]. See, also, *Higgs v Farmor’s School* [2025] EWCA Civ 109, [2025] IRLR 368 at [63]. [↑](#footnote-ref-391)
391. See Kent Greenawalt “Insults and Epithets: Are They Protected Speech?” (1990) 42 Rutgers L Rev 287 at 293 and 298. [↑](#footnote-ref-392)
392. *Campbell v United Kingdom* [1982] ECHR 1 at [36], contrasting “conviction” or “belief” with “opinions” or “ideas”. See, similarly, *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 at [23]. [↑](#footnote-ref-393)
393. See *Eweida v United Kingdom* [2013] ECHR 37 at [82], discussed further below. [↑](#footnote-ref-394)
394. See *Buscarini v San Marino* (1999) 30 EHRR 208 at [34]; and *Lee v Ashers* [2018] UKSC 49, [2020] AC 413 at [50]. [↑](#footnote-ref-395)
395. *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142, [2021] 2 NZLR 795 at [113]. See, also, *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [72]; and *R (on the application of Countryside Alliance) v Attorney-General* [2007] UKHL 52, [2008] 1 AC 719 at [117]–[118] per Baroness Hale. [↑](#footnote-ref-396)
396. *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [72]. [↑](#footnote-ref-397)
397. See *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC) at [50] per Elias CJ. [↑](#footnote-ref-398)
398. See *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [68(f)]. [↑](#footnote-ref-399)
399. Human Rights Act 1993, s 21(1)(c) and (j). There is also a ground of “ethical belief” but it is defined narrowly to mean the lack of a religious belief: Human Rights Act 1993, s 21(1)(d). [↑](#footnote-ref-400)
400. Equality Act 2010 (UK), s 10. See, for example, *Higgs v Farmor’s School* [2025] EWCA Civ 109, [2025] IRLR 368. [↑](#footnote-ref-401)
401. See Paul Rishworth “Inner Freedoms: Thought, Conscience, Religion and Belief” in Te Kāhui Ture o Aotearoa | New Zealand Law Society *Human Rights Law – Trans-Tasman Conference* (2024) 199 at 216. [↑](#footnote-ref-402)
402. See Australian Law Reform Commission *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Final Report* (ALRC Report 129, 2015) at [5.147], making this point in relation to freedom of religion. [↑](#footnote-ref-403)
403. See *Matthews v Newberrys Funeral Home Ltd* [2022] NZERA 345 at [77]. [↑](#footnote-ref-404)
404. For example, *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [57]–[59] per Blanchard J, [89]–[91] per Tipping J and [186]–[189] per McGrath J. The NZ Bill of Rights can be overridden by unambiguous legislation: New Zealand Bill of Rights Act 1990, s 4. However, the courts are slow to resort to this provision. We do not see it as qualifying the analysis below. [↑](#footnote-ref-405)
405. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at [17.47] and [17.52]. [↑](#footnote-ref-406)
406. Most of these legal experts noted their express agreement, and none disagreed, with the proposition that the discrimination provisions in the Human Rights Act would be interpreted to ensure that behaviour falling below this seriousness threshold was not a breach of the Act. [↑](#footnote-ref-407)
407. *Bell v Radio New Zealand Ltd* BSA 2023-016, 30 May 2023. In that case, the Authority dismissed a complaint that the deadnaming and misgendering of an interviewee by a Radio NZ host breached the relevant broadcasting code. Kia Rangona te Kōrero | Free Speech Union was nevertheless concerned about the Authority’s observations as to when intervention is or is not appropriate. [↑](#footnote-ref-408)
408. Ethos therefore urged us to consider carefully exceptions for organised religion and single-sex schools (issues we address in Chapters 9 and 12). It also recommended a conscience exception for health practitioners, which we discuss below. [↑](#footnote-ref-409)
409. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296. [↑](#footnote-ref-410)
410. We explain more precisely the division between Part 1A and Part 2 in Chapter 8. [↑](#footnote-ref-411)
411. We discuss the tests for establishing a breach of Part 1A in more detail in Chapter 18. [↑](#footnote-ref-412)
412. There is no settled approach from the New Zealand courts as to which of these two techniques is more appropriate when reconciling tensions between conflicting rights: see, generally, Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis NZ, Wellington, 2015) at [6.6.19]–[6.6.36]. [↑](#footnote-ref-413)
413. Human Rights Act 1993, ss 22(1)(c), 36(2)(b) and 57(1)(d). Detriment is not defined in the Human Rights Act but is defined in a discrimination provision in the Employment Relations Act 2000 as “anything that has a detrimental effect on the employee’s employment, job performance, or job satisfaction”: Employment Relations Act 2000, s 104(2). [↑](#footnote-ref-414)
414. See, for example, *Brooker v Police* [2007] NZSC 30,[2007] 3 NZLR 91 at [59] per Blanchard J, at [91] per Tipping J and at [130] per McGrath J, holding that the word “disorderly” must be construed and applied to avoid an unjustified limit on freedom of expression. Compare *Bullock v Department of Corrections* [2008] NZHRRT 4 at [82]–[83], in which Te Taraipiunara Mana Tangata | Human Rights Review Tribunal held that “detriment” does not incorporate a de minimis threshold. However, no New Zealand Bill of Rights Act 1990 argument was made in that case. [↑](#footnote-ref-415)
415. Some recent cases include *Hickson v Television New Zealand Ltd* BSA 2023-044, 20 November 2023 at [13]–[16]; *Bell v Radio New Zealand Ltd* BSA 2023-016, 30 May 2023 at [14]; and *Rivers v Radio New Zealand Ltd* BSA 2023-082, 7 November 2023 at [11]. [↑](#footnote-ref-416)
416. Occasionally, submitters referred to other rights such as freedom of movement or freedom of peaceful assembly. We do not think the review affects these rights so do not discuss them further. [↑](#footnote-ref-417)
417. We discuss the feedback we received on harassment separately in Chapter 16. [↑](#footnote-ref-418)
418. This count of 6,013 is approximate as it was reached after removing obvious duplicates (as we explained in Chapter 1). [↑](#footnote-ref-419)
419. Once the individual had selected the form text, it appears the Free Speech Union’s computerised submission builder varied slightly some words in each paragraph to individualise the feedback, but without changing the substance of the feedback. [↑](#footnote-ref-420)
420. Hate speech laws target hostility towards a group rather than an individual and raise different issues from a free speech perspective. We were requested by the Minister of Justice not to review hate speech provisions in the Human Rights Act and have not done so. [↑](#footnote-ref-421)
421. The submission quoted from *Policy of the Women’s Rights Party:* *With amendments voted on at the Annual Conference* (29 June 2024) at 3. [↑](#footnote-ref-422)
422. Human Rights Act 1993, ss 62(3)(k) and 63(2)(k). For reasons set out in Chapter 16, we do not recommend reforms of sections 62 or 63, and their scope will not be expanded by the reforms we propose of section 21. [↑](#footnote-ref-423)
423. See, for example, *R (on the application of Miller) v College of Policing* [2021] EWCA Civ 1926, [2022] 1 WLR 4987 at [102]. [↑](#footnote-ref-424)
424. *Adam v Radio New Zealand Ltd* BSA 2022-067, 27 February 2023 at [20] (footnotes omitted). See, also, *Whitmore v Palmerston North City Council* [2021] NZHC 1551, (2021) 12 HRNZ 862 at [48]–[50]. [↑](#footnote-ref-425)
425. *Higgs v Farmor’s School* [2025] EWCA Civ 109, [2025] IRLR 368 at [62]. The Unted Kingdom Supreme Court has refused leave to appeal this decision. [↑](#footnote-ref-426)
426. At [139]. [↑](#footnote-ref-427)
427. For example, *Forstater v CGD Europe* [2022] ICR 1 (UKEAT) at [111]–[116]; *Forstater v CGD Europe* UKET 2200909/2019, 6 July 2022; *Fahmy v Arts Council England* UKET 6000042/2022, 21 June 2023; *Adams v Edinburgh Rape Crisis Centre* UKET (Scotland) 4102236/2023, 14 May 2024; *Meade v Westminster City Council* UKET 2200179/2022 and 2211483/2022, 4 January 2024; *Phoenix v The Open University* UKET3322700/2021 and 3323841/2012, 22 January 2024; and *Higgs v Farmor’s School* [2025] EWCA Civ 109, [2025] IRLR 368. [↑](#footnote-ref-428)
428. For discussion of this threshold, see *Higgs v Farmor’s School* [2025] EWCA Civ 109, [2025] IRLR 368 at [139]–[143]. [↑](#footnote-ref-429)
429. There are also some cases involving misgendering, which we discuss below. [↑](#footnote-ref-430)
430. *Orwin v East Riding of Yorkshire Council* UKET 6000146/2022, 28 June 2024 at [250]. [↑](#footnote-ref-431)
431. *McBride v Scottish Ministers* UKET (Scotland) 4102841/2023, 18 July 2024. See, also, *Drybowski v The Bishop of Llandaff Church In Wales High School* UKET 1601681/2023 and 1601682/2023, 2 December 2024. In *Massoff v Chief Executive of Inland Revenue Department* [2025] NZERA 402, Te Ratonga Ahumana Taimahi | Employment Relations Authority dismissed a claim of unjustified disadvantage and constructive dismissal from an employee who received a letter of expectation after making sarcastic remarks about gender on an internal forum. However, the Authority’s key finding was that the letter of expectation did not impose disciplinary consequences and, therefore, did not give rise to a disadvantage for the purposes of employment law: at [27] and [31]. We understand the decision is being appealed. [↑](#footnote-ref-432)
432. *R (on the application of Leger) v Secretary of State for Education* [2025] EWHC 665 (Admin). In the United Kingdom, similar sanctions have been imposed on a teacher under safeguarding legislation: see *DMR v Disclosure and Barring Service* [2024] UKUT 426 (AAC). [↑](#footnote-ref-433)
433. *British Columbia College of Nurses and Midwives v Hamm* BCCNM Discipline Committee, 13 March 2025 (this decision is being appealed to the British Columbia Supreme Court). See, also, *Turner v Professional Conduct Committee of the Nursing Council of New Zealand* [2025] NZHC 134 at [52] (although only one of the remarks that were the subject of the regulatory sanction related to gender). [↑](#footnote-ref-434)
434. A complaint of discrimination under a British Columbia anti-discrimination statute (arising from the expression of gender-critical beliefs as well as misgendering of a transgender person) was upheld in *Oger v Whatcott (No 7)* 2019 BCHRT 58. But the provision at issue in that case has no counterpart in our legislation and is more akin to a hate speech law. [↑](#footnote-ref-435)
435. “Hate speech”, which directs hostility at a group rather than an individual, raises different issues. [↑](#footnote-ref-436)
436. See *Redmond-Bate v Director of Public Prosecutions* [1999] Crim LR 998 (QB) at [20]: “Freedom only to speak inoffensively is not worth having.” See, also, *Cohen v California* 403 US 15 (1971). [↑](#footnote-ref-437)
437. As noted earlier, these include democratic self-government, promoting the discovery of truth and self-fulfilment. [↑](#footnote-ref-438)
438. Kent Greenawalt “Insults and Epithets: Are They Protected Speech?” (1990) 42 Rutgers L Rev 287 at 293. [↑](#footnote-ref-439)
439. See Kent Greenawalt “Insults and Epithets: Are They Protected Speech?” (1990) 42 Rutgers L Rev 287 at 298 and 306. [↑](#footnote-ref-440)
440. As noted earlier, deadnaming is a subcategory of misgendering that involves calling someone by a previous name linked to their sex assigned at birth. [↑](#footnote-ref-441)
441. See, for example, *Lee v Ashers Baking Company Ltd* [2018] UKSC 49, [2020] AC 413 at [52]–[56]. [↑](#footnote-ref-442)
442. *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510, (2021) 12 HRNZ 693 at [129]–[135]. [↑](#footnote-ref-443)
443. See *Eweida v United Kingdom* [2013] ECHR 37 at [82]. [↑](#footnote-ref-444)
444. *Eweida v United Kingdom* [2013] ECHR 37 at [82]. The Court held in this case that the right was engaged by restrictions on religious clothing or symbols in the workplace (at [89] and [97]) and by requiring a counsellor to offer psycho-sexual counselling services to same-sex couples (at [108]). The Court also held that requiring a registrar to perform a same-sex civil partnership fell within the “ambit” of the right — a broader penumbra surrounding the right that has no analogy in New Zealand law (at [103]). In another case, the Court held the right was not engaged by a requirement that a pharmacist supply contraceptives despite their religious objection: *Pichon v France* [2001] ECHR 898. [↑](#footnote-ref-445)
445. *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510, (2021) 12 HRNZ 693 at [109]–[115]. Compare *Four Members of the Armed Forces v Chief of Defence Force* [2024] NZCA 17, [2024] 3 NZLR 1 at [129]–[133], holding that a mandate requiring people to use a vaccine that may have been tested on cells derived from a human foetus that may have been aborted engaged section 15. The decision was appealed successfully to Te Kōti Mana Nui | Supreme Court, but the finding that section 15 was engaged was not at issue in the appeal: *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [20]. [↑](#footnote-ref-446)
446. See, for example, *Forstater v CGD Europe* [2022] ICR 1 (UKEAT) at [103]. [↑](#footnote-ref-447)
447. Issues Paper at [17.53]–[17.57]. [↑](#footnote-ref-448)
448. Other legal academics who agreed broadly with our analysis on this point were Professor Paul Rishworth KC and Professor Dean Knight. [↑](#footnote-ref-449)
449. See Alex Casey “Deadnaming, insults and harassment: trans Corrections officer brings landmark human rights case against employer” (16 May 2024) The Spinoff <[thespinoff.co.nz](https://thespinoff.co.nz/society/16-05-2024/deadnaming-insults-and-harassment-trans-corrections-officer-brings-landmark-human-rights-case-against-his-employer)>. [↑](#footnote-ref-450)
450. For example, *SR v DLPH Hambleton Group Inc (aka Burger King Franchise 3566)* 2024 HRTO 1491; *Nelson v Goodberry Restaurant Group Ltd* 2021 BCHRT 137; *EN v Gallagher’s Bar and Lounge* 2021 HRTO 240; *Bilac v Abbey* 2023 CHRT 43; *Vanderputten v Seydaco Packaging Corp* 2012 HRTO 1977; *de Souza E Souza v Primark Stores Ltd* UKET 2206063/2017, 22 December 2017; and *AB v Royal Borough of Kingston upon Thames* UKET 2303616/2021, 11 September 2023. [↑](#footnote-ref-451)
451. *M v A* [2007] QADT 8; and *AB v Mad Wax Windsor Inc* 2024 HRTO 721. [↑](#footnote-ref-452)
452. *Complaints Assessment Committee v Teacher* [2023] NZTDT 2022/24; *Ontario College of Teachers v Teal* 2022 ONOCT 33; and Teaching Regulation Agency *Mr Joshua Sutcliffe: Professional conduct panel outcome – Panel decision and reasons on behalf of the Secretary of State for Education* (0017091, 5 May 2023). See, also, *Sutcliffe v Secretary of State for Education* [2024] EWHC 1878 (Admin), [2024] ICR 1332, in which the England and Wales High Court dismissed Mr Sutcliffe’s appeal. [↑](#footnote-ref-453)
453. *Lister v New College Swindon* UKET 1404223/2022, 27 March 2024. See, also, *Mackereth v Department for Work and Pensions* [2022] EAT 99, [2022] ICR 1609, although that case largely turned on a failure to prove adverse treatment. [↑](#footnote-ref-454)
454. Professor Paul Rishworth KC and Dr Eddie Clark agreed with this suggestion. Countering Hate Speech Aotearoa, DLA Piper New Zealand, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Qtopia also agreed. [↑](#footnote-ref-455)
455. Employers have obligations under the Health and Safety at Work Act 2015 to ensure the health and safety of workers so far as is reasonably practicable: s 36. [↑](#footnote-ref-456)
456. See Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, rights 3 and 4(3), entitling healthcare consumers to have services provided in a manner that respects their dignity and is consistent with their needs. [↑](#footnote-ref-457)
457. See Te Tāhuhu o te Mātauranga | Ministry of Education “Te whakatakoto nawe | Make a complaint” (11 April 2024) <[www.education.govt.nz](https://www.education.govt.nz/our-work/our-role-and-our-people/contact-us/complaints)>. Under the Education and Training Act 2020, school boards have obligations to ensure the school is a physically and emotionally safe place for all students and staff and to take all reasonable steps to eliminate stigma and bullying: s 127(1)(b)(i) and (iii). [↑](#footnote-ref-458)
458. See Privacy Act 2020, pt 5. [↑](#footnote-ref-459)
459. We also gave submitters a fifth option – “Another option (please specify)”. [↑](#footnote-ref-460)
460. These were Identify Survey, InsideOUT Kōaro, Te Ngākau Kahukura, Qtopia, Rainbow Support Collective, Community Law Centres o Aotearoa, LGB Alliance, Ethos, Association of Proprietors of Integrated Schools, Lesbian Resistance New Zealand, DLA Piper New Zealand, Women’s Declaration International NZ, Speak Up for Women, Kia Rangona te Kōrero | Free Speech Union, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Resist Gender Education. [↑](#footnote-ref-461)
461. These included Te Kāhui Ture o Aotearoa | New Zealand Law Society and Associate Professor Selene Mize. Associate Professor Mize also suggested the Human Rights Act should provide a right to have documents edited with new names and genders. [↑](#footnote-ref-462)
462. See the fuller discussion of harassment provisions in Chapter 16. [↑](#footnote-ref-463)
463. In the specific context of gender-critical speech, see *R (on the application of Miller) v College of Policing* [2021] EWCA Civ 1926, [2022] 1 WLR 4987 at [68]; and *Higgs v Farmor’s School* [2025] EWCA Civ 109, [2025] IRLR 368 at[64]. [↑](#footnote-ref-464)
464. The sexual and racial harassment provisions, which we discuss in Chapter 16, are departures from this approach. However, they do not displace the ability to argue that speech-related harms constitute discrimination under other Part 2 provisions. [↑](#footnote-ref-465)
465. *Lee v Ashers Baking Company Ltd* [2018] UKSC 49, [2020] AC 413 at [35]. [↑](#footnote-ref-466)
466. *Lee v Ashers Baking Company Ltd* [2018] UKSC 49, [2020] AC 413 at [55]–[56] and [62]. See, similarly, *303 Creative LLC v Elenis* 600 US 570 (2023). [↑](#footnote-ref-467)
467. *Lee v Ashers Baking Company Ltd* [2018] UKSC 49, [2020] AC 413 at [55]. [↑](#footnote-ref-468)
468. *Eweida v United Kingdom* [2013] ECHR 37 at [102]–[106]. [↑](#footnote-ref-469)
469. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, right 6. [↑](#footnote-ref-470)
470. Human Rights Act 1993, s 21B. See *Jacobsen v Zhou* [2015] NZHRRT 38. [↑](#footnote-ref-471)
471. Te Kaunihera Rata o Aotearoa | Medical Council of New Zealand *Good Medical Practice* (November 2021) at [20]. [↑](#footnote-ref-472)
472. Contraception, Sterilisation, and Abortion Act 1977, s 14; and End of Life Choice Act 2019, s 8. [↑](#footnote-ref-473)
473. Contraception, Sterilisation, and Abortion Act 1977, s 14(2)(b); and End of Life Choice Act 2019, s 9(2)(b). [↑](#footnote-ref-474)
474. *Pichon and Sajous v France* [2001] ECHR 898. [↑](#footnote-ref-475)
475. *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510, (2021) 12 HRNZ 693. [↑](#footnote-ref-476)
476. Human Rights Act 1993, ss 36(1)–(2) and 37. [↑](#footnote-ref-477)
477. For decisions in which the United States Supreme Court has held that requiring large professional and business associations to comply with anti-discrimination laws regarding their membership does not infringe on freedom of association, see: *Roberts v United States Jaycees* 468 US 609 (1984); *Board of Directors of Rotary International v Rotary Club of Duarte* 481 US 537 (1987); and *New York State Club Association Inc v City of New York* 487 US 1 (1988). Outside the context of business associations, United States law is less settled: see, for example, *Boy Scouts of America v Dale* 530 US 640 (2000); and *Christian Legal Society Chapter of the University of California, Hastings College of Law v Martinez* 561 US 661 (2010). [↑](#footnote-ref-478)
478. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296. [↑](#footnote-ref-479)
479. *Lesbian Action Group v Australian Human Rights Commission* [2025] ARTA 34. The power to grant such an exemption is conferred by section 44 of the Sex Discrimination Act 1984 (Cth). There is no comparable exemption power in New Zealand law. [↑](#footnote-ref-480)
480. Human Rights Act 1993, s 44(4). [↑](#footnote-ref-481)
481. But, see, *Bhana v The Bay of Plenty (Rotorua) Indian Association Inc* (2000) 5 HRNZ 515 (HC). [↑](#footnote-ref-482)
482. As we discuss further in Chapter 8, section 73 sets out some limited circumstances in which a measure that is done to advance the equality of a disadvantaged group will not be unlawful under Part 2 of the Human Rights Act. [↑](#footnote-ref-483)
483. *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142, [2021] 2 NZLR 795 at [113]. On appeal, Te Kōti Mana Nui | Supreme Court was inclined to agree but did not consider it necessary to resolve the point: *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [65]. [↑](#footnote-ref-484)
484. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at ch 7. [↑](#footnote-ref-485)
485. Employment status is defined to mean people who are unemployed, on a benefit or receiving ACC payments: Human Rights Act 1993, s 21(1)(k). [↑](#footnote-ref-486)
486. Issues Paper at [7.8]–[7.23]. [↑](#footnote-ref-487)
487. At [7.24]–[7.62]. [↑](#footnote-ref-488)
488. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879. [↑](#footnote-ref-489)
489. At [177], [210] and [264]. See, also, discussion of exceptions for single-sex services (at [211]–[221]), accommodation (at [222]–[225]), educational institutions (at [226]–[228]), associations and charities (at [229]–[231]), sport (at [232]–[236]) and the public sector equality duty (at [237]–[244]). [↑](#footnote-ref-490)
490. Although, as we noted in Chapter 2, this term is still preferred by some people. [↑](#footnote-ref-491)
491. See Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 9. Some respondents to this survey also described their gender as woman/girl or man/boy. [↑](#footnote-ref-492)
492. Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 63. [↑](#footnote-ref-493)
493. However, we discuss further below the desirability of extending any ground to cover cultural identities. [↑](#footnote-ref-494)
494. Equality Act 2010 (UK), ss 4 and 7. [↑](#footnote-ref-495)
495. We set out the grounds in other jurisdictions in a table at the end of this chapter. [↑](#footnote-ref-496)
496. Issues Paper at [7.44]. [↑](#footnote-ref-497)
497. Human Rights Act 1993, s 80. [↑](#footnote-ref-498)
498. Human Rights Act 1993, ss 115 and 115A. [↑](#footnote-ref-499)
499. Human Rights Act 1993, s 92L. [↑](#footnote-ref-500)
500. We discuss later the desirability of a combined ground in relation to sex characteristics. [↑](#footnote-ref-501)
501. These would need to be included as section 21(1)(a) specifies that they are protected under the current ground of sex. [↑](#footnote-ref-502)
502. Some submitters supported a symmetrical option without expressing a preference as to which. [↑](#footnote-ref-503)
503. It had a “slight preference” for a stand-alone ground such as gender, gender identity or gender expression. [↑](#footnote-ref-504)
504. The rainbow organisations that supported a stand-alone symmetrical ground were InsideOUT Kōaro, Paekākāriki Pride, Qtopia, Rainbow Greens, Rainbow Path, Rainbow Support Collective, Tīwhanawhana Trust and Wellington Pride Festival. The other organisations that supported this option were: DLA Piper New Zealand, ICONIQ Legal Advocates, NZ Women’s Law Journal and Wellington Community Justice Project – Law Reform Team. [↑](#footnote-ref-505)
505. The five organisations that supported this option were: Gender Minorities Aotearoa, OutLine Aotearoa, Te Pūkenga Here Tikanga Mahi | Public Service Association, Te Ngākau Kahukura and Women’s Health Action. In addition, some organisations that preferred a stand-alone symmetrical ground acknowledged some advantages of a combined sex or gender ground or said this was their second choice. [↑](#footnote-ref-506)
506. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [198]–[199]. [↑](#footnote-ref-507)
507. See Issues Paper at [2.9]–[2.11] and [2.16]. [↑](#footnote-ref-508)
508. For example, Equal Status Act 2000 (Ireland), s 3(2)(a); Employment Equality Act 1998 (Ireland), s 6(2)(a); Alberta Human Rights Act RSA 2000 c A-25.5, preamble; and Anti-Discrimination Act 1998 (Tas), s 16(e). [↑](#footnote-ref-509)
509. For example, the submissions from Feminist Older Women Lobbyists and Women’s Declaration International NZ referred to gender as a social construct. [↑](#footnote-ref-510)
510. We discussed some of these terms in Chapter 2. [↑](#footnote-ref-511)
511. This was one reason why Te Ngākau Kahukura preferred a combined sex or gender ground. [↑](#footnote-ref-512)
512. Patrick Thomsen and others *The Manalagi Survey Community Report: Examining the Health and Wellbeing of Pacific Rainbow+ Peoples in Aotearoa-New Zealand* (2023) at 27. Respondents were asked which statement applied to their gender identity. Fifty-two per cent said they were cisgender, 28 per cent said they were transgender or non-binary and 20 per cent said none of those statements applied to their gender identity. [↑](#footnote-ref-513)
513. See, also, Law Commission Act 1985, s 5(2)(a), stating the Law Commission’s obligation to “take into account te ao Māori” and to “give consideration to the multicultural character of New Zealand society”. [↑](#footnote-ref-514)
514. For further discussion of article 3, see Chapter 5. [↑](#footnote-ref-515)
515. Oranga Tamariki Act 1989, s 2 definition of “mana tamaiti (tamariki)”. [↑](#footnote-ref-516)
516. See *The Yogyakarta Principles* *plus 10*: *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (Geneva, 10 November 2017) at 6. [↑](#footnote-ref-517)
517. Options suggested for wording included: gender; gender identity and gender expression as separate grounds; gender identity and gender expression as separate grounds; gender identity and gender expression as a combined ground; and gender identity defined to include gender expression. [↑](#footnote-ref-518)
518. In the Issues Paper at [7.44], we discussed two (unsuccessful) Canadian cases where cisgender men brought gender expression claims relating to stereotypically masculine forms of expression. [↑](#footnote-ref-519)
519. The first option is used in Alberta, Manitoba, Newfoundland and Labrador, Novia Scotia, Nunavut, Ontario and Prince Edward Island. The second is used in Canadian federal legislation and in British Columbia, New Brunswick, Northwest Territories, Quebec and Yukon. The third is used by the Commonwealth of Australia and in the Australian Capital Territory, Northern Territory, Queensland, South Australia, Tasmania and Victoria. [↑](#footnote-ref-520)
520. Giovanna Gilleri “Abandoning Gender “Identity”” (2022) 116 AJIL Unbound 27 at 30. [↑](#footnote-ref-521)
521. For example, Rikki Holtmaat and Paul Post “Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?” (2015) 33 Nordic Journal of Human Rights 319 at 320, n 5. [↑](#footnote-ref-522)
522. See discussion of this point in Charlie Ferguson “We’re All Born Naked and the Rest is Speech: Gender Expression and the First Amendment” (2024) 172 U Pa L Rev 829 at 856–857. [↑](#footnote-ref-523)
523. Human Rights Act 1993, s 27(4). [↑](#footnote-ref-524)
524. Human Rights Act 1993, s 21(1)(a). [↑](#footnote-ref-525)
525. *The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (Geneva, 10 November 2017) at 6. [↑](#footnote-ref-526)
526. Sex Discrimination Act 1984 (Cth), s 4(1) definition of “gender identity”; Discrimination Act 1991 (ACT), s 2 and definition of “gender identity”; Anti-Discrimination Act 1992 (NT), s 4(1) definition of “gender identity”; Anti-Discrimination Act 1991 (Qld), s 4 and sch 1, definition of “gender identity”; Legislation Interpretation Act 2021 (SA), s 4 definition of “gender identity”; Anti-Discrimination Act 1998 (Tas), s 3 definition of “gender identity”; and Equal Opportunity Act 2010 (Vic), s 4(1) definition of “gender identity”. [↑](#footnote-ref-527)
527. Issues Paper at [7.37]. [↑](#footnote-ref-528)
528. See Florence Ashley, Shari Brightly-Brown and G Nic Rider “Beyond the trans/cis binary” (2024) 630 Nature 293 at 294. [↑](#footnote-ref-529)
529. As we explained in Chapter 2, these terms refer to a person who previously identified as transgender but who now identifies as cisgender or another gender. According to one explanation, the term ‘retransition’ is more commonly used to acknowledge the possibility of transitioning to different identities several times, while detransition is generally focused on reaffirming a cisgender identity: see Gender Minorities Aotearoa *Trans 101 Glossary: Transgender terms and how to use them* (Wellington, 2023) at 15. [↑](#footnote-ref-530)
530. Sex Discrimination Act 1984 (Cth), s 4(1) definition of “gender identity”; Discrimination Act 1991 (ACT), s 2 and definition of “gender identity”; Anti-Discrimination Act 1992 (NT), s 4(1) definition of “gender identity”; Anti-Discrimination Act 1991 (Qld), s 4 and sch 1, definition of “gender identity”; Legislation Interpretation Act 2021 (SA), s 4 definition of “gender identity”; Anti-Discrimination Act 1998 (Tas), s 3 definition of “gender identity”; and Equal Opportunity Act 2010 (Vic), s 4(1) definition of “gender identity”. [↑](#footnote-ref-531)
531. Discrimination Act 1991 (ACT), s 2 and definition of “gender identity”. [↑](#footnote-ref-532)
532. We discussed the possibility of protection under the existing ground of disability in Chapter 4. [↑](#footnote-ref-533)
533. See Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 9. [↑](#footnote-ref-534)
534. For example, one submitter raised the issue of banks and financial services discriminating against people whose income comes from sex work. They said this affects some transgender women and non-binary people who receive income from sex work or online services. [↑](#footnote-ref-535)
535. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 157. [↑](#footnote-ref-536)
536. Discrimination Act 1991 (ACT), s 7(1)(p); Anti-Discrimination Act 1992 (NT), s 19(1)(ec); Anti-Discrimination Act 1991 (Qld), s 7(l); Anti-Discrimination Act 1998 (Tas), s 16(d); and Equal Opportunity Act 2010 (Vic), s 6(g). [↑](#footnote-ref-537)
537. For example, Catherine Healy, Ahi Wi-Hongi and Chanel Hati “It’s work, it’s working: The integration of sex workers and sex work in Aotearoa/New Zealand” (2017) 31 WSJ 50 at 58. [↑](#footnote-ref-538)
538. Sex Discrimination Act 1984 (Cth), s 4(1) definition of “gender identity”; Discrimination Act 1991 (ACT), s 2 and definition of “gender identity”; Anti-Discrimination Act 1992 (NT), s 4(1) definition of “gender identity”; Legislation Interpretation Act 2021 (SA), s 4 definition of “gender identity”; Anti-Discrimination Act 1998 (Tas), s 3 definition of “gender identity”; and Equal Opportunity Act 2010 (Vic), s 4(1) definition of “gender identity”. [↑](#footnote-ref-539)
539. Anti-Discrimination Act 1991 (Qld), s 4 and sch 1, definition of “gender identity”. [↑](#footnote-ref-540)
540. Anti-Discrimination Act 1991 (Qld), s 4 and sch 1, definition of “gender identity”; Anti-Discrimination Act 1992 (NT), s 4(1) definition of “gender identity”; and Equal Opportunity Act 2010 (Vic), s 4(1). [↑](#footnote-ref-541)
541. Discrimination Act 1991 (ACT), s 2 and definition of “gender identity”; and Anti-Discrimination Act 1998 (Tas), s 3 definition of “gender identity”. [↑](#footnote-ref-542)
542. Sex Discrimination Act 1984 (Cth), s 4(1) definition of “gender identity”; Discrimination Act 1991 (ACT), s 2 and definition of “gender identity”; Legislation Interpretation Act 2021 (SA), s 4 definition of “gender identity”; and Anti-Discrimination Act 1998 (Tas), s 3 definition of “gender identity”. [↑](#footnote-ref-543)
543. Anti-Discrimination Act 1992 (NT), s 4(1) definition of “gender identity”; Anti-Discrimination Act 1991 (Qld), s 4 and sch 1, definition of “gender identity”; and Equal Opportunity Act 2010 (Vic), s 4(1) definition of “gender identity”. [↑](#footnote-ref-544)
544. As we explained in Chapter 4, seven Australian jurisdictions have grounds aimed at protecting people who have an innate variation of sex characteristics and, of these, five have a symmetrical ground of sex characteristics. Other Anglo-Commonwealth jurisdictions do not have grounds aimed specifically at protecting people who have an innate variation of sex characteristics. [↑](#footnote-ref-545)
545. For example, Intersex Aotearoa preferred an asymmetrical approach, while participants in the interviews conducted on our behalf by Te Ngākau Kahukura with people with an innate variation of sex characteristics all preferred a symmetrical approach. At our consultation hui for people with innate variations of sex characteristics, there was support for both asymmetrical and symmetrical approaches. [↑](#footnote-ref-546)
546. See *Re: Sera’s Women’s Shelter Incorporated* [2024] QIRC 199 at [88]. [↑](#footnote-ref-547)
547. Human Rights Act 1993, s 27(3)(a). [↑](#footnote-ref-548)
548. We discuss these social norms about bodily privacy in later chapters. [↑](#footnote-ref-549)
549. Issues Paper at ch 3. [↑](#footnote-ref-550)
550. This figure represents 0.4 per cent of the Census “usually resident population” aged 15 years and over who responded: Tatauranga Aotearoa | Stats NZ “2023 Census shows 1 in 20 adults belong to Aotearoa New Zealand’s LGBTIQ+ population (corrected)” (3 October 2024) <[www.stats.govt.nz](https://www.stats.govt.nz/news/2023-census-shows-1-in-20-adults-belong-to-aotearoa-new-zealands-lgbtiq-population/)>. [↑](#footnote-ref-551)
551. Although, as we discuss above, we think this issue is unlikely to be significant in practice. [↑](#footnote-ref-552)
552. This included six organisations: Gender Minorities Aotearoa, OutLine Aotearoa, Te Pūkenga Here Tikanga Mahi | Public Service Association, Te Ngākau Kahukura, Women’s Health Action and ICONIQ Legal Advocates. [↑](#footnote-ref-553)
553. We are not aware of any New Zealand research on the terminology preferred by people with innate variations but overseas studies show differing preferences. A European empirical study of preferences among individuals with “congenital atypical development of chromosomal, gonadal or anatomical sex” found that intersex was rated the lowest: Elena Bennecke and others “Disorders or Differences of Sex Development? Views of Affected Individuals on DSD Terminology” (2021) 58 J Sex Res 522 at 529. However, an Australian study of people with congenital variations in sex characteristics found that 60 per cent of participants preferred to use an intersex-related term: Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 95. [↑](#footnote-ref-554)
554. For example, Tove Lundberg, Peter Hegarty and Katrina Roen “Making sense of ‘Intersex’ and ‘DSD’: how laypeople understand and use terminology” (2018) 9 Psychol Sex 161 at 166–168. [↑](#footnote-ref-555)
555. The Australian Capital Territory initially had the ground of “intersex status”, while Tasmania had the ground of “intersex variations of sex characteristics”. [↑](#footnote-ref-556)
556. For example, Elizabeth Reis “Divergence or Disorder? The politics of naming intersex” (2007) 50 Perspectives in Biology and Medicine 535 at 537; and Leonard Sax “How Common is Intersex? A Response to Anne Fausto-Sterling” (2002) 39 J Sex Res 174. [↑](#footnote-ref-557)
557. See Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD Thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 69. Hypospadias is a condition where the urethral opening is on the underside of the penis rather than the tip. [↑](#footnote-ref-558)
558. For example, InterACT *Intersex Variations Glossary*: *People-centered definitions of intersex traits & variations in sex characteristics* at 20; and Intersex Aotearoa “All About Intersex” <[www.intersexaotearoa.org](https://www.intersexaotearoa.org/all-about-intersex)>. [↑](#footnote-ref-559)
559. For example, Tatauranga Aotearoa | Stats NZ *Data standard for gender, sex, and variations of sex characteristics* (April 2021) at 20; and Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023 (ACT), s 7(1). [↑](#footnote-ref-560)
560. United Nations Human Rights Council *Combating discrimination, violence and harmful practices against intersex persons* UN Doc A/HRC/RES/55/14 (8 April 2024) at 2. [↑](#footnote-ref-561)
561. Tatauranga Aotearoa | Stats NZ *Data standard for gender, sex, and variations of sex characteristics* (April 2021) at 19–20. See, also, InterACT *Intersex Variations Glossary*: *People-centered definitions of intersex traits & variations in sex characteristics* at 3. [↑](#footnote-ref-562)
562. Issues Paper at [7.64]–[7.75]. [↑](#footnote-ref-563)
563. For example, the following organisations took this view: Ethos, Feminist Older Women Lobbyists, LGB Alliance, Resist Gender Education, Save Women’s Sport Australasia, Speak Up for Women, Women’s Declaration International NZ and Women’s Rights Party. [↑](#footnote-ref-564)
564. For example, the following organisations took this view: Burnett Foundation Aotearoa, Gender Minorities Aotearoa, ICONIQ Legal Advocates, Inside Out Kōaro, Te Kāhui Ture o Aotearoa | New Zealand Law Society, OutLine Aotearoa, Professional Association for Transgender Health Aotearoa, Qtopia, Paekākāriki Pride, Meredith Connell’s Rainbow Alliance, Rainbow Greens, Rainbow Support Collective, Te Kāhui Tika Tangata | Human Rights Commission, Te Ngākau Kahukura and Te Aho Kawe Kaupapa Ture a ngā Wāhine | New Zealand’s Women’s Law Journal. [↑](#footnote-ref-565)
565. For example, Susan Strongman “Sex self-identification debate a ‘cesspool of harmful stereotypes’” (8 February 2019) Radio New Zealand <[www.rnz.co.nz](https://www.rnz.co.nz/news/in-depth/381878/sex-self-identification-debate-a-cesspool-of-harmful-stereotypes)>; Sky News “Why the definition of a woman has caused so much controversy” (17 April 2025) <[news.sky.com](https://news.sky.com/story/why-the-definition-of-a-woman-has-caused-so-much-controversy-13349944)>; and Deborah Barfield Berry “Trump order recognizes only two sexes. Advocates call it ‘cruel,’ ‘lawless.’” (28 January 2025) USA Today <[www.usatoday.com](https://www.usatoday.com/story/news/politics/2025/01/28/transgender-rights-at-risk-trump-executive-order/77977951007/)>. [↑](#footnote-ref-566)
566. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [6]. [↑](#footnote-ref-567)
567. *For Women Scotland Ltd v Scottish Ministers* [2023] CSIH 37, [2024] IRLR 138 at [31]. [↑](#footnote-ref-568)
568. Some Canadian anti-discrimination statutes, like New Zealand’s, have provisions specifying that pregnancy and childbirth are covered by the ground of sex. [↑](#footnote-ref-569)
569. Some United States jurisdictions have defined sex biologically for the purposes of statutory interpretation, including the interpretation of anti-discrimination laws. See, for example, Alabama (Alabama Act 2025-3); Iowa (2025 IA SF 418); Kansas (Kan Stat Ann § 77-207(a)(1)); Montana (Mon Code Ann § 1-1-201(1)(f)); North Dakota (ND Cent Code § 1-01-49(18)); Oklahoma (Okla Stat, title 25 § 16(8)); and Tennessee (Tenn Code Ann § 1-3-105(c)). See, also, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government Exec Order14168, 90 Fed Reg 8615 (2025).  [↑](#footnote-ref-570)
570. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [7]. The Court did not specify how that should be determined. [↑](#footnote-ref-571)
571. For example, the Court placed emphasis on frequent references in the United Kingdom statute to pregnancy and maternity in the context of sex discrimination. Based on the way the argument had been presented, the Court also thought it odd that the category of men or women would otherwise be comprised of people of that “biological sex” together with the narrow category of transgender people who had been able to obtain a Gender Recognition Certificate under strict United Kingdom eligibility rules: *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [198]–[203]. [↑](#footnote-ref-572)
572. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [2]. See, also, *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, in which the House of Lords held that it was required as a matter of statutory interpretation to give the terms ‘male’ and ‘female’ a narrow biological meaning (at [36]–[37] and [78]) but made a declaration of incompatibility between the Matrimonial Causes Act 1973 (UK) and the European Convention on Human Rights (at [53], [55], [70] and [79]–[81]). [↑](#footnote-ref-573)
573. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296 at [62]. [↑](#footnote-ref-574)
574. See *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [2]. See, also, *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 at [36]–[37] and [78]. [↑](#footnote-ref-575)
575. The definitions of “gender identity” and “intersex status” are contained in the Legislation Interpretation Act 2021 (SA). [↑](#footnote-ref-576)
576. “Gender identity” was a prohibited ground of discrimination from 2000 in an earlier Victorian anti-discrimination statute: Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000 (Vic). [↑](#footnote-ref-577)
577. Prior to this, case law had held that transgender people were covered by the grounds of “sex” and “physical or mental disability”: *Sheridan v Sanctuary Investments Ltd (No 3)* 1999 BCHRT 4, (1999) 33 CHRR D/467 at [90]–[91], [94] and [107]. [↑](#footnote-ref-578)
578. Sex Discrimination (Gender Reassignment) Regulations 1999 (UK). [↑](#footnote-ref-579)
579. For example, it explains some important issues that affect the way any amendments to exceptions would need to be worded. [↑](#footnote-ref-580)
580. Human Rights Act 1993, ss 20J(1) and 21A, referring to New Zealand Bill of Rights Act 1990, s 3. A person or body might do some things that are government functions and others that are not. [↑](#footnote-ref-581)
581. An example of a public function discharged by a private organisation might be decisions of an industry regulatory body such as the Advertising Standards Authority. [↑](#footnote-ref-582)
582. Human Rights Act 1993, s 20J(2). [↑](#footnote-ref-583)
583. Human Rights Act 1993, ss 151 and 152. These provisions were repealed on 1 January 2002 when Part 1A came into effect. [↑](#footnote-ref-584)
584. Human Rights Act 1993, s 20J(3). [↑](#footnote-ref-585)
585. See *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [51] suggesting council services that are “intended for the social well-being of the community” are likely to be provided in the exercise of a public function. [↑](#footnote-ref-586)
586. There are some exceptions but they are not relevant to this review. [↑](#footnote-ref-587)
587. There are also two other short subparts relating to superannuation and to positive discrimination. [↑](#footnote-ref-588)
588. Human Rights Act 1993, ss 44 and 53. [↑](#footnote-ref-589)
589. Te Tāhū o te Ture | Ministry of Justice *Discussion Paper: Re-evaluation of the Human Rights Protections in New Zealand* (October 2000) at [27]. [↑](#footnote-ref-590)
590. An anomalous provision relating to superannuation sits in its own subpart and contains exceptions to two areas of life – employment matters and provision of goods and services: Human Rights Act 1993, s 70. [↑](#footnote-ref-591)
591. Section 73(2) states general exceptions relating to age, employment status and family status. It is not relevant to this review. [↑](#footnote-ref-592)
592. Indirect discrimination under section 65 is not, however, unlawful if there was “good reason” for it. [↑](#footnote-ref-593)
593. Section 69 (concerning employers’ liability for sexual or racial harassment of their employees by customers or clients) might also fit in this category. [↑](#footnote-ref-594)
594. Human Rights Act, ss 62–63A and 66(3). [↑](#footnote-ref-595)
595. For example, as we discussed in Chapter 4, Te Kāhui Tika Tangata | Human Rights Commission received 887 complaints alleging unlawful discrimination in the financial year ending June 2024: Te Kāhui Tika Tangata | Human Rights Commission *Pūrongo-ā-tau: Annual Report* (2024) at 42. In that same time period, Te Taraipiunara Mana Tangata | Human Rights Review Tribunal issued seven substantive decisions under the Human Rights Act. [↑](#footnote-ref-596)
596. It was preceded by the Complaints Review Tribunal and the Equal Opportunities Tribunal. [↑](#footnote-ref-597)
597. Christina Inglis, Chief Judge of Te Kōti Take Mahi | Employment Court “Barriers to Justice in Employment: Discrimination Claims – the path less travelled” (speech to Community Law Centres o Aotearoa Hui, Auckland, 14 November 2024). The Chief Judge was discussing the number of cases pursued in either Te Ratonga Ahumana Taimahi | Employment Relations Authority, Te Kōti Take Mahi | Employment Court or Te Taraipiunara Mana Tangata | Human Rights Review Tribunal. [↑](#footnote-ref-598)
598. This count does not include exceptions that apply to all prohibited grounds. [↑](#footnote-ref-599)
599. For reasons we explain further below, we do not think the same uncertainty arises in respect of having an innate variation of sex characteristics. [↑](#footnote-ref-600)
600. The outlier is “colour”. There are, however, exceptions that apply to race and ethnic or national origin. [↑](#footnote-ref-601)
601. We do, however, discuss one exception for qualifying bodies in Chapter 9. [↑](#footnote-ref-602)
602. Human Rights Act 1993, ss 24 (employment on foreign ships or aircraft outside New Zealand), 34(1) (discharge or release from the regular forces for incompatible behaviour), 44(4) (private clubs) and 54 (residential accommodation that is shared with the person disposing of the accommodation). [↑](#footnote-ref-603)
603. For example, in consultation, some people told us about mistreatment by flatmates such as being forced out of flatting situations. Issues of this sort cannot be addressed under the Human Rights Act because of the exception in section 54. [↑](#footnote-ref-604)
604. Human Rights Act 1993, s 31. [↑](#footnote-ref-605)
605. Human Rights Act 1993, s 39(3)(a). [↑](#footnote-ref-606)
606. See, though, *Avis Rent A Car v Proceedings Commissioner* [1998] NZCRT 16, (1998) 5 HRNZ 501; and *Proceedings Commissioner v Thoroughbred Racing New Zealand Inc* Decision No 31/1999, CRT 9/99, 27 October 1999. [↑](#footnote-ref-607)
607. The other reference is in section 47, an exception in relation to skill, which we discuss in Chapter 10. [↑](#footnote-ref-608)
608. This clarification can sometimes be achieved through amendments to the exception itself but may sometimes require the insertion of new provisions into the Human Rights Act. [↑](#footnote-ref-609)
609. As noted earlier, Chapters 9 to 12 discuss the discrimination protections relating to areas of life in four groupings. [↑](#footnote-ref-610)
610. Human Rights Act 1993, s 70(2). [↑](#footnote-ref-611)
611. If superannuation is provided by an employer, the discrimination protections for employment may also be relevant. [↑](#footnote-ref-612)
612. Human Rights Act 1993, s 26. [↑](#footnote-ref-613)
613. Human Rights Act 1993, s 27(2). See Te Tāhū o te Ture | Ministry of Justice *Discussion Paper: Re-evaluation of the Human Rights Protections in New Zealand* (October 2000) at [27]. [↑](#footnote-ref-614)
614. Human Rights Act 1993, ss 43(1) and 46. [↑](#footnote-ref-615)
615. Human Rights Act 1993, ss 27(3)(b), 27(5) and 55. [↑](#footnote-ref-616)
616. See Lawrence Friedman and Joanna Grossman “A Private Underworld: The Naked Body in Law and Society” (2013) 61 Buff L Rev 169; and Danielle Keats Citron “Sexual Privacy” (2019) 128 Yale LJ 1870. [↑](#footnote-ref-617)
617. See Danielle Keats Citron “Sexual Privacy” (2019) Yale LJ 1870; and *West v Radtke* 20-1570 (7th Cir 2022), citing *Harris v Miller* 818 F 3d 49, 59 (2d Cir 2016). [↑](#footnote-ref-618)
618. However, as we explained earlier, preferential treatment based on having an innate variation of sex characteristics would never be in breach of the Human Rights Act under the reforms we propose as the ground of having an innate variation of sex characteristics would be asymmetrical. [↑](#footnote-ref-619)
619. For one exception, our approach does not fit into these categories. This is the exception in section 47 that currently allows service providers to exercise a skill in relation to men or women only (if the requirements of the exception are met). We recommend this exception is redrafted to clarify its current application as well as its application to new grounds. [↑](#footnote-ref-620)
620. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at [8.50]–[8.52]. [↑](#footnote-ref-621)
621. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, (2024) 333 IR 296 at [55]–[64]. This decision has been appealed. [↑](#footnote-ref-622)
622. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [265]. It also said the terms ‘woman’ and ‘man’ in the United Kingdom legislation mean “biological woman and biological man” (at [264]). The Court used these terms to refer to someone’s sex “at birth” (at [6]). [↑](#footnote-ref-623)
623. As we discussed in Chapter 2, we understand that many people who have an innate variation of sex characteristics describe their sex as male or female. [↑](#footnote-ref-624)
624. It is possible a different position might be reached in relation to a small handful of exceptions in the Human Rights Act that we think are particularly focused on the presence or absence of specific physical characteristics. The exception for competitive sporting activities is one example. However, as we propose to extend exceptions of this kind to both grounds, this issue does not arise. [↑](#footnote-ref-625)
625. *Tan v New Zealand Police* [2016] NZHRRT 32 at [77], citing *Canterbury Regional Council v Independent Fisheries Ltd*[2012] NZCA 601, [2013] 2 NZLR 57.  [↑](#footnote-ref-626)
626. See Privacy Act 2020, s 17(1)(c). For example, in 2025, the Privacy Commissioner published guidance for tenants, landlords and others to clarify what information may be requested at each stage of the rental process: Te Mana Mātāpono Matatapu | Privacy Commissioner *Privacy Act guidance for tenants* (February 2025) and Te Mana Mātāpono Matatapu | Privacy Commissioner *Privacy Act guidance for landlords and property managers* (February 2025). [↑](#footnote-ref-627)
627. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [265]. [↑](#footnote-ref-628)
628. At [221]. [↑](#footnote-ref-629)
629. See, for example, Canadian Human Rights Act RSC 1985 c H-6, s 15(1)(g); Alberta Human Rights Act RSA 2000 c A-25.5, s 11; Human Rights Code CCSM 1987 c H175, ss 13(1) and 14(1); and Human Rights Act RSNB 2011 c 171, s 2.2. Some of these apply to all areas of life while others apply to a particular area of life such as employment. [↑](#footnote-ref-630)
630. See, for example, Equality Act 2010 (UK), sch 9, para 2 and sch 23, para 2 (organised religion); sch 5, paras 1–4 (owner-occupied small premises); sch 9, para 20 (insurance); and s 192 (national security). [↑](#footnote-ref-631)
631. Equal Status Act 2000 (Ireland), s 3(2)(a); and Employment Equality Act 1998 (Ireland), s 6(2)(a). [↑](#footnote-ref-632)
632. Irish Human Rights and Equality Commission “Services & Gender” <[www.ihrec.ie](https://www.ihrec.ie/your-rights/services/gender/)>; and *Hannon v First Direct Logistics Ltd* Equality Tribunal (Ireland) DEC-S2011-066, 29 March 2011 at [4.3], citing Case C-13/94 *P v S* [1996] ECR I-2143. [↑](#footnote-ref-633)
633. See, for example, Civil Rights Act 42 USC § 2000e-2; Fair Housing Act 42 USC § 3604; Educational Amendments 20 USC § 1681; and Americans with Disabilities Act 42 USC § 12101. [↑](#footnote-ref-634)
634. *Bostock v Clayton County* 590 US 644 (2020*).* [↑](#footnote-ref-635)
635. For example, the competitive sports exception in section 49(1) of the Human Rights Act 1993 is similar to an exception in Commonwealth legislation: Sex Discrimination Act 1984 (Cth), s 42. [↑](#footnote-ref-636)
636. Sex Discrimination Act 1984 (Cth), s 44; Discrimination Act 1991 (ACT), s 109; Anti-Discrimination Act 1977 (NSW), ss 126 and 126A; Anti-Discrimination Act 1992 (NT), s 59; Anti-Discrimination Act 1991 (Qld), s 113; Equal Opportunity Act 1984 (SA), s 92; Anti-Discrimination Act 1998 (Tas), ss 56–57; Equal Opportunity Act 2010 (Vic), s 89; and Equal Opportunity Act 1984 (WA), s 135. [↑](#footnote-ref-637)
637. For example, in *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* A333/2006 Victorian Civil and Administrative Tribunal, 3 May 2007, the Tribunal granted an exemption for discrimination on the basis of nationality to allow Boeing to comply with foreign national security laws when hiring staff. [↑](#footnote-ref-638)
638. For example, in New South Wales, where exemptions are generally related to positive discrimination, Anti-Discrimination New South Wales granted 65 exemptions in the 2023/24 financial year: Anti-Discrimination NSW *Annual Report 2023-24* at 24. [↑](#footnote-ref-639)
639. Human Rights Act 1993, s 55. [↑](#footnote-ref-640)
640. Sex Discrimination Act 1984 (Cth), ss 23(3)(b) and (c) and 34(2). [↑](#footnote-ref-641)
641. As we explain later in the chapter, there are some other exceptions that relate to discrimination in employment that we address elsewhere in this report. [↑](#footnote-ref-642)
642. See Human Rights Act 1993, s 2(1) definition of “employer”; and *DML v Montgomery* [2014] NZHRRT 6 at [122]–[123]. [↑](#footnote-ref-643)
643. Human Rights Act 1993, ss 20J and 21A. For further discussion, see Chapters 8 and 18. [↑](#footnote-ref-644)
644. Human Rights Act 1993, subss 68(1) and (3). This is so even if the employer did not know or approve of the employee’s actions. [↑](#footnote-ref-645)
645. *Greenslade v Commissioner of Police* [2023] NZHC 717, (2023) 13 HRNZ 902 at [52]. [↑](#footnote-ref-646)
646. At [53], citing *Director of Human Rights Proceedings v Goodrum* CRT36/2001, 12 April 2002. [↑](#footnote-ref-647)
647. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at ch 9. In this chapter of the Final Report, we do not address two issues that submitters raised in their responses to these questions: misgendering and deadnaming, and access to work bathrooms or changing rooms. We address these issues in Chapters 6 and 14 of this report, respectively. [↑](#footnote-ref-648)
648. At [3.19]–[3.21], [3.33] and [3.57]. [↑](#footnote-ref-649)
649. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025)at 153–154. In this survey, 47 per cent of transgender and non-binary respondents said they worried that interviewers would discriminate against them if they realised they were transgender or non-binary, 26 per cent said they had delayed taking steps in their gender transition because they worried about how they would be treated at work and 26 per cent said co-workers had made unwanted comments or talked about them in ways they did not like. [↑](#footnote-ref-650)
650. Human Rights Act 1993, s 22(1)(a). [↑](#footnote-ref-651)
651. Human Rights Act 1993, s 22(1)(c). [↑](#footnote-ref-652)
652. Human Rights Act 1993, s 22(1)(b). [↑](#footnote-ref-653)
653. Human Rights Act 1993, s 22(1)(b). According to case law under earlier anti-discrimination legislation, it is no answer to a discrimination complaint of this kind to say that customers or clients would object to the employee: *Race Relations Conciliator v Marshall* [1993] 2 ERNZ 290 (Complaints Review Tribunal) at 298. [↑](#footnote-ref-654)
654. Human Rights Act 1993, s 22(1)(b). [↑](#footnote-ref-655)
655. Human Rights Act 1993, s 22(1)(c). See, also, Chapter 16, where we discuss sexual harassment. [↑](#footnote-ref-656)
656. Human Rights Act 1993, s 22(1)(c). [↑](#footnote-ref-657)
657. Human Rights Act 1993, s 22(2). [↑](#footnote-ref-658)
658. See, for example, *Hemmingson v Swan* [2016] NZERA Auckland 212. [↑](#footnote-ref-659)
659. A person could also choose to pursue a complaint to Te Ratonga Ahumana Taimahi | Employment Relations Authority under the Employment Relations Act 2000. [↑](#footnote-ref-660)
660. Human Rights Act 1993, s 92F(2). [↑](#footnote-ref-661)
661. Christina Inglis, Chief Judge of Te Kōti Take Mahi | Employment Court “Barriers to Justice in Employment: Discrimination Claims – the path less travelled” (speech to Community Law Centres o Aotearoa Hui, Auckland, 14 November 2024). Her Honour’s assessment of legal need was based on the Ministry of Justice’s Legal Needs Survey: see Te Tāhū o te Ture | Ministry of Justice *Access to Justice: 2023 Legal Needs Survey* (29 October 2024). [↑](#footnote-ref-662)
662. A handful of provisions in the Human Rights Act require employers to provide additional support to certain classes of employee. These relate to disability and religious observance: Human Rights Act 1993, ss 28(3), 29(1) and 29(2). [↑](#footnote-ref-663)
663. Human Rights Act 1993, s 27(3)(a). [↑](#footnote-ref-664)
664. Although these submitters raised this point when discussing the education protections in the Human Rights Act, we consider this is more relevant to employment. [↑](#footnote-ref-665)
665. *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [44]–[45]. [↑](#footnote-ref-666)
666. Ethical belief is defined to mean the lack of a religious belief: Human Rights Act 1993, s 21(1)(d). [↑](#footnote-ref-667)
667. Human Rights Commission Act 1977, ss 15(9) and 15A(1)(b). The latter was added by section 4 of the Human Rights Commission Amendment Act 1992 and applied specifically to age. [↑](#footnote-ref-668)
668. See Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 23. [↑](#footnote-ref-669)
669. At 23. [↑](#footnote-ref-670)
670. Human Rights Commission Act 1977, s 15(9). [↑](#footnote-ref-671)
671. Human Rights Commission Act 1977, s 15A(1)(b). [↑](#footnote-ref-672)
672. Human Rights Commission Act 1977, ss 15(9) and 15A(1)(b). [↑](#footnote-ref-673)
673. Human Rights Act 1993, s 35. [↑](#footnote-ref-674)
674. We consider this last example to be more hypothetical than real, as we discuss below. [↑](#footnote-ref-675)
675. A person who identifies outside the gender binary might, however, still be excluded from a role that is restricted to persons of a different sex assigned at birth. We discussed the difficulties in accommodating people who identify outside the gender binary in legislation that is structured around binary sex exceptions in Chapter 8. [↑](#footnote-ref-676)
676. None of the organisations that submitted on this issue opposed extending the exception to new grounds. [↑](#footnote-ref-677)
677. See Executive Order No 14183, 90 Fed Reg 8757 (27 January 2025). We understand there is currently litigation in the United States that is challenging this Executive Order. We acknowledge we have not undertaken an exhaustive survey of all legal systems. [↑](#footnote-ref-678)
678. According to a World Bank report from 2023, 65 economies restrict women from working in certain industries and 20 prohibit women from working at night: World Bank *Women, Business and the Law 2023* (2023). [↑](#footnote-ref-679)
679. These include Brunei (Syariah Penal Code, art 198) and United Arab Emirates (Federal Penal Code 1987, art 412(2)). [↑](#footnote-ref-680)
680. Human Dignity Trust *Brunei: Briefing on Brunei’s implementation of the Syariah Penal Code Order 2013* (10 April 2019); and Human Rights Watch “UAE: Stop Policing Gender Expression – Arrest of Singaporeans Sheds Light on Misuse of Law” (7 September 2017) <[www.hrw.org](https://www.hrw.org/news/2017/09/07/uae-stop-policing-gender-expression)>. [↑](#footnote-ref-681)
681. For example, according to travel advice from Manatū Aorere | Ministry of Foreign Affairs and Trade, people travelling on a New Zealand passport showing X in the gender field cannot enter or transit the United Arab Emirates: Manatū Aorere | Ministry of Foreign Affairs and Trade “United Arab Emirates” (29 November 2024) Safetravel <[safetravel.govt.nz](https://www.safetravel.govt.nz/destinations/united-arab-emirates)>. [↑](#footnote-ref-682)
682. See Human Rights Act 1993, s 21B(1), which provides that, if rules in Part 2 conflict with other laws, the other laws prevail. [↑](#footnote-ref-683)
683. We are aware of at least one conviction under the Health and Safety at Work Act 2015 involving work outside New Zealand, but the point has not been the subject of full argument: see *Maritime New Zealand v Genera Ltd* [2021] NZDC 11060, [2021] DCR 635. [↑](#footnote-ref-684)
684. In Chapter 7, we recommended that the ground of gender identity should be defined to include gender expression. [↑](#footnote-ref-685)
685. See Chapter 7. [↑](#footnote-ref-686)
686. Human Rights Commission Act 1977, s 15(3)(a). [↑](#footnote-ref-687)
687. *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [41] per Elias CJ and Blanchard and Wilson JJ. The provision being interpreted did not include the additional requirement of “authenticity”. [↑](#footnote-ref-688)
688. *Greenslade v Commissioner of Police* [2021] NZHRRT 53, (2021) 12 HRNZ 913 at [48]. This point was cited with approval on appeal in *Greenslade v Commissioner of Police* [2023] NZHC 717, (2023) 13 HRNZ 902 at [58]. [↑](#footnote-ref-689)
689. See Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 24; and (15 December 1992) 532 NZPD 13213 (Hon Dr Michael Cullen). [↑](#footnote-ref-690)
690. C127/91 Human Rights Commission, 8 May 1991; and C127/92 Human Rights Commission, 31 July 1992. Te Kāhui Tika Tangata | Human Rights Commission no longer has an investigation role in relation to discrimination complaints. [↑](#footnote-ref-691)
691. *Planet Green (Possum Bikini)* NZASA 99/310, 28 February 2000. [↑](#footnote-ref-692)
692. Human Rights Act 1993, s 35. [↑](#footnote-ref-693)
693. A person who identifies outside the gender binary might, however, still be excluded from a role that is restricted to persons of a different sex assigned at birth. As noted, we discussed the difficulties in accommodating people who identify outside the gender binary in Chapter 8. [↑](#footnote-ref-694)
694. *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [41] per Elias CJ and Blanchard and Wilson JJ. [↑](#footnote-ref-695)
695. Human Rights Commission Act 1977, ss 15(3)(c) and 15A(1)(a) (the age exception was added in 1992). [↑](#footnote-ref-696)
696. The now disbanded Complaints Division of Te Kāhui Tika Tangata | Human Rights Commission took the view in one 1994 case note that outdoor work such as gardening and chopping wood does not fall within the exception: C231/94 Human Rights Commission, 1 September 1994. The complaints officer who considered the complaint also doubted that babysitting or child-minding would qualify but did not need to decide the point. [↑](#footnote-ref-697)
697. See Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 24. [↑](#footnote-ref-698)
698. The employer would still need to comply with requirements of other legislation such as the Employment Relations Act 2000. [↑](#footnote-ref-699)
699. A person who identifies outside the gender binary might, however, still be excluded from a role that is restricted to persons of a different sex assigned at birth. As noted, we discussed the difficulties in accommodating people who identify outside the gender binary in Chapter 8. [↑](#footnote-ref-700)
700. See Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 24. [↑](#footnote-ref-701)
701. Organisations that supported extending this exception to new grounds included InsideOUT Kōaro, Te Kaunihea Wāhine o Aotearoa | National Council of Women of New Zealand, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Qtopia, Meredith Connell’s Rainbow Alliance and Rainbow Support Collective. [↑](#footnote-ref-702)
702. For example, Te Kaunihera Wāhine o Aotearoa | National Council of Women of New Zealand. [↑](#footnote-ref-703)
703. For example, InsideOUT Kōaro and Rainbow Support Collective. [↑](#footnote-ref-704)
704. This included two organisations: Te Pūkenga Here Tikanga Mahi | Public Service Association and Rainbow Wellington. [↑](#footnote-ref-705)
705. Larry Alexander “What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies” (1992) 141 U Pa L Rev 149 at 154–156 and 201–202. [↑](#footnote-ref-706)
706. Privacy Act 2020, s 22, information privacy principle 1. [↑](#footnote-ref-707)
707. An employer would, however, be required to advise the applicant of those potential consequences: Privacy Act 2020, s 22, information privacy principle 3. [↑](#footnote-ref-708)
708. Some other jurisdictions have similar exceptions that specify this more clearly. For example, in the Northern Territory, a person may discriminate on any prohibited grounds of discrimination in offering work where the work is to be performed in the person’s home: Anti-Discrimination Act 1992 (NT), s 35A. [↑](#footnote-ref-709)
709. Human Rights Commission Act 1977, s 15(3)(b). [↑](#footnote-ref-710)
710. We discussed this rationale in Chapter 8. [↑](#footnote-ref-711)
711. There are, however, more specific laws and guidelines relating to the execution of such searches: see, for example, Search and Surveillance Act 2012, s 126(4); Corrections Act 2004, s 94(1); Ngā Pirihimana o Aotearoa | New Zealand Police “Police Instructions: Search – Part 8 Searching People” (5 May 2023) [<www.police.govt.nz>](https://www.police.govt.nz/sites/default/files/publications/search-part-8-searching-people-redacted-090523.pdf); Ara Poutama Aotearoa | Department of Corrections *Prison Operations Manual* at [I.10.03]; and Te Mana Ārai o Aotearoa | New Zealand Customs Service “Guidelines for Strip Searches” <[www.customs.govt.nz](https://www.customs.govt.nz/media/0q2bigro/guidelines-for-strip-searches.pdf)>. To the extent these are found in law, they will take primacy over section 27(3)(a) in the event of any conflict: Human Rights Act 1993, s 21B(1). [↑](#footnote-ref-712)
712. Human Rights Act 1993, s 35. [↑](#footnote-ref-713)
713. C162/93 Human Rights Commission, 16 September 1993. [↑](#footnote-ref-714)
714. A person who identifies outside the gender binary might, however, still be excluded from a role that is restricted to persons of a different sex assigned at birth. As noted, we discussed the difficulties in accommodating people who identify outside the gender binary in Chapter 8. [↑](#footnote-ref-715)
715. The latter consequence should, however, be rare given section 35 of the Human Rights Act 1993. [↑](#footnote-ref-716)
716. In Chapter 8, we discussed other safeguards put in place by the Privacy Act 2020. [↑](#footnote-ref-717)
717. However, an employer would be required to advise the applicant of those potential consequences: Privacy Act 2020, s 22, information privacy principle 3. [↑](#footnote-ref-718)
718. A qualifying body is an authority or body that has a power to confer an approval, authorisation or qualification that is needed for, or facilitates, engagement in a profession, trade or calling: Human Rights Act 1993, s 38(1). For reasons explained in Chapter 8, we do not otherwise consider the Part 2 provisions relating to qualifying bodies in this report. [↑](#footnote-ref-719)
719. International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 18; and New Zealand Bill of Rights Act 1990, ss 13 and 15. We discussed freedom of religion in more depth in Chapter 6. [↑](#footnote-ref-720)
720. *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland* [2013] NZHRRT 36, (2013) 9 HRNZ 612 at [41]–[42]. [↑](#footnote-ref-721)
721. At [92]. [↑](#footnote-ref-722)
722. At [93], citing Rex Ahdar and Ian Leigh *Religious Freedom in the Liberal State* (2nd ed, Oxford University Press, Oxford, 2013) at 395. [↑](#footnote-ref-723)
723. Human Rights Commission Act 1977, ss 15(6) and 21(2). [↑](#footnote-ref-724)
724. See Human Rights Act 1993, s 92F(2). [↑](#footnote-ref-725)
725. *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 (CA) at 523. [↑](#footnote-ref-726)
726. See, for example, *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland* [2013] NZHRRT 36, (2013) 9 HRNZ at [79], [88] and [100]–[102]. [↑](#footnote-ref-727)
727. *Kapiarumala v New Zealand Catholic Bishops Conference* [2018] NZHRRT 18. [↑](#footnote-ref-728)
728. At [36]. However, whether a religious leader is an employee is likely to depend on the particular circumstances: see *Mabon v Conference of the Methodist Church in New Zealand* [1998] 3 NZLR 513 (CA). [↑](#footnote-ref-729)
729. The Law Reform Commission of Western Australia took a similar view when reviewing the equivalent provisions in Western Australian anti-discrimination legislation in 2022: see Law Reform Commission of Western Australia *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, 2022) at [4.5.4.3]. [↑](#footnote-ref-730)
730. Rainbow organisations that supported extending these exceptions to new grounds were InsideOUT Kōaro, Qtopia, Meredith Connell’s Rainbow Alliance and Rainbow Support Collective. Only one organisation (Rainbow Wellington) opposed extending these exceptions to new grounds. [↑](#footnote-ref-731)
731. The Church of Jesus Christ of Latter-Day Saints *General Handbook: Serving in The Church of Jesus Christ of Latter-day Saints* (Salt Lake City, 2025)at [38.6.23]. [↑](#footnote-ref-732)
732. See, for example, Mark Lowery “The Male Priesthood: The Argument from Sacred Tradition” (1996) 5(6) The Catholic Faith. [↑](#footnote-ref-733)
733. See, generally, Abigail Favale *The Genesis of Gender: A Christian Theory*(Ignatius Press, San Francisco, 2022). The Association of Proprietors of Integrated Schools also told us this in its submission. [↑](#footnote-ref-734)
734. John Norton “Vatican says ‘sex-change’ operation does not change person’s gender” (14 January 2003) National Catholic Reporter <[www.ncronline.org](https://www.ncronline.org/news/vatican-says-sex-change-operation-does-not-change-persons-gender)>. [↑](#footnote-ref-735)
735. See, for example, Ann Schneible “Transgender Seminary Applicants: What Is the Church’s Pastoral Response?” (25 January 2022) The National Catholic Register <[www.ncregister.com](https://www.ncregister.com/news/transgender-seminary-applicants-what-is-the-church-s-pastoral-response)>; and Colleen Dulle “‘Conclave’ explainer: Could that twist ending really happen?” *America Magazine* (online ed, New York, 27 November 2024). [↑](#footnote-ref-736)
736. As we explain later in the chapter, there are some other exceptions that relate to discrimination in the provision of goods, facilities or services and in access to places, vehicles and associated facilities that we address elsewhere in the report. [↑](#footnote-ref-737)
737. This exception sits in its own subpart. [↑](#footnote-ref-738)
738. The one New Zealand case we are aware of on this issue is *Coburn v Human Rights Commission* [1994] 3 NZLR 323 (HC). Te Kōti Matua | High Court (at 336) said the meaning of these phrases must be construed having regard to the purpose of the Human Rights Act and that, in making the assessment, it can be helpful to question whether the legislature intended the activity would not be subject to scrutiny under the Act. [↑](#footnote-ref-739)
739. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at ch 10. [↑](#footnote-ref-740)
740. Issues Paper at [3.22]–[3.24]. [↑](#footnote-ref-741)
741. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025)at 114–115. [↑](#footnote-ref-742)
742. See, for example, *Kadel v Folwell* 100 F 122 (4th Cir 2024) at 133–134, 149 and 152. But, see, *Petition of Elizabeth Poucher: Insurance coverage for transgender people – Report of the Finance and Expenditure Committee* (August 2020). [↑](#footnote-ref-743)
743. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025)at 117. [↑](#footnote-ref-744)
744. We discuss this exception here both because of its similarities to the insurance exception we discuss in this chapter, and because superannuation providers are supplying goods, facilities or services to the public. In the Issues Paper, we discussed this exception in Chapter 15, relating to “Other issues in Part 2”. [↑](#footnote-ref-745)
745. See (9 December 1976) 408 NZPD 4687 (David Thomson MP); and (7 July 1977) 411 NZPD 1246 (John Richard Harrison MP). [↑](#footnote-ref-746)
746. Human Rights Commission Act 1977, s 24(5). [↑](#footnote-ref-747)
747. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, right 4(1). [↑](#footnote-ref-748)
748. See *Jacobsen v Zhou* [2015] NZHRRT 38. [↑](#footnote-ref-749)
749. We also gave submitters a fourth option — “Another option (please specify)”. [↑](#footnote-ref-750)
750. Among organisations: Save Women’s Sport Australasia supported retaining the exception in its current form; Qtopia, Rainbow Support Collective and Speak Up for Women supported option 2; Te Kāhui Ture o Aotearoa | New Zealand Law Society said option 3 may best meet the underlying objectives but either option 2 or 3 would be appropriate; and InsideOUT Kōaro and Rainbow Wellington wanted the exception repealed altogether. [↑](#footnote-ref-751)
751. See, for example, Max Towle “Cut and thrust: The barber shop that refuses to cut women’s hair” *The New Zealand Herald* (online ed, Auckland, 30 January 2018); and “AKL Barber shop refuses to serve trans person” (5 April 2016) <[www.pridenz.com](https://www.pridenz.com/gaynz/18131.html)>. [↑](#footnote-ref-752)
752. The 2022 Counting Ourselvessurvey found that hair removal was the most highly desired form of gender-affirming care for respondents who were transgender women and non-binary respondents who were assigned male at birth. Of the 81 per cent of respondents who desired hair removal, 49 per cent had not received it. Of those, 21 per cent reported this was because they might be treated badly for being transgender or non-binary: Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 19–20. [↑](#footnote-ref-753)
753. The Wellington Pride Festival did not support any of the options presented. It said it favoured a context-specific approach that would take into account sex characteristics where relevant to the service provided. [↑](#footnote-ref-754)
754. As section 48 is a long provision, we do not set it out in full. [↑](#footnote-ref-755)
755. See Association of British Insurers *Insurance in the UK: The Benefits of Pricing Risk* (January 2008). [↑](#footnote-ref-756)
756. See Department of Justice *Human Rights Bill: Clauses 62, 82–84 – Report of the Department of Justice* (1993) at 2–3. [↑](#footnote-ref-757)
757. See Consumer “Are insurance policy exclusions for mental health unfair?” (14 April 2022) <[www.consumer.org.nz](https://www.consumer.org.nz/articles/are-insurance-policy-exclusions-for-mental-health-unfair?gad_source=1&gclid=EAIaIQobChMI8ua79aSmggMVFINLBR15LAeNEAAYASAAEgLyfvD_BwE)>. The exception does not allow an insurer to refuse to provide a policy altogether. [↑](#footnote-ref-758)
758. Human Rights Commission Act 1977, s 24(6). [↑](#footnote-ref-759)
759. As introduced, the Bill expanded the exception to allow different terms and conditions of insurance for disabled persons and for persons of different ages but did not include an exception for sex: Human Rights Bill 1992 (214-1), cl 62. [↑](#footnote-ref-760)
760. See Human Rights Bill 1992 (214-1) (select committee report) at 8–9. [↑](#footnote-ref-761)
761. See Te Whatu Ora | Health New Zealand *Life Expectancy in Aotearoa New Zealand: An Analysis of Socioeconomic, Geographic, Sex and Ethnic Variation from 2001 to 2022* (July 2024) at 26. [↑](#footnote-ref-762)
762. Letter from Margaret Nixon (Secretary of Justice) to Minister of Justice regarding Human Rights Commission Act 1977: discrimination in insurance and superannuation (7 August 1990) at 3. [↑](#footnote-ref-763)
763. Human Rights Act 1993, s 48(1)(b). In the case of different treatment based on disability (but not sex or age), if no actuarial or statistical data is available, reputable medical or actuarial advice or opinion can be relied on instead. [↑](#footnote-ref-764)
764. Human Rights Act 1993, s 48(2). [↑](#footnote-ref-765)
765. See Life Direct “It’s time to close the insurance gender gap” <[www.lifedirect.co.nz](https://www.lifedirect.co.nz/article/close-the-insurance-gender-gap)>; and Tatauranga Aotearoa | Stats NZ “New Zealand cohort life tables: March 2025 update” (28 March 2025) <[www.stats.govt.nz](https://www.stats.govt.nz/information-releases/new-zealand-cohort-life-tables-march-2025-update/)>. [↑](#footnote-ref-766)
766. See MoneyHub “Compare Health Insurance NZ 2025: Best Policies, Quotes & Deals” (15 May 2025) <[www.moneyhub.co.nz](https://www.moneyhub.co.nz/health-insurance.html)>. [↑](#footnote-ref-767)
767. See Kaitlin Aldridge “Woman shocked at higher car insurance premium when husband removed from policy” (10 August 2021) 1news <[www.1news.co.nz](https://www.1news.co.nz/2021/08/09/woman-shocked-at-higher-car-insurance-premium-when-husband-removed-from-policy/)>. [↑](#footnote-ref-768)
768. Vero Insurance “Vero Insurance removes gender-based factors from personal car insurance products” (28 June 2023) <[www.vero.co.nz](https://www.vero.co.nz/newsroom/vero-insurance-removes-gender-based-factors-from-personal-car-insurance-products.html)>. [↑](#footnote-ref-769)
769. See Margaret Murolo “Automobile Insurance Premium Price Discrimination: Sex/Gender” (2023) 30(1) Conn Ins LJ 111 at 147–148. At the time this article was published, seven states had banned the use of sex or gender in setting the cost of car insurance, and two more states were in the process of doing so. [↑](#footnote-ref-770)
770. See Margaret Murolo “Automobile Insurance Premium Price Discrimination: Sex/Gender” (2023) 30(1) Conn Ins LJ111 at 120; Jonah von der Embse “Beyond the Binary – How Insurance Companies Can Adapt to Meet the Needs of Transgender, Non-binary, and Intersex Individuals” in Society of Actuaries Research Institute *Insurance Issues for LGBTQ+ Individuals: A Collection of Essays* (2023). [↑](#footnote-ref-771)
771. European Commission *Factsheet: EU rules on gender-neutral pricing in insurance* (20 December 2012). This followed a 2011 ruling by the Court of Justice of the European Union that differences in insurance premiums for men and women contribute to discrimination on the grounds of sex: Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL v Conseil des ministres* ECLI:EU:C:2011:100. [↑](#footnote-ref-772)
772. The Financial Services Council described itself in its submission as a “non-profit member organisation” with 113 members, which include “the major insurers in life, health, disability and income insurance”. [↑](#footnote-ref-773)
773. Southern Cross Health Insurance “Diversity and Inclusion” <[www.southerncross.co.nz](https://www.southerncross.co.nz/society/info-hub/being-better-for-our-customers/diversity-and-inclusion)>. [↑](#footnote-ref-774)
774. Southern Cross Health Insurance “Diversity and Inclusion” <[www.southerncross.co.nz](https://www.southerncross.co.nz/society/info-hub/being-better-for-our-customers/diversity-and-inclusion)>. [↑](#footnote-ref-775)
775. We discussed earlier in this chapter some feedback we received about the slightly different issue of insurance cover for gender-affirming health care. [↑](#footnote-ref-776)
776. Southern Cross Health Insurance “Diversity and Inclusion” < [www.southerncross.co.nz](https://www.southerncross.co.nz/society/info-hub/being-better-for-our-customers/diversity-and-inclusion)>. [↑](#footnote-ref-777)
777. See Caitlin Bingham “Health Insurance For Kids: How it Works in NZ” (10 July 2023) Canstar <[www.canstar.co.nz](https://www.canstar.co.nz/health-insurance/health-insurance-for-kids-how-it-works-in-nz/)>. [↑](#footnote-ref-778)
778. We acknowledge that some Australian states have not extended an insurance exception to grounds such as gender identity: Equal Opportunity Act 1984 (WA); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1977 (NSW); and Anti-Discrimination Act 1991 (Qld). In the Australian Capital Territory and Northern Territory, the insurance exceptions apply to all prohibited grounds of discrimination, including gender identity: Discrimination Act 1991 (ACT), s 28; and Anti-Discrimination Act 1991 (NT), s 49. [↑](#footnote-ref-779)
779. This might be because it would not engage a ground of discrimination at all or because it would be covered by the sex or disability exception. [↑](#footnote-ref-780)
780. Under section 21(1)(h) of the Human Rights Act 1993, “disability” includes “any loss or abnormality of psychological, physiological, or anatomical structure or function”. [↑](#footnote-ref-781)
781. See, generally, American Academy of Actuaries *Issue Brief: Valuing Gender Expansive Data* (August 2023). [↑](#footnote-ref-782)
782. See the comment from Te Ara Ahunga Ora | Retirement Commission (below) about this in relation to the superannuation exception. [↑](#footnote-ref-783)
783. See Taturanga Aotearoa | Stats NZ *Sex and gender identity statistical standards: Consultation* (July 2020) at 13. [↑](#footnote-ref-784)
784. See, also, Human Rights Act 1993, s 2 definition of “superannuation scheme”. [↑](#footnote-ref-785)
785. The Financial Services Council also referred us to the superannuation exceptions in the Human Rights Amendment Act 1994. Section 4 of that Act is a revised exception relating to sex or marital status for superannuation schemes caught by section 88(2), (4) and (5) of the Human Rights Commission Act 1977. The 1994 Act was a response to the decision in *Coburn v Human Rights Commission* [1994] 3 NZLR 323 (HC). We do not consider that our review necessitates any amendment to this Act. [↑](#footnote-ref-786)
786. Suzy Morrissey *What does retirement look like for women?* (Te Ara Ahunga Ora | Retirement Commission, 30 June 2022) at 5. [↑](#footnote-ref-787)
787. At 5. [↑](#footnote-ref-788)
788. We discuss further below some significant limits, in practice, on the operation of this exception. [↑](#footnote-ref-789)
789. Human Rights Commission Act 1977, s 88(8). [↑](#footnote-ref-790)
790. See Department of Justice *Human Rights Bill: Clauses 62, 82-84 – Report of the Department of Justice* (1993) at 9–10. [↑](#footnote-ref-791)
791. Department of Justice *Human Rights Bill: Clauses 62, 82-84 – Report of the Department of Justice* (1993) at 9–10. The report used the word ‘gender’ in this context, presumably interchangeably with ‘sex’. [↑](#footnote-ref-792)
792. See (27 July 1993) 537 NZPD 16905 (Rt Hon Douglas Graham MP). [↑](#footnote-ref-793)
793. Human Rights Act 1993, s 70(6). [↑](#footnote-ref-794)
794. According to submissions from Te Ara Ahunga Ora | Retirement Commission and the Financial Services Council, only six schemes that might potentially be covered by this exception are open to new members. [↑](#footnote-ref-795)
795. This might be necessary, for example, to avoid a claim that providing a transgender woman with a higher lump-sum benefit than a cisgender man is gender identity discrimination. [↑](#footnote-ref-796)
796. As we explain further below, these are located in the subpart relating to employment, not accommodation. [↑](#footnote-ref-797)
797. Human Rights Act 1993, s 54. As we discussed in Chapter 8, general exceptions of this kind fall outside the scope of our review. [↑](#footnote-ref-798)
798. For discussion of the boundary between Part 1A and Part 2, see Chapter 8. [↑](#footnote-ref-799)
799. *M v Board of Trustees of Palmerston North Boys’ High School* [1997] 2 NZLR 60 (HC) at 71. [↑](#footnote-ref-800)
800. See Andrew Butler “Is This A Public Law Case?” (2000) 31 VUWLR 747 at 769. [↑](#footnote-ref-801)
801. See Education and Training Act 2020, ss 470–473, 630–633 and 643; and Education (Hostels) Regulations 2005. [↑](#footnote-ref-802)
802. The laws that regulate public school boarding facilities also apply to private and charter schools: see Education (Hostels) Regulations 2005, reg 4 definition of “hostel” and reg 5; and Education and Training Act 2020, s 10(1) definitions of “hostel” and “registered school”. [↑](#footnote-ref-803)
803. See, generally, Residential Tenancies Act 1986, s 5B; and Education (Pastoral Care of Tertiary and International Learners) Code of Practice 2021, pt 5. [↑](#footnote-ref-804)
804. *Zhang v Victoria University of Wellington* [2023] NZHRRT 36. [↑](#footnote-ref-805)
805. See, generally, *Turner v Te Whatu Ora – Health New Zealand, Wairarapa* [2024] NZCA 203, (2024) ERNZ 347 at [23]; and Pae Ora (Healthy Futures) Act 2022, ss 14(b) and 4 definitions of “public health services” and “services”. [↑](#footnote-ref-806)
806. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at ch 11. [↑](#footnote-ref-807)
807. At [3.25]–[3.26]. [↑](#footnote-ref-808)
808. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025)at 158–159. [↑](#footnote-ref-809)
809. This included the rainbow organisations InsideOUT Kōaro, OutLine Aotearoa and Rainbow Support Collective. The organisations also commented that people who are transgender or non-binary or who have innate variations of sex characteristics often face discrimination when accessing accommodation. [↑](#footnote-ref-810)
810. We discuss later in the chapter an exception for shared accommodation that has relevance in hostel situations. [↑](#footnote-ref-811)
811. Since the date of our Issues Paper, this amendment has been passed into law: Residential Tenancies Act 1986, s 51. We discuss the Residential Tenancies Act in Chapter 19. [↑](#footnote-ref-812)
812. As we mentioned earlier, there is an accommodation exception that applies to all grounds. It relates to residential accommodation that is to be “shared with the person disposing of the accommodation”: Human Rights Act 1993, s 54. [↑](#footnote-ref-813)
813. Human Rights Commission Act 1977, s 25(3). [↑](#footnote-ref-814)
814. *Zhang v Victoria University of Wellington* [2023] NZHRRT 36 at [25]. [↑](#footnote-ref-815)
815. Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 40. [↑](#footnote-ref-816)
816. Ruth Fry “Education: girls and women” (2018) New Zealand History <[nzhistory.govt.nz](https://nzhistory.govt.nz/women-together/theme/education-girls-and-women)>. [↑](#footnote-ref-817)
817. Accommodation of this type would be captured by the general exception in section 54 discussed earlier. [↑](#footnote-ref-818)
818. See Toni McCallum “National Collective of Independent Women’s Refuges” (2018) New Zealand History <[nzhistory.govt.nz](https://nzhistory.govt.nz/women-together/national-collective-independent-womens-refuges)>. [↑](#footnote-ref-819)
819. See *Zhang v Victoria University of Wellington* [2023] NZHRRT 36 at [27]–[28]. [↑](#footnote-ref-820)
820. We acknowledge this research is not comprehensive. [↑](#footnote-ref-821)
821. We heard from Te Whare Wānaka o Aoraki | Lincoln University, Te Herenga Waka | Victoria University of Wellington, Te Kunenga ki Pūrehuroa | Massey University (Auckland campus) and Waipapa Taumata Rau | University of Auckland. [↑](#footnote-ref-822)
822. See Education Counts “New Zealand Schools: Schools Directory Builder” <[www.educationcounts.govt.nz](https://www.educationcounts.govt.nz/directories/list-of-nz-schools)>. [↑](#footnote-ref-823)
823. For example, Holy Cross Seminary, Marist Seminary, Carmelite Monastery of Christ the King and Tyburn Monastery. [↑](#footnote-ref-824)
824. We did find rules for one religious hostel restricting the ability of a tenant to have a member of the “opposite sex” in their room: *Eden Christan Hostel Rules 2024* <[edenchristianhostel.nz](https://edenchristianhostel.nz/wp-content/uploads/2024/05/ECH-Rules-2024.pdf)> at [2.8]. [↑](#footnote-ref-825)
825. Gender Minorities Aotearoa *ARC Readiness Assessment: transgender and intersex competency in violence prevention services* (2023) at 23. See, also, Phoebe Ellen McHardy Moir “Transforming Women-Only Spaces: Law, Policies and Realities of Trans Inclusion in Women-Only Safe Houses in Aotearoa New Zealand” (2022) 6 NZWLJ 43 at 68. There are around 58 women’s refuges in New Zealand. [↑](#footnote-ref-826)
826. One in seven respondents (14 per cent) reported they had ever needed to access an organisation for emergency housing, including a shelter or refuge. Of those respondents, 8 per cent said they had been denied access because they were transgender or non-binary. Two per cent of respondents said they had ever stayed in emergency housing and, of those, 11 per cent said they were thrown out after the emergency housing provider learned they were transgender or non-binary: Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 160–161. [↑](#footnote-ref-827)
827. If a provider wanted to offer separate accommodation of this kind, they might be able to rely on section 73 of the Human Rights Act, which enables temporary measures to ensure equality. [↑](#footnote-ref-828)
828. A person who identifies outside the gender binary might, however, still be excluded from accommodation that was restricted to persons of a different sex assigned at birth. We discussed the difficulties in accommodating people who identify outside the gender binary in an Act that is structured around binary sex exceptions in Chapter 8. [↑](#footnote-ref-829)
829. Organisations that expressed these views included Speak Up for Women, Save Women’s Sport Australasia and Lesbian Resistance New Zealand. [↑](#footnote-ref-830)
830. It referred us to an online article about a transgender woman in the United Kingdom who sexually assaulted a female patient on the same ward: David McLoone “UK hospital finally admits ‘transgender’ patient raped a woman after denying it was possible for a year” (23 March 2022) LifeSiteNews <[www.lifesitenews.com](https://www.lifesitenews.com/news/uk-hospital-admits-bowing-to-gender-ideology-after-denying-a-patient-was-raped-because-accused-man-is-transgender/)>. As noted earlier, the rules in Part 2 of the Human Rights Act are unlikely to apply to accommodation in public hospitals. [↑](#footnote-ref-831)
831. We discussed this exception in Chapter 9. [↑](#footnote-ref-832)
832. See, generally, Lawrence J Wichlinski “Adaptive Solutions to the Problem of Vulnerability During Sleep” (2022) 8 Evolutionary Psychological Science 442. [↑](#footnote-ref-833)
833. See, also, *Re: Sera’s Women’s Shelter Incorporated* [2024] QIRC 199 at [100]. [↑](#footnote-ref-834)
834. See Chapter 13 (courses and counselling) and Chapter 15 (competitive sports). [↑](#footnote-ref-835)
835. Speak Up for Women supported an amendment to section 55 to include “variation of sex characteristics” but did not give reasons. As discussed in Chapter 7, Speak Up for Women proposed this ground would apply to transgender people who had taken material steps to alter their sex characteristics (as well as to people with innate variations of sex characteristics). [↑](#footnote-ref-836)
836. For further discussion, see Chapter 14. [↑](#footnote-ref-837)
837. In the Issues Paper, we sought feedback on whether an amendment to the Human Rights Act to encourage the provision of unisex facilities such as bathrooms would be desirable (and, if so, what the provision should require). In Chapter 14, we discuss the feedback we received and conclude that making a recommendation about unisex facilities would not be appropriate as part of this review. [↑](#footnote-ref-838)
838. We discussed the implications of CEDAW for this project more fully in Chapters 3 and 4. [↑](#footnote-ref-839)
839. United Nations Committee on the Elimination of Discrimination against Women *General Recommendation No 19 Violence against women* UN Doc A/47/38 (30 January 1992) at [24(k)], [24(r)] and [24(t)]. [↑](#footnote-ref-840)
840. Human Rights Commission Act 1977, s 15(3)(d) and (11). [↑](#footnote-ref-841)
841. In circumstances where it is a benefit, section 27(5) would protect the employer from a discrimination claim being taken by another employee who has not been excused the term or condition. [↑](#footnote-ref-842)
842. (20 July 1977) 411 NZPD 1475. [↑](#footnote-ref-843)
843. However, it cautioned that no central record regarding their conditions or configurations exists. It commented that, while some districts may have individual policies, there is no overarching policy governing Resident Medical Officer lounges and sleeping arrangements across districts. [↑](#footnote-ref-844)
844. A person who identifies outside the gender binary might, however, still be excluded from accommodation that was restricted to persons of a different sex assigned at birth. We discussed the difficulties in accommodating people who identify outside the binary in an Act that is structured around binary sex exceptions in Chapter 8. [↑](#footnote-ref-845)
845. See *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53]. [↑](#footnote-ref-846)
846. The practicality rationale is already reflected in the wording of the exception. [↑](#footnote-ref-847)
847. See Chapters 13 (courses and counselling) and 15 (competitive sports). [↑](#footnote-ref-848)
848. This is different from the current reasonableness requirement in section 27(3)(b), which only concerns whether it is reasonable to expect the employer to provide separate accommodation on site, not with whether it might be reasonable to accommodate the person in existing on-site accommodation. [↑](#footnote-ref-849)
849. The proposed wording of subsection 3A is identical to the wording of the current section 27(3)(b). [↑](#footnote-ref-850)
850. Human Rights Act 1993, s 57(2). Vocational training bodies also have additional obligations under section 40 of the Act. As we explained in Chapter 8, we are not aware of any specific issues for this review that relate to section 40 and therefore do not address it separately in this report. [↑](#footnote-ref-851)
851. For example, *Waara v Te Wānanga o Aotearoa* HC Wellington CIV-2003-485-2481, 30 September 2004 at [11]; Paul Rishworth “Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum” in Legal Research Foundation (ed) *Education and the Law in New Zealand* (Auckland, 1993) 12 at 18–20; and Andrew Butler “Is this a Public Law Case?” (2000) 31 VUWLR 747 at 768–769. [↑](#footnote-ref-852)
852. See Education and Training Amendment Act 2024, s 212ZI. [↑](#footnote-ref-853)
853. For example, Paul Rishworth “Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum” in Legal Research Foundation (ed) *Education and the Law in New Zealand* (Auckland, 1993) 12 at 18–20; and Andrew Butler “Is this a Public Law Case?” (2000) 31 VUWLR 747 at 768–769. [↑](#footnote-ref-854)
854. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at ch 12. In this chapter of the Final Report, we do not address two issues that submitters raised in their responses to these questions: misgendering and deadnaming; and access to school bathrooms and changing rooms. We address these issues in Chapters 6 and 14, respectively. [↑](#footnote-ref-855)
855. At ch 3. [↑](#footnote-ref-856)
856. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 106–107. In this survey, 13 per cent of transgender and non-binary students aged 15 to 19 reported experiencing discrimination at school (compared to 2 per cent of all students) and almost half reported they had been bullied at school in the past year. In addition, 19 per cent of transgender and non-binary students said they felt unsafe in their school or course most or all the time. [↑](#footnote-ref-857)
857. Human Rights Act 1993, s 57(1)(a). [↑](#footnote-ref-858)
858. Human Rights Act 1993, s 57(1)(b). [↑](#footnote-ref-859)
859. Human Rights Act 1993, s 57(1)(d). [↑](#footnote-ref-860)
860. Human Rights Act 1993, s 57(1)(c). [↑](#footnote-ref-861)
861. Human Rights Act 1993, s 57(1)(d). [↑](#footnote-ref-862)
862. Although Teaching Council of Aotearoa New Zealand says it is not primarily a complaints service and complaints should first be made to the school: Matatū Aotearoa | Teaching Council of Aotearoa New Zealand *Reporting a concern* <[teachingcouncil.nz](https://teachingcouncil.nz/professional-practice/conduct-concerns/reporting-a-concern/#complaints)>. [↑](#footnote-ref-863)
863. We discussed existing laws and regulations relating to education more fully in the Issues Paper at [12.10]. [↑](#footnote-ref-864)
864. Privacy Act 2020. We discussed the implications of the Privacy Act for this review in Chapter 8. [↑](#footnote-ref-865)
865. Education and Training Act 2020, ss 127(1) and 597(3)(b) and sch 7, cls 2(a) and (h); and Health and Safety at Work Act 2015, s 36. See, also, Te Tāhuhu o te Mātauranga | Ministry of Education *Health and Safety at Work Act 2015: A practical guide for boards of trustees and school leaders* (August 2017) at 50. [↑](#footnote-ref-866)
866. There are no general exceptions in this subpart applying to all prohibited grounds. [↑](#footnote-ref-867)
867. Human Rights Commission Act 1977, s 26(2). The 1993 Act omitted colour from the exception and added disability and age. [↑](#footnote-ref-868)
868. Some tertiary institutions limit certain courses to only males or females but these would not be covered by this exception. [↑](#footnote-ref-869)
869. See, for example, JB Elkind “Human Rights – How to Make it Work” [1978] NZLJ 189; and Paul Rishworth “Inner Freedoms: Thought, Conscience, Religion and Belief” in Te Kāhui Ture o Aotearoa | New Zealand Law Society *Human Rights Law – Trans-Tasman Conference* (2024) 199 at 220. [↑](#footnote-ref-870)
870. See Education Counts “New Zealand Schools: Schools Directory Builder” <[www.educationcounts.govt.nz](https://www.educationcounts.govt.nz/directories/list-of-nz-schools)>. Three of these schools are co-educational at some levels. [↑](#footnote-ref-871)
871. If section 58(1) also covers charter schools, we are aware of at least one that is single-sex: see “Establishment of TIPENE as a Charter School” (13 December 2024) *New Zealand Gazette* No 2024-go6254. [↑](#footnote-ref-872)
872. We also gave submitters a fifth option – “Another option (please specify)”. [↑](#footnote-ref-873)
873. For reasons we discussed in Chapter 8, we do not think there would be the same uncertainty about the effect of this option on a new ground of having an innate variation of sex characteristics. It would mean distinctions cannot be drawn on this basis. [↑](#footnote-ref-874)
874. Births, Deaths, Marriages, and Relationships Registration Act 2021, s 23(2). The application must also be accompanied by a letter of support from a “suitably qualified” third party attesting to various things: s 25(1)(c). [↑](#footnote-ref-875)
875. Births, Deaths, Marriages, and Relationships Registration Act 2021, s 24(1)(c). The letter must attest to various things. A list of “suitably qualified” types of person is prescribed by the Births, Deaths, Marriages, and Relationships Registration (Registering Nominated Sex) Regulations 2023, reg 6. [↑](#footnote-ref-876)
876. We asked a separate consultation question about whether additional amendments to section 58(1) are required to accommodate students who identify outside the gender binary, which we discuss below. [↑](#footnote-ref-877)
877. The Association of Proprietors of Integrated Schools, Resist Gender Education and Speak Up for Women supported option 3. Lesbian Resistance New Zealand supported option 1. Some organisations did not comment on the exception or did not clearly specify the option with which they agreed. For example, Ethos, the Women’s Rights Party and Save Women’s Sport Australasia were supportive of exceptions for single-sex schools but did not specify an option. [↑](#footnote-ref-878)
878. Education and Training Act 2020, s 191. This section permits the Minister to declare a state school to be a single-sex school or a co-educational school. This declaration can limit the number of boys who can attend a girls’ single-sex school and the number of girls who can attend a boys’ single-sex school. See, also, (3 April 2001) 591 NZPD. [↑](#footnote-ref-879)
879. See Mahaila Day and Annette Brömdal “Mental health outcomes of transgender and gender diverse students in schools: a systematic literature review” (2024) International Journal of Transgender Health 1. [↑](#footnote-ref-880)
880. Mahaila Day and Annette Brömdal “Mental health outcomes of transgender and gender diverse students in schools: a systematic literature review” (2024) International Journal of Transgender Health 1. [↑](#footnote-ref-881)
881. A 2021 briefing to the Minister of Education identified four areas where access to co-educational schooling was limited due to zoning or the local schooling network: Te Tāhuhu o te Mātauranga | Ministry of Education *Briefing note: access to co-education for gender-diverse students* (22 December 2021) at 1. [↑](#footnote-ref-882)
882. The Association assumed for the purpose of its submission that state integrated schools were covered by Part 2. [↑](#footnote-ref-883)
883. We did not receive submissions commenting on the position with respect to any other religions. [↑](#footnote-ref-884)
884. This includes the only single-sex state integrated special character Islamic school of which we are aware: Zayed College for Girls “About our School” <[www.zayedcollege.school.nz](https://www.zayedcollege.school.nz/about-us/our-school/)>. [↑](#footnote-ref-885)
885. Mahaila Day and Annette Brömdal “Mental health outcomes of transgender and gender diverse students in schools: a systematic literature review” (2024) International Journal of Transgender Health 1 at 16. [↑](#footnote-ref-886)
886. *Eweida v United Kingdom* [2013] ECHR 37 at [82]. [↑](#footnote-ref-887)
887. See, for example, Australian Law Reform Commission *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*(ALRC R142, 2023) at [4.103] stating that it is unclear whether the freedom to manifest religious belief includes the ability to determine the people who should “constitute the entirety of the community with whom they seek to manifest religion or belief”. One of that Commission’s recommendations was to repeal the exception for discrimination by religious educational institutions against employees and students on the grounds of sex, sexual orientation, gender identity, marital or relationship status or pregnancy. [↑](#footnote-ref-888)
888. For further discussion, see Chapters 6 and 18. [↑](#footnote-ref-889)
889. For example, Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 28 and 29. [↑](#footnote-ref-890)
890. Education and Training Act 2020, s 33. [↑](#footnote-ref-891)
891. Education and Training Act 2020, sch 20, cl 14(2)(b). [↑](#footnote-ref-892)
892. Te Tāhuhu o te Mātauranga | Ministry of Education *Briefing note: access to co-education for gender-diverse students* (22 December 2021). [↑](#footnote-ref-893)
893. See, for example, John Fenaughty and others *Te āniwaniwa takatāpui whānui: te irawhiti me te ira huhua mō ngā rangatahi* | *Gender Identity and young people’s wellbeing in Youth19* (Youth19 Research Group, 2023) at 8, in which 1 per cent of children and young people surveyed said they were transgender. [↑](#footnote-ref-894)
894. Te Roopu Kaiwhiriwhiri o Aotearoa | New Zealand Association of Counsellors “What is Counselling” <[www.nzac.org.nz](https://www.nzac.org.nz/site/counsel/learn?nav=sidebar)>. [↑](#footnote-ref-895)
895. See Christoph Flückiger and others “The Alliance in Adult Psychotherapy: A Meta-Analytic Synthesis” (2018) 55 Psychotherapy 316. [↑](#footnote-ref-896)
896. This contrasts with the exception in section 27(3)(a), which allows different treatment based on sex where the position needs to be held by one sex to preserve reasonable standards of privacy. [↑](#footnote-ref-897)
897. See, for example, *Coburn v Human Rights Commission* [1994] 3 NZLR 323 (HC) at 335. [↑](#footnote-ref-898)
898. A person who identifies outside the binary of male and female might still be excluded from a role that was restricted to persons of a different sex assigned at birth. In Chapter 8, we discussed the difficulties in accommodating people who identify outside the binary in legislation that is structured around binary sex exceptions. [↑](#footnote-ref-899)
899. Other than the exceptions that apply to all grounds, the only exceptions in the Human Rights Act that apply to race and ethnic or national origins are the counselling exceptions and the exception for an educational establishment to be maintained wholly or principally for students of one race. Other than the exceptions that apply to all grounds, the only exceptions that apply to sexual orientation are the counselling exceptions and the exception for domestic employment in a private household. [↑](#footnote-ref-900)
900. Te Ohaakii a Hine | National Network Ending Sexual Violence Together “Principle 6: Gender Choice” TOAH-NNEST <[toah-nnest.org.nz](https://toah-nnest.org.nz/principle-6-gender-choice/)>. [↑](#footnote-ref-901)
901. Te Roopu Kaiwhiriwhiri o Aotearoa | New Zealand Association of Counsellors “What is Counselling” <[www.nzac.org.nz](https://nzac.in1touch.org/site/counsel/learn?nav=sidebar)> [↑](#footnote-ref-902)
902. *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (2018) at [3.2.1]. [↑](#footnote-ref-903)
903. Speak Up for Women thought this exception should apply to the ground of “variation of sex characteristics”. As discussed in Chapter 7, it proposed this ground would apply to transgender people who had taken material steps to alter their sex characteristics (as well as to people with innate variations of sex characteristics). [↑](#footnote-ref-904)
904. These were Rotorua Chamber of Pride, Professional Association for Transgender Health Aotearoa, InsideOUT Kōaro, OutLine Aotearoa and Rainbow Support Collective. [↑](#footnote-ref-905)
905. However, an employer would be required to advise the applicant of those potential consequences: Privacy Act 2020, s 22, information privacy principle 3. [↑](#footnote-ref-906)
906. Letter from Margaret Nixon (Secretary for Justice) to Chief Parliamentary Counsel regarding review of Human Rights Commission Act 1997 and Race Relations Act 1971 (12 February 1990) at 15. [↑](#footnote-ref-907)
907. See, for example, Te Roopu Kaiwhiriwhiri o Aotearoa | New Zealand Association of Counsellors *Code of Ethics: A Framework for Ethical Practice* (2002) at [5.2(d)] and [5.2(g)]; and New Zealand Christian Counsellors’ Association *Code of Ethics and Practice* (5 June 2025) at [1.1] and [1.3]. [↑](#footnote-ref-908)
908. See, for example, *Director of Proceedings v Mogridge* [2007] NZHRRT 27 at [103]. [↑](#footnote-ref-909)
909. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, rights 1–3 and 4(3). [↑](#footnote-ref-910)
910. A person who identifies outside the binary of male and female might still be excluded from a role that was restricted to persons of a different sex assigned at birth. [↑](#footnote-ref-911)
911. We acknowledge, however, that InsideOUT Kōaro and Qtopia said the risk of services being limited to cisgender people is not worth the benefit of allowing for services focused on transgender and non-binary communities. [↑](#footnote-ref-912)
912. In the latest Counting Ourselvessurvey, transgender women and non-binary people, as well as transgender men, reported having experienced attempted or forced sexual intercourse at rates higher than for women in the general population and at least four times higher than for men in the general population: Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 124.   [↑](#footnote-ref-913)
913. One survey of sexual violence prevention and family violence prevention services found 46 per cent of respondents did not know of any sexual or family violence services that were safe to refer transgender people to: Gender Minorities Aotearoa *ARC Readiness Assessment: transgender and intersex competency in violence prevention services* (2023) at 20. See, also, Sandra Dickson *Building Rainbow Communities Free of Partner and Sexual Violence* (Hohou Te Rongo Kahukura | Outing Violence, April 2016) at 41–47. [↑](#footnote-ref-914)
914. Privacy Act 2020, s 22, information privacy principle 1. [↑](#footnote-ref-915)
915. Privacy Act 2020, s 22, information privacy principle 11. [↑](#footnote-ref-916)
916. It is possible that, in some circumstances, running a peer support group might amount to provision of a service and therefore fall under the counselling exception for goods and services in section 45. [↑](#footnote-ref-917)
917. This is because it is a key part of the health and physical education curriculum that must be taught in all state, state-integrated and charter schools: see Education and Training Act 2020, s 164. See, also, Te Tāhuhu o te Mātauranga | Ministry of Education *The New Zealand Curriculum* (2015) at 22. [↑](#footnote-ref-918)
918. This is because principals at state schools and the people responsible for teaching and learning at charter schools have a statutory responsibility to ensure that students get good guidance and counselling: Education and Training Act 2020, s 103(a). Unless guidance counselling was provided in a group setting, it would not be covered in any event. [↑](#footnote-ref-919)
919. For example, in accordance with obligations under the Education (Pastoral Care of Tertiary and International Learners) Code of Practice 2021. [↑](#footnote-ref-920)
920. We discussed section 42 in Chapter 10. [↑](#footnote-ref-921)
921. We also discussed section 44 in Chapter 10. [↑](#footnote-ref-922)
922. Although section 46 mentions “services” as well as “facilities”, in this chapter, we tend to refer solely to facilities as we think this is now the primary application of the exception. [↑](#footnote-ref-923)
923. Human Rights Commission Act 1977, ss 23(2) and 24(4). [↑](#footnote-ref-924)
924. (7 July 1977) 411 NZPD 1246 (Richard Harrison MP). [↑](#footnote-ref-925)
925. Section 42 covers facilities accessible to “members of the public”. Section 44 covers facilities supplied to “the public or to any section of the public”. [↑](#footnote-ref-926)
926. Later in this chapter, we discuss overlap with the shared accommodation exception that we discussed in Chapter 11. [↑](#footnote-ref-927)
927. In Chapter 18, we explore the different rules that govern public sector discrimination under Part 1A. [↑](#footnote-ref-928)
928. We also gave submitters a fifth option — “Another option (please specify)”. [↑](#footnote-ref-929)
929. For reasons we discussed in Chapter 8, we do not think there would be the same uncertainty about the effect of this option on a new ground of having an innate variation of sex characteristics. It would mean distinctions cannot be drawn on this basis. [↑](#footnote-ref-930)
930. Ipsos *LGBT+ Pride 2023: A 30-Country Ipsos Global Advisor Survey* (2023) at 37. [↑](#footnote-ref-931)
931. Women’s Rights Party *Women’s Issues Poll* (2023) at 2. [↑](#footnote-ref-932)
932. See Marc Daalder “Race relations among most divisive issues in election – poll” (3 November 2023) Newsroom <[newsroom.co.nz](https://newsroom.co.nz/2023/11/03/race-relations-among-most-divisive-issues-in-election-poll/)>. [↑](#footnote-ref-933)
933. This count only includes organisations that clearly expressed a view about the options. [↑](#footnote-ref-934)
934. Specifically Chinese Pride New Zealand, InsideOUT Kōaro, Meredith Connell’s Rainbow Alliance, Rainbow Support Collective, OutLine Aotearoa, Rotorua Chamber of Pride and Rainbow Wellington. [↑](#footnote-ref-935)
935. Human Rights Code RSBC 1996 c 210, s 8(2)(a); The Saskatchewan Human Rights Code SS 2018 c S-24.2, s 12(2); Human Rights Code RSO 1990 c H19, s 20(1); and Human Rights Act SNL 2010 c H-13.1, s 11(3)(b). These exceptions all refer to the rationale of public decency. [↑](#footnote-ref-936)
936. The Saskatchewan Human Rights Code SS 2018 c S-24.2, s 16(10). [↑](#footnote-ref-937)
937. See, for example, *Salsman v London Sales Arena Corp* 2014 HRTO 775, 79 CHRR 315; *Lewis v Sugar Daddys Nightclub* 2016 HRTO 347; *Shwan v Ontario Lottery and Gaming Corporation* 2019 HRTO 653; and *Iversen v Gateway Casinos & Entertainment* 2023 BCHRT 3. [↑](#footnote-ref-938)
938. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16 at [211]–[221]. See, also, Equality and Human Rights Commission “An interim update on the practical implications of the UK Supreme Court judgment” (25 April 2025) <[www.equalityhumanrights.com](https://www.equalityhumanrights.com/media-centre/interim-update-practical-implications-uk-supreme-court-judgment)>; and HM Government *The Building Regulations 2010 – Toilet accommodation: Approved Document T* (2024). [↑](#footnote-ref-939)
939. As discussed in Chapter 4, this is the wording of the United Kingdom’s gender-related ground. [↑](#footnote-ref-940)
940. Equality Act 2010 (UK), sch 3, para 28. [↑](#footnote-ref-941)
941. Equal Status Act 2000 (Ireland), s 5(2)(g). [↑](#footnote-ref-942)
942. Equal Status Act 2000 (Ireland), s 3(2)(a); and Employment Equality Act 1998 (Ireland), s 6(2)(a). [↑](#footnote-ref-943)
943. We discussed the implications of CEDAW for this review more fully in Chapters 3 and 4. [↑](#footnote-ref-944)
944. As we discuss later in this chapter, we recommend that, in situations of overlap, the test we proposed in Chapter 11 for shared accommodation should take precedence. [↑](#footnote-ref-945)
945. We discuss later in the chapter the possibility of an intermediate position (such as the one reflected in option 4). For reasons set out there, we do not consider any intermediate option we have identified to be practicable or desirable. [↑](#footnote-ref-946)
946. For example, New Zealand passports and New Zealand birth certificates can both reflect a person’s nominated sex. [↑](#footnote-ref-947)
947. See, for example, Arwa Mahdawi “Whether you’re trans or not, the gender police are coming for you too” (17 June 2023) The Guardian <[www.theguardian.com](https://www.theguardian.com/commentisfree/2023/jun/17/gender-police-trans-war-women)>; Rhian Lubin “Lauren Boebert forced to apologize after trying to kick out ‘a guy’ from women’s bathroom at Capitol” (24 January 2025) The Independent <[www.independent.co.uk](https://www.independent.co.uk/news/world/americas/us-politics/lauren-boebert-trump-transgender-policy-b2685813.html)>; Brandon Truitt “Woman says security guard at Liberty Hotel in Boston confronted her in bathroom, asked to prove gender” (7 May 2025) CBS News <[www.cbsnews.com](https://www.cbsnews.com/boston/news/women-boston-liberty-hotel-bathroom-gender/?intcid=CNM-00-10abd1h)>; and Kiara Alfonesca “Killing, harassment spotlight transphobia’s impact on all people: advocates” (24 August 2023) ABC News <[abcnews.go.com](https://abcnews.go.com/US/transphobia-impact-gender-stereotypes-advocates/story?id=102129254)>. [↑](#footnote-ref-948)
948. See, for example, Susan Hornsby-Geluk “Room for improvement in workplace gender-identity decision-making” *The Post* (online ed, Wellington, 20 September 2023); and John Fenaughty and others *Identify Survey: Community and advocacy report* (2022) at 53. [↑](#footnote-ref-949)
949. For example, International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), arts 18(3), 21 and 22(2). Proportionality is another of the core values we identified. [↑](#footnote-ref-950)
950. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans and Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 120. The survey does not specify whether these were single-sex or unisex bathrooms. [↑](#footnote-ref-951)
951. At 120. [↑](#footnote-ref-952)
952. See Adam O Hill and others *Writing Themselves In 4: The health and wellbeing of LGBTQA+ young people in Australia* (Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, 2021) at 130; and Sandy E James and others *Early Insights: A Report of the 2022 US Transgender Survey* (National Center for Transgender Equality, Washington DC, 2024) at 21. [↑](#footnote-ref-953)
953. Three per cent of respondents to the 2022 Counting Ourselves survey said that they had an innate variation of sex characteristics so some of those individuals may be captured in the data referred to above: Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans and Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 13. [↑](#footnote-ref-954)
954. Tiffany Jones and others *Intersex: Stories and Statistics from Australia*(Open Book Publishers, Cambridge, 2016) at 164. [↑](#footnote-ref-955)
955. Janet Fanslow and Tracey McIntosh *Key findings and policy and practice implications from He Koiora Matapopore* | *The 2019 New Zealand Family Violence Study* (Waipapa Taumata Rau | University of Auckland, 2023) at 7. See, also, Te Tāhū o te Ture | Ministry of Justice “NZCVS Cycle 7 resources and results” (2025) <[www.justice.govt.nz](https://www.justice.govt.nz/justice-sector-policy/research-data/nzcvs/nzcvs-cycle-7-resources-and-results/)>, noting that 0.9 per cent of men in New Zealand experienced sexual assault in the preceding 12 months from the survey date compared to 2.9 per cent of women; and Janet L Fanslow and others “Evidence of Gender Asymmetry in Intimate Partner Violence Experience at the Population-Level” (2023) 38 Journal of Interpersonal Violence 9159 at 9167. [↑](#footnote-ref-956)
956. Kenneth F Ferraro “Women’s Fear of Victimization: Shadow of Sexual Assault?” (1996) 75 Social Forces 667 at 681. [↑](#footnote-ref-957)
957. At 681. See, also, Helmut Hirtenlehner, Stephen Farrall and Eva Groß “Are women of all age groups equally affected by the shadow of sexual assault? Evidence from Germany” (2023) 20 European Journal of Criminology 834. [↑](#footnote-ref-958)
958. More than two in five *Counting Ourselves* respondents aged 15 or older (42 per cent) reported that someone had forced them, or had tried to force them, to have sex. Although the rates varied among different cohorts of respondents, they all remained high: 51 per cent of non-binary people assigned female at birth, 40 per cent of transgender men, 32 per cent of transgender women and 28 per cent of non-binary people assigned male at birth reported someone had forced them, or had tried to force them, to have sex. The rates for each group are higher than is reported by women in the general population and at least four times higher than for men in the general population: Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans and Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 124–125. The comparisons are made against the New Zealand Crimes and Victims Survey 2021/22. [↑](#footnote-ref-959)
959. Amira Hasenbush, Andrew R Flores and Jody L Herman “Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms” (2019) 16 Sex Res Soc Policy 70 at 79–80. That study found that violations in such spaces occurred annually at most at a rate of 4.5 per 100,000 population in the jurisdictions studied compared to violent crimes reported at a rate of 390.1 per 100,000 population. [↑](#footnote-ref-960)
960. For example, a study from the United States found that the enactment of anti-discrimination laws relating to gender identity did not increase the number or frequency of criminal incidents in such settings: Amira Hasenbush, Andrew R Flores and Jody L Herman “Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms” (2019) 16 Sex Res Soc Policy 70 at 81. [↑](#footnote-ref-961)
961. David Fisher “Public toilets and changing rooms going unisex bringing greater comfort to gender fluid comfort stops” *The New Zealand Herald* (online ed, New Zealand, 2 May 2023). [↑](#footnote-ref-962)
962. Reduxx “UK: Man Who Identified Himself As ‘Female’ Sentenced After Sexually Assaulting Woman In Train Station Bathroom” (21 February 2023) <[reduxx.info](https://reduxx.info/uk-man-who-identified-himself-as-female-sentenced-after-sexually-assaulting-woman-in-train-station-bathroom/)>. The Women’s Rights Party referred to three other articles from Reduxx relating to unisex facilities. [↑](#footnote-ref-963)
963. See Melody Wood “6 Men Who Disguised Themselves as Women to Access Bathrooms” (3 June 2016) The Daily Signal <[www.dailysignal.com](https://www.dailysignal.com/2016/06/03/6-examples-highlight-serious-problems-with-obamas-bathroom-rule/)>; and Family Research Council *Issue Brief: Bathroom Incidents* (Washington DC, 2017). [↑](#footnote-ref-964)
964. For example, Jacinta Francis and others “Gender-Neutral Toilets: A Qualitative Exploration of Inclusive School Environments for Sexually and Gender Diverse Youth in Western Australia” (2022) 19(16) Int J Environ Res Public Health 10089 at [3.3.5] and [4]. [↑](#footnote-ref-965)
965. See Adeno Addis “Justice Kennedy on Dignity” (2023) 60 Houston L Rev 519 at 602; and JM Bernstein *Torture and Dignity* (University of Chicago Press, 2015) at 259. [↑](#footnote-ref-966)
966. See, generally, Ipsos *LGBT+ Pride 2023: A 30-Country Ipsos Global Advisor Survey* (2023); and Marc Daalder “Race relations among most divisive issues in election – poll” (3 November 2023) Newsroom <[newsroom.co.nz](https://newsroom.co.nz/2023/11/03/race-relations-among-most-divisive-issues-in-election-poll/)>. [↑](#footnote-ref-967)
967. Te Kāhui Tika Tangata | Human Rights Commission advises the public that people who are transgender or non-binary or who have an innate variation of sex characteristics should be able to use the facility in which they feel most comfortable (although it says this is not legal advice): Te Kāhui Tika Tangata | Human Rights Commission “Frequently Asked Questions: Sport and community – Can I use public toilets and changing rooms that align with my gender?” <[tikatangata.org.nz](https://tikatangata.org.nz/resources-and-support/frequently-asked-questions)>. Some organisations advise the public to the contrary — that providers are entitled to exclude people from single-sex facilities based on their ‘biological sex’: see, for example, Speak Up for Women *Opinion regarding the provision of single sex facilities* (2023). [↑](#footnote-ref-968)
968. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans and Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 121. [↑](#footnote-ref-969)
969. See Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans and Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 121, where the data is compared. [↑](#footnote-ref-970)
970. John Fenaughty and others *Identify Survey: Community and advocacy report* (2022) at 41. [↑](#footnote-ref-971)
971. Adam O Hill and others *Writing Themselves In 4: The health and wellbeing of LGBTQA+ young people in Australia* (Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, 2021) at 130–131. In this study, 85.7 per cent of trans men, 70.8 per cent of trans women and 50.3 per cent of non-binary respondents said they had avoided using toilets in the past 12 months. Similar percentages said they had felt uncomfortable or unsafe accessing toilets. Some of these respondents said they had limited how much they ate or drank to avoid having to go to the toilet (59.7 per cent of trans men, 45.8 per cent of trans women and 28.9 per cent of non-binary respondents). [↑](#footnote-ref-972)
972. Births, Deaths, Marriages, and Relationships Registration Act 2021, s 24. The fee is currently $55 as well as a fee of $33 to obtain a copy of the amended certificate. There is an additional fee of $170 if the individual also wants to change their name: Births, Deaths, Marriages, and Relationships Registration (Fees) Regulations 1995, reg 2 and sch. [↑](#footnote-ref-973)
973. As noted above, however, we did not find evidence of this being a significant problem in other jurisdictions. [↑](#footnote-ref-974)
974. See ILGA World Database “Legal Frameworks | Legal Gender Recognition”<[database.ilga.org](https://database.ilga.org/legal-gender-recognition)>. [↑](#footnote-ref-975)
975. It might be possible to design the law in such a way as to encompass other forms of identification that identify a person’s sex or gender (such as passports). [↑](#footnote-ref-976)
976. Equal Status Act 2000 (Ireland), s 5(2)(g). As already explained, gender discrimination is defined in the Act to mean discrimination between males and females but has been interpreted to also protect people from gender identity discrimination. [↑](#footnote-ref-977)
977. Equality Act 2010 (UK), sch 3, para 28. [↑](#footnote-ref-978)
978. *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [220] and [265]. [↑](#footnote-ref-979)
979. For example, we recommend new reasonableness thresholds in relation to exceptions for courses and counselling (Chapter 13) and competitive sports (Chapter 15). [↑](#footnote-ref-980)
980. Human Rights Act 1993, s 5(2)(a) and (e). [↑](#footnote-ref-981)
981. Section 53 applies to residential accommodation but the Act defines it widely to include hotels or motels: Human Rights Act 1993, s 2 “residential accommodation”. [↑](#footnote-ref-982)
982. Human Rights Act 1993, s 57. We discussed this provision in Chapter 12. [↑](#footnote-ref-983)
983. Human Rights Act 1993, s 22. We discussed this provision in Chapter 9. [↑](#footnote-ref-984)
984. For example, it is possible that requiring males and females to use separate facilities was not thought to give rise to a “detriment” or a restriction on access within the terms of sections 22 or 57. The wording of sections 42 and 44 is slightly different. [↑](#footnote-ref-985)
985. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at [13.65]–[13.76]. [↑](#footnote-ref-986)
986. At [13.69]. [↑](#footnote-ref-987)
987. See Building Regulations 1992, sch 1; and Te Tari Kaupapa Whare | Department of Building and Housing *Compliance Document for New Zealand Building Code Clause G1: Personal Hygiene – Second Edition* (2011). [↑](#footnote-ref-988)
988. Human Rights Act 1993, ss 27(3) and (5), 28(3), 29, 36, 37, 39, 41, 43, 52, 56 and 60. [↑](#footnote-ref-989)
989. Human Rights Act 1993, ss 29, 36, 37, 39, 41, 43, 52, 56 and 60. There are also some that relate to sex and to religious or ethical belief: Human Rights Act 1993, ss 27(3) and (5) and 28(3). [↑](#footnote-ref-990)
990. Building Act 2004, s 118. [↑](#footnote-ref-991)
991. These are the requirements for unisex toilets in the Building Code: Te Tari Kaupapa Whare | Department of *Building and Housing Compliance Document for New Zealand Building Code Clause G1: Personal Hygiene – Second Edition* (2011) at [1.1.8]; and Te Mana Tautikanga o Aotearoa | Standards New Zealand *NZS 4241:1999 Public toilets* (1999). [↑](#footnote-ref-992)
992. There seems to be similar support for unisex facilities in other countries. See, for example, Ministry of Housing, Communities and Local Government *Toilet provision for men and women: call for evidence – analysis of responses received* (13 August 2023), in which 83 per cent of 17,589 responses were read to be supportive of non-gendered toilets in a call for evidence by the government in the United Kingdom. [↑](#footnote-ref-993)
993. For example, Te Kāhui Whaihanga | New Zealand Institute of Architects *Practice Note: Beyond the Binary Bathroom – A Guide for All-Gender Bathroom Facilities* (PN 5.203, May 2024) at 5–6; and Te Kaunihera aa Takiwaa o Waikato | Waikato District Council *Public Toilet Strategy* (13 July 2015) at [4.1.2]. [↑](#footnote-ref-994)
994. See Te Tari Kaupapa Whare | Department of Building and Housing *Compliance Document for New Zealand Building Code Clause G1: Personal Hygiene – Second Edition* (2011). [↑](#footnote-ref-995)
995. See David Fisher “Public toilets and changing rooms going unisex bringing greater comfort to gender fluid comfort stops” *The New Zealand Herald* (online ed, New Zealand, 2 May 2023). [↑](#footnote-ref-996)
996. Ihi Aotearoa | Sport New Zealand *Active NZ: Changes in Participation – The New Zealand Participation Survey 2021* (June 2022) at 4. [↑](#footnote-ref-997)
997. Human Rights Act 1993, s 49(2)(a)–(c). [↑](#footnote-ref-998)
998. Human Rights Act 1993, s 49(2)(d). [↑](#footnote-ref-999)
999. Human Rights Commission Act 1977, s 24(7). [↑](#footnote-ref-1000)
1000. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at [14.15], citing Jaime Schultz “A Brief History of Women’s Sport” in Jaime Schultz (ed) *Women’s Sports: What Everyone Needs to Know* (Oxford University Press, Oxford, 2018) 10; and Irena Martinkova and others “Sex and gender in sport categorization: aiming for terminological clarity” (2022) 49 Journal of the Philosophy of Sport 134. [↑](#footnote-ref-1001)
1001. For example, *Robertson v Australian Ice Hockey Federation* [1998] VADT 112 at 10. [↑](#footnote-ref-1002)
1002. Ihi Aotearoa | Sport New Zealand *Transgender Inclusion Sport Sector Policy Update* (BRF-13545, 30 April 2024) at [7]–[8]. [↑](#footnote-ref-1003)
1003. Ihi Aotearoa | Sport New Zealand *Guiding Principles for the Inclusion of Transgender People in Community Sport* (December 2022) at 8. The supporting principles were: wellbeing and safety; privacy and dignity; anti-discrimination, anti-bullying and anti-harassment; listening and responding; and education. [↑](#footnote-ref-1004)
1004. Chris Bishop “Sport NZ asked to update Transgender Inclusion Guiding Principles” (press release, 9 October 2024). The Minister acknowledged the importance of people who are transgender being able to participate in community sport but said the principles did not adequately grapple with issues of fairness and safety. [↑](#footnote-ref-1005)
1005. Ihi Aotearoa | Sport New Zealand “Statement” (press release, 24 July 2025). [↑](#footnote-ref-1006)
1006. World Athletics *Regulations for the Implementation of Eligibility Rule 3.5 (Male and Female Categories)* (23 July 2025) (in effect from 1 September 2025); and World Aquatics *Competition Regulations* (25 June 2025) at 10–11. [↑](#footnote-ref-1007)
1007. See International Boxing Association *IBA Technical & Competition Rules* (3 March 2024) at 7, 9 and 17; and World Boxing “World Boxing to introduce mandatory sex testing for all boxers that want to participate in its competitions” (press release, 30 May 2025). [↑](#footnote-ref-1008)
1008. As at April 2024, Sport New Zealand was aware of 18 sports codes that had a policy on transgender inclusion and 21 that were developing one. It was also aware of 24 organisations that did not have a policy and were not intending to develop one: Ihi Aotearoa | Sport New Zealand *Transgender Inclusion Sport Sector Policy Update* (BRF-13545, 30 April 2024) at [8] and 5. [↑](#footnote-ref-1009)
1009. Basketball New Zealand *Transgender and Transsexual Policy* (2020). We understand this policy may be under review: Ihi Aotearoa | Sport New Zealand *Transgender Inclusion Sport Sector Policy Update* (BRF-13545, 30 April 2024) at 5. [↑](#footnote-ref-1010)
1010. Ihi Aotearoa | Sport New Zealand *Transgender Inclusion Sport Sector Policy Update* (BRF-13545, 30 April 2024) at [9]. [↑](#footnote-ref-1011)
1011. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans and Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 171–172. [↑](#footnote-ref-1012)
1012. We also gave submitters a seventh option – “Another option (please specify)”. [↑](#footnote-ref-1013)
1013. See Human Rights Act 1993, s 21B, which states that the obligations in Part 2 give way to other laws. [↑](#footnote-ref-1014)
1014. We discussed section 97 and the uncertainty about its application in Chapter 8. [↑](#footnote-ref-1015)
1015. There is no case law on section 49(1). The Australian cases we are aware of do not consider how this language applies to differences in treatment based on gender identity or having an innate variation of sex characteristics. [↑](#footnote-ref-1016)
1016. Te Kaunihera Wahine o Aotearoa | National Council of Women of New Zealand *Aotearoa New Zealand Gender Attitudes Survey 2023* (July 2023) at 49. [↑](#footnote-ref-1017)
1017. Marc Daalder “Race relations among most divisive issues in election – poll” (3 November 2023) Newsroom <[newsroom.co.nz](https://newsroom.co.nz/2023/11/03/race-relations-among-most-divisive-issues-in-election-poll/)>. [↑](#footnote-ref-1018)
1018. Save Women’s Sports Australasia *Curia Women’s Sports Poll* (10 September 2024). [↑](#footnote-ref-1019)
1019. Some submitters also commented on inclusion of athletes who identify outside the gender binary or who have an innate variation of sex characteristics, but most submitters focused on transgender athletes. [↑](#footnote-ref-1020)
1020. We provide more detail about submitters’ views on particular options later in the chapter. [↑](#footnote-ref-1021)
1021. Meredith Connell’s Rainbow Alliance identified some considerations it thought we should consider rather than expressing a preferred option on reform of section 49(1). [↑](#footnote-ref-1022)
1022. International Olympic Committee *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations* (22 November 2021) at 4. [↑](#footnote-ref-1023)
1023. Since publishing the Issues Paper, we have further updated our research and also examined any studies that submitters brought to our attention. [↑](#footnote-ref-1024)
1024. For example, Blair Hamilton, Fergus Guppy and Yannis Pitsiladis “Comment on: ‘Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage’” (2024) 54 Sports Med 237; and Joanna Harper “Transgender Athletes and International Sports Policy” (2022) 85(1) Law & Contemp Probs 151 at 158 and 160. [↑](#footnote-ref-1025)
1025. For example, Blair R Hamilton and others “Integrating Transwomen and Female Athletes with Differences of Sex Development (DSD) into Elite Competition: The FIMS 2021 Consensus Statement” (2021) 51 Sports Medicine 1401 at 1405; and Ethan Moreland and others “Implications of gender-affirming endocrine care for sports participation” (2023) 14 Ther Adv Endocrinol Metab 1 at 12. [↑](#footnote-ref-1026)
1026. Loughborough University “Transwomen and elite sport” <[www.lboro.ac.uk](https://www.lboro.ac.uk/schools/sport-exercise-health-sciences/research-innovation/research-spotlights/transwomen-and-elite-sport/)>. [↑](#footnote-ref-1027)
1027. The one specific study we came across was: John Armstrong, Alice Sullivan and George M Perry “Performance of non-binary athletes in mass-participation running events” (2023) 9 BMJ Open Sp Ex Med e001662. [↑](#footnote-ref-1028)
1028. For example, Sandra K Hunter and others “The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine” (2023) 55 Med Sci Sports Exerc 2328 at 2349. [↑](#footnote-ref-1029)
1029. For example, Sandra K Hunter and others “The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine” (2023) 55 Med Sci Sports Exerc 2328 at 2349. [↑](#footnote-ref-1030)
1030. For example, David J Handelsman “Sex differences in athletic performance emerge coinciding with the onset of male puberty” (2017) 87 Clinical Endocrinology 68 at 70–72; and Espen Tønnessen and others “Performance Development in Adolescent Track and Field Athletes According to Age, Sex and Sport Discipline” (2015) 10(6) PLoS ONE e0129014 at 7. [↑](#footnote-ref-1031)
1031. For example, Konstantinos D Tambalis and others “Physical fitness normative values for 6–18-year-old Greek boys and girls, using the empirical distribution and the lambda, mu, and sigma statistical method” (2016) 16 Eur J Sport Sci 736 at 739 and 744; and Gregory A Brown, Brandon S Shaw and Ina Shaw “Sex-based differences in shot put, javelin throw, and long jump in 8-and-under and 9–10-year-old athletes” (2025) 25 Eur J Sport Sci e12241. [↑](#footnote-ref-1032)
1032. See, for example, Espen Tønnessen and others “Performance Development in Adolescent Track and Field Athletes According to Age, Sex and Sport Discipline” (2015) 10(6) PLoS ONE e0129014 at 7. [↑](#footnote-ref-1033)
1033. See, for example, Sandra K Hunter and Jonathon W Senefeld “Sex differences in human performance” (2024) 602 J Physiol 4129 at 4137, attributing the narrowing of the gap between male and female performances in some athletic events over the last 50 years to increased opportunities for women to train and compete. [↑](#footnote-ref-1034)
1034. Valérie Thibault and others “Women and men in sport performance: The gender gap has not evolved since 1983” (2010) 9 J Sports Sci Med 214 at 222. [↑](#footnote-ref-1035)
1035. See Jonathon W Senefeld and Sandra K Hunter “Hormonal Basis of Biological Sex Differences in Human Athletic Performance” (2024) 165(5) Endocrinology bqae036 at 2. [↑](#footnote-ref-1036)
1036. Tim Whitaker, Alison Hargreaves and Inga A Wolframm “Differences in elite showjumping performance between male and female riders” (2012) 12 International Journal of Performance Analysis in Sport 425. [↑](#footnote-ref-1037)
1037. For example, Joanna Harper and others “How does hormone transition in transgender women change body composition, muscle strength and haemoglobin? Systematic review with a focus on the implications for sports participation” (2021) 55 Br J Sports Med 865; and Ada S Cheung and others “The Impact of Gender-Affirming Hormone Therapy on Physical Performance” (2024) 109 J Clin Endocrinol Metab e455 at e457 to e460. [↑](#footnote-ref-1038)
1038. For example, Blair Hamilton and others “Strength, power and aerobic capacity of transgender athletes: a cross-sectional study” (2024) 58 Br J Sports Med 586 at 596. [↑](#footnote-ref-1039)
1039. Blair R Hamilton and others “A unique pseudo-eligibility analysis of longitudinal laboratory performance data from a transgender female competitive cyclist” (2024) 1 Transl Exerc Biomed 111. The study also considered performance at three months and six months. [↑](#footnote-ref-1040)
1040. At 111 and 119–120. She had a grip strength advantage and peak and average power advantage but a jump performance disadvantage. [↑](#footnote-ref-1041)
1041. Anna Wiik and others “Muscle Strength, Size, and Composition Following 12 Months of Gender-affirming Treatment in Transgender Individuals” (2020) 105 J Clin Endocrinol Metab e805 at e812. [↑](#footnote-ref-1042)
1042. Timothy A Roberts, Joshua Smalley and Dale Ahrendt “Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organisations and legislators” (2021) 55 Br J Sports Med 577 at 579–580. [↑](#footnote-ref-1043)
1043. Athiwat Saitong and others “Physical Fitness and Exercise Performance of Transgender Women” (2025) 57 Med Sci Sports Exerc 134. [↑](#footnote-ref-1044)
1044. Blair Hamilton and others “Strength, power and aerobic capacity of transgender athletes: a cross-sectional study” (2024) 58 Br J Sports Med 586 at 588. The study also compared the performances of transgender male athletes with those of cisgender men. [↑](#footnote-ref-1045)
1045. At 596. [↑](#footnote-ref-1046)
1046. Leonardo Azevedo Mobilia Alvares and others “Cardiopulmonary capacity and muscle strength in transgender women on long-term gender-affirming hormone therapy: a cross-sectional study” (2022) 56 Br J Sports Med 1292. [↑](#footnote-ref-1047)
1047. At 1298. [↑](#footnote-ref-1048)
1048. Joseph S Lightner and others “Physical activity among transgender individuals: A systematic review of quantitative and qualitative studies” (2024) 19(2) PLoS ONE e0297571. [↑](#footnote-ref-1049)
1049. A review of scientific literature published between 2011 and 2021 stated there were no studies that examined whether transgender women posed a realised or potential safety risk to cisgender women in sport: E-Alliance *Transgender Women Athletes and Elite Sport: A Scientific Review* (2022)at 26. [↑](#footnote-ref-1050)
1050. Carbmill Consulting *International Literature Review: SCEG Project for Review and Redraft of Guidance for Transgender Inclusion in Domestic Sport 2020* at 7. [↑](#footnote-ref-1051)
1051. At 7. [↑](#footnote-ref-1052)
1052. Ethan Moreland and others “Implications of gender-affirming endocrine care for sports participation” (2023) 14 Ther Adv Endocrinol Metab 1 at 7. [↑](#footnote-ref-1053)
1053. World Rugby *Summary of Transgender Biology and Performance Research* (2020). We have read critiques of using data on cisgender men and cisgender women to assess the potential safety risk of having transgender women participate in women’s sport. See E-Alliance *Transgender Women Athletes and Elite Sport: A Scientific Review* (2022)at 26; and Blair R Hamilton and others “Integrating Transwomen and Female Athletes with Differences of Sex Development (DSD) into Elite Competition: The FIMS 2021 Consensus Statement” (2021) 51 Sports Medicine 1401 at 1407. [↑](#footnote-ref-1054)
1054. See Martine Cools and others “Caring for individuals with a difference of sex development (DSD): a Consensus Statement”(2018) 14 Nat Rev Endocrinol 415 at 422. [↑](#footnote-ref-1055)
1055. For example, Blair Hamilton and others “Integrating Transwomen and Female Athletes with Differences of Sex Development (DSD) into Elite Competition: The FIMS 2021 Consensus Statement” (2021) 51 Sports Medicine 1401 at 1409. [↑](#footnote-ref-1056)
1056. For example, Silvia Camporesi, Sarah Teetzel and Jonathan Ospina-Betancurt “Conflicting values, implicit norms, and flawed evidence: a critical review of World Athletics’s eligibility criteria to compete in the women’s category from 2009 to 2024” (2024) 24 Int Sports Law J 82 at 91–92; and Peter H Sőnksen and others “Hyperandrogenism controversy in elite women’s sport: an examination and critique of recent evidence” (2018) 52 Br J Sports Med 1481. [↑](#footnote-ref-1057)
1057. See Cleveland Clinic “Hyperandrogenism” <[my.clevelandclinic.org](https://my.clevelandclinic.org/health/diseases/24639-hyperandrogenism)>. [↑](#footnote-ref-1058)
1058. Robert L Rosenfield, Randall B Barnes and David A Ehrmann “Hyperandrogenism, Hirsutism, and Polycystic Ovary Syndrome” in J Larry Jameson and others (eds) *Endocrinology: Adult and Pediatric*(7th ed, Elsevier Saunders, Philadelphia, 2016) 2275 at2280–2281. [↑](#footnote-ref-1059)
1059. See InterACT *No one-size fits all: Myths and Misconceptions about PCOS* (28 October 2022) <[www.interactadvocates.org](https://interactadvocates.org/no-one-size-fits-all-myths-and-misconceptions-about-pcos/)>. [↑](#footnote-ref-1060)
1060. See David J Handelsman, Angelica L Hirschberg and Stephane Bermon “Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance” (2018) 39 Endocrine Reviews 803 at 806–807. [↑](#footnote-ref-1061)
1061. See David Handelsman, Angelica L Hirschberg and Stephane Bermon “Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance” (2018) 39 Endocrine Reviews 803 at 810; and Robert L Rosenfield, Randall B Barnes and David A Ehrmann “Hyperandrogenism, Hirsutism, and Polycystic Ovary Syndrome” in J Larry Jameson and others (eds) *Endocrinology: Adult and Pediatric*(7th ed, Elsevier Saunders, Philadelphia, 2016) 2275 at2280–2281. [↑](#footnote-ref-1062)
1062. See David Handelsman, Angelica L Hirschberg and Stephane Bermon “Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance” (2018) 39 Endocrine Reviews 803 at 810. [↑](#footnote-ref-1063)
1063. See Agnethe Berglund and others “Incidence, Prevalence, Diagnostic Delay, and Clinical Presentation of Female 46,XY Disorders of Sex Development” (2016) 101 J Clin Endocrinol Metab 4532. [↑](#footnote-ref-1064)
1064. Stéphane Bermon and Pierre-Yves Garnier “Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes” (2017) 51 Br J Sports Med 1309; and “Correction: *Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes”* (2021) 55 Br J Sports Med e7. [↑](#footnote-ref-1065)
1065. Anette Rickenlund and others “Hyperandrogenicity is an alternative mechanism underlying oligomenorrhea or amenorrhea in female athletes and may improve physical performance” (2003) 79 Fertil Steril 947 at 947 and 952–954. [↑](#footnote-ref-1066)
1066. Stéphane Bermon “Androgens and athletic performance of elite female athletes” (2017) 24 Curr Opini Endocrinol 246 at 249–250. A consensus statement from the International Federation of Sports Medicine commented about this study that: “Although a notable finding, no firm conclusions can be reached due to the reliance on a small number of athletes.” See Blair R Hamilton and others “Integrating Transwomen and Female Athletes with Differences of Sex Development (DSD) into Elite Competition: The FIMS 2021 Consensus Statement” (2021) 51 Sports Medicine 1401 at 1404. [↑](#footnote-ref-1067)
1067. Stéphane Bermon and others “Serum Androgen Levels in Elite Female Athletes” (2014) 99 J Clin Endocrinol Metab 4328 at 4334. The authors considered this was indirect evidence of the performance-enhancing effects of hyperandrogenism. [↑](#footnote-ref-1068)
1068. As noted earlier, we do not explore option 1 (no reform) given the considerable uncertainty that it would cause. [↑](#footnote-ref-1069)
1069. We acknowledge there is some research suggesting there are biological differences (on a population level) between transgender women who have not undergone gender-affirming hormone therapy and cisgender men: for example, Joanna Harper “Transgender Athletes and International Sports Policy” (2022) 85(1) Law and Contemporary Problems 151 at 159–160. [↑](#footnote-ref-1070)
1070. If this option were pursued, it might be necessary to clarify its impact on people who identify outside the gender binary and the extent of choice available to them. [↑](#footnote-ref-1071)
1071. Te Whare Āwhina Mō Ngā Wāhine Puawai | Nelson Women’s Centre. In addition, while the Identify Survey supported option 6, it said it would advocate for “the most inclusive option”. [↑](#footnote-ref-1072)
1072. The Rotorua Chamber of Pride supported option 3 for social-level sport. It said for “competitive level sporting”, an approach more closely aligned to option 6 may be necessary. [↑](#footnote-ref-1073)
1073. However, some organisations that preferred option 1 thought the existing exception should be interpreted in a way that would allow the exclusion of transgender women from women’s sport such as by defining sex as ‘biological sex’. This may be similar to option 4. [↑](#footnote-ref-1074)
1074. World Aquatics “Update on the Open Category competitions at the World Aquatics Swimming World Cup – Berlin 2023” (3 October 2023) <[www.worldaquatics.com](https://www.worldaquatics.com/news/3715191/update-on-the-open-category-competitions-at-the-world-aquatics-swimming-world-cup-berlin-2023)>. [↑](#footnote-ref-1075)
1075. As presented in the Issues Paper, option 5 would not restrict women with innate variations of sex characteristics from competing in the women’s category. However, it would be possible for this option to be worded to restrict such athletes. [↑](#footnote-ref-1076)
1076. This is consistent with the approach adopted by the International Olympic Committee. [↑](#footnote-ref-1077)
1077. For example, *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53]*.* [↑](#footnote-ref-1078)
1078. Rainbow organisations that supported option 6 were Identify Survey, InsideOUT Kōaro, OutLine Aotearoa, Rainbow Support Collective, Rotorua Chamber of Pride (for non-social-level sport), Te Ngākau Kahukura and Professional Association for Transgender Health Aotearoa. In addition, Te Aho Kawe Kaupapa Ture a ngā Wāhine | New Zealand Women’s Law Journal supported a modified version of option 6 (it did not think the exception should apply to people with innate variations of sex characteristics). [↑](#footnote-ref-1079)
1079. New Zealand Ice Figure Skating Association. [↑](#footnote-ref-1080)
1080. For example, some submitters considered that categories based on weight, height and skill better address fairness and safety issues or that men’s and women’s categories make it difficult for people who identify outside the gender binary and some people who have innate variations of sex characteristics to participate. [↑](#footnote-ref-1081)
1081. We also discussed in that chapter the implications this has for our ability in this review to accommodate the needs and concerns of people who identify outside the gender binary. [↑](#footnote-ref-1082)
1082. This is consistent with a key element in a human rights proportionality inquiry, which, as we explain in Chapter 18, is to consider whether the measure that limits the right has been designed with care to achieve its aim without limiting rights more than necessary. [↑](#footnote-ref-1083)
1083. See Jonathan Cooper “Fair Competition and Inclusion in Sport: Avoiding the Marginalisation of Intersex and Trans Women Athletes” (2023) 8 Philosophies 28; Silvia Camporesi, Sarah Teetzel and Jonathan Ospina-Betancurt “Conflicting values, implicit norms, and flawed evidence: a critical review of World Athletics’s eligibility criteria to compete in the women’s category from 2009 to 2024” (2024) 24 Int Sports Law J 82 at 89–91; and David J Handelsman and Stéphane Bermon “Biology and Management of Male-Bodied Athletes in Elite Female Sports” (2025) Drug Testing and Analysis (Online Version of Record) at 3–4. [↑](#footnote-ref-1084)
1084. International Olympic Committee *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations* (22 November 2021) at [4.1(a)]. [↑](#footnote-ref-1085)
1085. Equality Act 2010 (UK), s 195(2)(b). [↑](#footnote-ref-1086)
1086. International Olympic Committee *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations* (22 November 2021) at 4. [↑](#footnote-ref-1087)
1087. See Boxing New Zealand “Boxing New Zealand announces support for the establishment of an open category in Olympic style boxing” (press release, 29 August 2022); and Australian Football League *Gender Diversity Policy: Community Football* (1 October 2020) at 10 and 12–13. [↑](#footnote-ref-1088)
1088. For example, World Rugby “Transgender Men Guidelines”<[www.world.rugby](https://www.world.rugby/the-game/player-welfare/guidelines/transgender/men)>; World Karate Federation *Note on Transgender Athletes* (August 2022); and World Aquatics Competition Regulations (25 June 2025) at 10 (applies in relation to water polo and high diving). [↑](#footnote-ref-1089)
1089. Human Rights Act 1993, s 26. [↑](#footnote-ref-1090)
1090. Ihi Aotearoa | Sport New Zealand suggested refined language to address this issue. [↑](#footnote-ref-1091)
1091. Sport and Recreation New Zealand Act 2002, s 8(l). [↑](#footnote-ref-1092)
1092. Te Kāhui Tika Tangata | Human Rights Commission “Frequently Asked Questions” <[tikatangata.org.nz](https://tikatangata.org.nz/resources-and-support/frequently-asked-questions#can-i-play-sports-as-my-affirmed-gender)>. [↑](#footnote-ref-1093)
1093. Human Rights Act 1993, s 5(2)(e). [↑](#footnote-ref-1094)
1094. We also briefly discuss some other possibilities for new provisions that emerged from consultation. [↑](#footnote-ref-1095)
1095. We explore the rationales for these provisions later in the chapter when considering whether new provisions should be added. [↑](#footnote-ref-1096)
1096. Human Rights Act 1993, ss 61 (racial disharmony) and 63A (conversion practices). [↑](#footnote-ref-1097)
1097. Human Rights Act 1993, ss 65 (indirect discrimination), 66(1) (victimisation of someone who is complaining of discrimination), 67 (advertising an intention to discriminate) and 68 (liability of employers and principals). [↑](#footnote-ref-1098)
1098. Human Rights Act 1993, ss 62A (adverse treatment in employment of people affected by family violence), 63 (racial harassment) and 66(3)(b) (victimisation of someone who is making a protected disclosure or a complaint under sports integrity legislation). [↑](#footnote-ref-1099)
1099. Human Rights Act 1993, s 62(1). [↑](#footnote-ref-1100)
1100. Human Rights Act 1993, s 62(2). [↑](#footnote-ref-1101)
1101. Human Rights Act 1993, s 62(3). [↑](#footnote-ref-1102)
1102. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at ch 15. [↑](#footnote-ref-1103)
1103. *Craig v Slater* [2018] NZHC 2712 at [411(b)], discussing the ordinary meaning of the term. Although this decision was appealed, Te Kōti Pīra | Court of Appeal did not discuss the meaning of sexual harassment in any relevant way: see *Craig v Slater* [2020] NZCA 305 at [89]. [↑](#footnote-ref-1104)
1104. Human Rights Act 1993, ss 20J(2) and 21A(1)(a). [↑](#footnote-ref-1105)
1105. Te Kāhui Tika Tangata | Human Rights Commission “Human Rights Bill: Submission of the Human Rights Commission to the Justice and Law Reform Select Committee” at 12. Earlier case law holding that sexual harassment was sex discrimination included: *H v E* (1985) 5 NZAR 333 (Equal Opportunities Tribunal); *Proceedings Commissioner v L* 1/91, 30 April 1991 (Equal Opportunities Tribunal); *Bundy v Jackson* 641 F 2d 934 (DC Cir 1981); and *Giouvanoudis v Golden Fleece Restaurant* (1984) 5 CHRR 1967 (Ontario Board of Inquiry). [↑](#footnote-ref-1106)
1106. See Employment Contracts Act 1991, s 29; and Labour Relations Act 1987, s 212. [↑](#footnote-ref-1107)
1107. Transgender Health Research Lab*Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 121. [↑](#footnote-ref-1108)
1108. At 121. [↑](#footnote-ref-1109)
1109. Te Kāhui Tika Tangata | Human Rights Commission *Experiences of Workplace Bullying and Harassment in Aotearoa New Zealand* (August 2022) at 11. [↑](#footnote-ref-1110)
1110. Thursdays in Black Aotearoa New Zealand *“In our own words”: Student experiences of sexual violence prior to and during tertiary education* (2017) at 38. [↑](#footnote-ref-1111)
1111. Australian Human Rights Commission *Time for respect: Fifth national survey on sexual harassment in Australian workplaces* (November 2022) at 12, 48 and 53. [↑](#footnote-ref-1112)
1112. This included three organisations: Community Law Centres o Aotearoa, InsideOUT Kōaro and Te Kāhui Ture o Aotearoa | New Zealand Law Society. Community Law said the current wording would be sufficient alongside other laws and if there was also amendment to section 21 to protect these groups. [↑](#footnote-ref-1113)
1113. See Greg Robins and Nicole Browne “Sexual harassment claims under the Human Rights Act 1993” [2023] NZLJ 278 at 278. [↑](#footnote-ref-1114)
1114. Gender Minorities Aotearoa suggested in its submission that section 62 already covers the use of sexed pronouns and gendered language (such as misgendering). We do not agree that this would be covered unless, in the circumstances, it was “language … of a sexual nature”. [↑](#footnote-ref-1115)
1115. See *Craig v Slater* [2018] NZHC 2712 at [397] and [411]. [↑](#footnote-ref-1116)
1116. See *Wallace v R* [2018] NZCA 2 at [12]. [↑](#footnote-ref-1117)
1117. “Rape shield” provisions of this kind were first introduced in 1977 through an amendment to the Evidence Act 1908. For equivalent provisions in current law, see Employment Relations Act 2000, s 116; and Evidence Act 2006, ss 44, 44AA and 44A. [↑](#footnote-ref-1118)
1118. Evidence Act 2006, s 4 “sexual reputation”. [↑](#footnote-ref-1119)
1119. We explored evidence about safety specifically in relation to single-sex facilities in Chapter 14. [↑](#footnote-ref-1120)
1120. Issues Paper at ch 15. [↑](#footnote-ref-1121)
1121. At [15.22] and [15.30]. [↑](#footnote-ref-1122)
1122. Some of these were based on provisions inanti-discrimination legislation from the 1970s. [↑](#footnote-ref-1123)
1123. Section 61 (racial disharmony) likely has a slightly different rationale, deriving from international law obligations to prohibit hate speech. As this provision falls outside of our terms of reference, we do not consider it further. [↑](#footnote-ref-1124)
1124. Human Rights Act 1993, ss 62 (sexual harassment) and 63 (racial harassment). We discussed the emerging case law on sexual harassment earlier in the chapter. In relation to racial harassment see, for example, *Patterson v McLean Credit Union* 491 US 164 (1989) at 180. Section 65 (indirect discrimination) was first protected (under a different name) in the Human Rights Commission Act 1977. It was likely placed in that Act for similar reasons, following the decision of the United States Supreme Court in *Griggs v Duke Power Co* 401 US 424(1977). [↑](#footnote-ref-1125)
1125. Human Rights Act 1993, ss 66 (victimisation of a person who is complaining of discrimination), 67 (advertising an intention to discriminate) and 68 (liability of employers and principals). Section 69 (concerning employers’ liability for sexual or racial harassment of their employees by customers or clients) might also fit in this category. [↑](#footnote-ref-1126)
1126. For example, Human Rights Act 1993, s 62A (protecting victims of family violence in the area of life of employment). [↑](#footnote-ref-1127)
1127. For example, Human Rights Act 1993, ss 62(3)(k) (extending sexual harassment protection to situations when people are participating in fora for the exchange of ideas and information), 63(2)(k) (doing the same for racial harassment) and 63A (conversion practices, which is not confined to certain areas of life). [↑](#footnote-ref-1128)
1128. For example, Human Rights Act 1993, s 63A (conversion practices). [↑](#footnote-ref-1129)
1129. Human Rights Act 1993, s 66(3) (relating to complainants under the Protected Disclosures (Protection of Whistleblowers) Act 2022 and the Integrity Sport and Recreation Act 2023, respectively). [↑](#footnote-ref-1130)
1130. See Te Tāhū o te Ture | Ministry of Justice “Impact Statement: Prohibition of Conversion Practices” (15 April 2021) at 5; and Conversion Practices Prohibition Legislation Bill 56-2 (select committee report) at 10. For discussion of the reasons why access to the Human Rights Act’s complaints mechanisms was thought to be desirable, see Te Tāhū o te Ture | Ministry of Justice “Departmental Report: Conversion Practices Prohibition Legislation Bill” (January 2022) at [277] and [365]. [↑](#footnote-ref-1131)
1131. This is similar to the reason Part 1A was added to the Act in 2001: to ensure that people who wish to complain about public sector discrimination using the tests set out in the New Zealand Bill of Rights Act 1990 can utilise the Human Rights Act’s complaints mechanisms. See Te Tāhū o te Ture | Ministry of Justice *Departmental Report on the Human Rights Amendment Bill* (October 2001) at 53. [↑](#footnote-ref-1132)
1132. Human Rights Act 1993, s 63(1). [↑](#footnote-ref-1133)
1133. Human Rights Act 1993, s 63(2). A corresponding provision in the Employment Relations Act 2000 applies specifically to racial harassment in the course of employment: Employment Relations Act 2000, s 109. Like sexual harassment, section 63 is one of the few provisions in Part 2 that apply to government agencies as well as to the private sector: Human Rights Act 1993, ss 20J(2) and 21A(1)(a). [↑](#footnote-ref-1134)
1134. For example, *Patterson v McLean Credit Union* 491 US 164 (1989) at 180. [↑](#footnote-ref-1135)
1135. Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 45. [↑](#footnote-ref-1136)
1136. The report did not include data about harassment in education or employment. [↑](#footnote-ref-1137)
1137. Transgender Health Research Lab*Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 117–120. [↑](#footnote-ref-1138)
1138. Adam O Hill and others *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia* (Australian Research Centre in Sex, Health & Society, La Trobe University, 2020) at 41. [↑](#footnote-ref-1139)
1139. This is the case in the United Kingdom, Ireland, eight of Canada’s 13 provinces and territories and Canada’s federal anti-discrimination legislation, Australia’s Northern Territory and Tasmania. Harassment on the basis of sex and disability is also prohibited in relation to at least some areas of life in Australian federal legislation. In the other Australian jurisdictions, the only form of harassment to be explicitly prohibited is sexual harassment although some jurisdictions have other forms of protection that may cover similar ground. [↑](#footnote-ref-1140)
1140. For example, eight Canadian jurisdictions prohibit harassment on the basis of gender identity, and seven of those prohibit harassment on the basis of gender expression. The United Kingdom protects against harassment on the ground of “gender reassignment”. [↑](#footnote-ref-1141)
1141. Anti-Discrimination Act 1992 (NT), s 20(1)(b), defining discrimination as including “harassment on the basis of an attribute”. [↑](#footnote-ref-1142)
1142. Queensland Human Rights Commission *Building belonging: Review of Queensland’s Anti-Discrimination Act 1991* (July 2022) at 137–138. See, also, New South Wales Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper 24, May 2025) at [9.92]. [↑](#footnote-ref-1143)
1143. United Nations Committee on Economic, Social and Cultural Rights *General Comment No 36 (2016): on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/23 (27 April 2016) at [48]. [↑](#footnote-ref-1144)
1144. See New South Wales Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper 24, May 2025) at [9.80]. [↑](#footnote-ref-1145)
1145. See, for example, *W v Proceedings Commissioner* [2000] NZAR 36 (HC) at 41; and *Adams v Edinburgh Rape Crisis Centre* UKET (Scotland) 4102236/2023, 14 May 2024 at [219]. See, generally, New South Wales Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper 24, May 2025) at [9.79]. [↑](#footnote-ref-1146)
1146. Human Rights Act 1993, s 22(1)(c). [↑](#footnote-ref-1147)
1147. Human Rights Act 1993, s 53(1)(c). [↑](#footnote-ref-1148)
1148. See Human Rights Act 1993, s 63(2)(k), listing, as one of the areas of life covered by the racial harassment protection, “participation in fora for the exchange of ideas and information”. [↑](#footnote-ref-1149)
1149. Harmful Digital Communications Act 2015, s 6(1). The most relevant principles are principle 1 (a digital communication should not be used to disclose sensitive personal facts about an individual), principle 5 (a digital communication should not be used to harass an individual) and principle 10 (a digital communication should not be used to denigrate an individual by reason of their colour, race, ethnic or national origin, religion, gender, sexual orientation or disability). [↑](#footnote-ref-1150)
1150. Human Rights Act 1993, s 92I. [↑](#footnote-ref-1151)
1151. Harmful Digital Communications Act 2015, s 19(2). [↑](#footnote-ref-1152)
1152. Harmful Digital Communications Act 2015, s 22. See, also, Harmful Digital Communications Act 2015, s 22A (posting intimate visual recording without consent). [↑](#footnote-ref-1153)
1153. Harassment Act 1997, ss 3, 8, 9 and 25. [↑](#footnote-ref-1154)
1154. Family Violence Act 2018, s 11(1)(b). [↑](#footnote-ref-1155)
1155. These included Speak Up for Women and Women’s Declaration International NZ. [↑](#footnote-ref-1156)
1156. John Fenaughty and others *Identify Survey: Community and Advocacy Report* (2022) at 56. [↑](#footnote-ref-1157)
1157. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) at ch 17. The concerns we discuss in this chapter relate to both surgical and non-surgical interventions, although the primary focus is on surgical interventions. [↑](#footnote-ref-1158)
1158. See, for example, United Nations Human Rights Council *Combating discrimination, violence and harmful practices against intersex persons* UN Doc A/HRC/55/L.9 (21 March 2024). [↑](#footnote-ref-1159)
1159. See Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 13–14; and InterACT *Intersex Variations Glossary: People-centered definitions of intersex traits & variations in sex characteristics* <[interactadvocates.org](https://interactadvocates.org/wp-content/uploads/2022/10/Intersex-Variations-Glossary.pdf)>. [↑](#footnote-ref-1160)
1160. See, for example, Jameson Garland and Milton Diamond “Evidence-Based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development” in Jens M Scherpe, Anatol Dutta and Tobias Helms (eds) *The Legal Status of Intersex Persons* (Intersentia, Cambridge, 2018) 81 at 84–87. [↑](#footnote-ref-1161)
1161. See Jemima Repo *The Biopolitics of Gender* (Oxford University Press, online ed, 2015) at 35–36; and Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD Thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 17. [↑](#footnote-ref-1162)
1162. See Jemima Repo *The Biopolitics of Gender* (Oxford University Press, online ed, 2015) at 35–36. [↑](#footnote-ref-1163)
1163. See Jemima Repo *The Biopolitics of Gender* (Oxford University Press, online ed, 2015) at 34–35. [↑](#footnote-ref-1164)
1164. Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD Thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 19. [↑](#footnote-ref-1165)
1165. See Jemima Repo *The Biopolitics of Gender* (Oxford University Press, online ed, 2015) at 35–36; and Senate Community Affairs References Committee *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013) at [3.10]–[3.21]. [↑](#footnote-ref-1166)
1166. See, for example, Morgan Carpenter “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in Jens M Scherpe, Anatol Dutta and Tobias Helms (eds) *The Legal Status of Intersex Persons* (Intersentia, Cambridge, 2018) 445 at 451–453. [↑](#footnote-ref-1167)
1167. See, for example, Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 Int J Child Rights 533; Te Kāhui Tika Tangata | Human Rights Commission *Prism: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 41–42; and Intersex Aotearoa *Thematic Report to the United Nations Committee on the Rights of the Child* (August 2022). [↑](#footnote-ref-1168)
1168. Starship “Differences of sex development – Atawhai Taihemahema” (9 October 2020) <[www.starship.org.nz](https://starship.org.nz/guidelines/differences-of-sex-development-atawhai-taihemahema/)>. As we discuss later in the chapter, work is currently under way on updating clinical guidelines. [↑](#footnote-ref-1169)
1169. Starship “Differences of sex development – Atawhai Taihemahema” (9 October 2020) <[www.starship.org.nz](https://starship.org.nz/guidelines/differences-of-sex-development-atawhai-taihemahema/)>. [↑](#footnote-ref-1170)
1170. Peter Hegarty and others “Drawing the line between essential and nonessential interventions on intersex characteristics with European health care professionals” (2021) 25 Rev of Gen Psych 101. [↑](#footnote-ref-1171)
1171. Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD Thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 145–156; and Geraldine Christmas “‘It’s a … does it matter?’ Theorising ‘boy or girl’ binary classifications, intersexuality and medical practice in New Zealand” (PhD Thesis, Te Herenga Waka | Victoria University of Wellington, 2013) at 154–156 and 161–162. [↑](#footnote-ref-1172)
1172. See Marijke Naezer and others “‘We just want the best for this child’: contestations of intersex/DSD and transgender health interventions” (2021) 30 J of Gender Studies 830 at 834. See, also, Senate Community Affairs References Committee *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013) at [3.57]. [↑](#footnote-ref-1173)
1173. Geraldine Christmas “‘It’s a … does it matter?’ Theorising ‘boy or girl’ binary classifications, intersexuality and medical practice in New Zealand” (PhD Thesis, Te Herenga Waka | Victoria University of Wellington, 2013) at 206; Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD Thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 157, 194–195 and 202; and Peter Hegarty and others “Drawing the line between essential and nonessential interventions on intersex characteristics with European health care professionals” (2021) 25 Rev of Gen Psych 101 at 110. [↑](#footnote-ref-1174)
1174. See Geraldine Christmas “‘It’s a … does it matter?’ Theorising ‘boy or girl’ binary classifications, intersexuality and medical practice in New Zealand” (PhD Thesis, Te Herenga Waka | Victoria University of Wellington, 2013) at 165–166; and Kevin G Behrens “A principled ethical approach to intersex paediatric surgeries” (2020) 21 BMC Med Ethics (#108). [↑](#footnote-ref-1175)
1175. Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 International Journal of Children’s Rights 533 at 537. [↑](#footnote-ref-1176)
1176. Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 Int J Child Rights 533 at 537, citing World Health Organization *The International Classification of Diseases* (2022). [↑](#footnote-ref-1177)
1177. See Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 Int J Child Rights 533 at 537. [↑](#footnote-ref-1178)
1178. See Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 Int J Child Rights 533. [↑](#footnote-ref-1179)
1179. *Seventh periodic report submitted by New Zealand under article 19 of the Convention pursuant to the simplified report procedure, due in 2019* UN Doc CAT/C/NZL/7 (16 March 2020) at [329]. [↑](#footnote-ref-1180)
1180. See Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD Thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 69. [↑](#footnote-ref-1181)
1181. Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 104. [↑](#footnote-ref-1182)
1182. At 105. [↑](#footnote-ref-1183)
1183. Crimes Act 1961, s 61. [↑](#footnote-ref-1184)
1184. Crimes Act 1961, s 61A. Consent is also a common law defence to assault (unless there are public policy reasons to exclude it): see *R v Lee* [2006] 3 NZLR 42 (CA) at [289]–[300].  [↑](#footnote-ref-1185)
1185. Crimes Act 1961, s 204A(6). Other provisions affect consent in different contexts, for example, Contraception, Sterilisation, and Abortion Act 1977, s 7; and Care of Children Act 2004, s 38. [↑](#footnote-ref-1186)
1186. Crimes Act 1961, s 204A(3). [↑](#footnote-ref-1187)
1187. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, right 2. [↑](#footnote-ref-1188)
1188. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, rights 6 and 7. See, also, New Zealand Bill of Rights Act 1990, s 11. [↑](#footnote-ref-1189)
1189. See *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL). Section 36(1) of the Care of Children Act 2004 also covers consent of a young person over 16. [↑](#footnote-ref-1190)
1190. Care of Children Act 2004, s 36(3). [↑](#footnote-ref-1191)
1191. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, reg 4 definition of “consumer”. [↑](#footnote-ref-1192)
1192. *Secretary of the* *Department of Health and Community Services v JWB* (1992) 175 CLR 218***.*** [↑](#footnote-ref-1193)
1193. See, for example, *Re Lesley (Special Medical Procedure)* [2008] FamCA 1226; *Re Sean and Russell (Special Medical Procedures)* (2010) 44 Fam LR 210 (FCA); and *Re Carla (medical procedure)* [2016] FamCA 7, (2016) 324 FLR 1. These cases take differing positions on the scope of parental consent. [↑](#footnote-ref-1194)
1194. *In Re A* (1993) 16 Fam LR 715 (FCA), applying *Secretary of the Department of Health and Community Services v JWB* (1992) 175 CLR 218. This requirement has also been applied to transgender children: *In re Alex* [2004] FamCA 297, (2004) 180 FLR 89. [↑](#footnote-ref-1195)
1195. *In Re A* (1993) 16 Fam LR 715 (FCA) at 722. [↑](#footnote-ref-1196)
1196. *Re X* [1991] 2 NZLR 365 (HC). [↑](#footnote-ref-1197)
1197. At 373 and 376. [↑](#footnote-ref-1198)
1198. InterAction *Darlington Statement* (10 March 2017) <[interaction.org.au](https://interaction.org.au/darlington-statement/)>. [↑](#footnote-ref-1199)
1199. Intersex Trust Aotearoa New Zealand “Submission to the Health Committee on Crimes (Definition of Female Genital Mutilation) Amendment Bill 2019” at 8. [↑](#footnote-ref-1200)
1200. Crimes (Definition of Female Genital Mutilation) Amendment Bill 194-2 (select committee report) at 6. [↑](#footnote-ref-1201)
1201. Conversion Practices Prohibition Legislation Bill 56-2 (select committee report) at 6. [↑](#footnote-ref-1202)
1202. Te Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Prohibiting Conversion Practices* (15 April 2021) at 4. [↑](#footnote-ref-1203)
1203. For example, Intersex Aotearoa *Thematic Report to the United Nations Committee on the Rights of the Child* (August 2022). [↑](#footnote-ref-1204)
1204. It also supported allowing procedures where the person had given free and informed consent. [↑](#footnote-ref-1205)
1205. InterACT Intersex Variations *Glossary: People-centered definitions of intersex traits & variations in sex characteristics* <[interactadvocates.org](https://interactadvocates.org/wp-content/uploads/2022/10/Intersex-Variations-Glossary.pdf)> at 13; and William G Reiner and John P Gearhart “Discordant Sexual Identity in Some Genetic Males with Cloacal Exstrophy Assigned to Female Sex at Birth” (2004) 350 The New England Journal of Medicine 333 at 334. We acknowledge there are different views about whether cloacal exstrophy is an intersex condition. [↑](#footnote-ref-1206)
1206. Starship “Differences of sex development – Atawhai Taihemahema” (9 October 2020) <[www.starship.org.nz](https://starship.org.nz/guidelines/differences-of-sex-development-atawhai-taihemahema/)>. [↑](#footnote-ref-1207)
1207. Senate Community Affairs References Committee *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013) at [1.57], citing Katrina Karkazis *Fixing Sex: Intersex, Medical Authority, and Lived Experience* (Duke University Press, Durham, 2008) at 139. [↑](#footnote-ref-1208)
1208. Katrina Roen, Claire Breen and Ashe Yee *Medical interventions on children with intersex variations in Aotearoa New Zealand: Reply to the issues relating to the United Nations Committee on the Rights of the Child sixth periodic report* (10 August 2022) at 2 and 5. [↑](#footnote-ref-1209)
1209. Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD Thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 179 and 289. [↑](#footnote-ref-1210)
1210. See, for example, Geraldine Christmas “‘It’s a … does it matter?’ Theorising ‘boy or girl’ binary classifications, intersexuality and medical practice in New Zealand” (PhD Thesis, Te Herenga Waka | Victoria University of Wellington, 2013) at 203–207. [↑](#footnote-ref-1211)
1211. See Laetitia Zeeman and Kay Aranda “A Systematic Review of the Health and Healthcare Inequalities for People with Intersex Variance” (2020) 17 Int J of Environmental Research and Public Health (#6533) at 11; and Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 109–110. [↑](#footnote-ref-1212)
1212. See Morgan Carpenter “The human rights of intersex people: addressing harmful practices and rhetoric of change” (2016) 24(47) Reproductive Health Matters 74 at 75. [↑](#footnote-ref-1213)
1213. See Marijke Naezer and others “‘We just want the best for this child’: contestations of intersex/DSD and transgender health interventions” (2021) 30 J of Gender Studies 830 at 835. [↑](#footnote-ref-1214)
1214. Tiffany Jones and others *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, 2016) at 16. See, also, at 89–92. [↑](#footnote-ref-1215)
1215. Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuitanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008) at 81–82. [↑](#footnote-ref-1216)
1216. At 4 and 82. [↑](#footnote-ref-1217)
1217. Issues Paper at [15.30]. [↑](#footnote-ref-1218)
1218. These were Community Law Centres o Aotearoa, Gender Minorities Aotearoa, Identify Survey, InsideOUT Kōaro, Intersex Aotearoa, OutLine Aotearoa, Te Pūkenga Here Tikanga Mahi | Public Service Association, Meredith Connell’s Rainbow Alliance, Rainbow Support Collective, Rotorua Chamber of Pride, Te Ngākau Kahukura, Professional Association for Transgender Health Aotearoa and Women’s Declaration International NZ. Lesbian Resistance New Zealand opposed a new provision but did not comment on its reasons. [↑](#footnote-ref-1219)
1219. Organisations that expressed this view included Professional Association for Transgender Health Aotearoa, Meredith Connell’s Rainbow Alliance and InsideOUT Kōaro. [↑](#footnote-ref-1220)
1220. The only organisation that expressed clear support for a provision in the Human Rights Act was Gender Minorities Aotearoa. [↑](#footnote-ref-1221)
1221. Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023 (ACT). [↑](#footnote-ref-1222)
1222. Variation in Sex Characteristics (Restricted Medical Treatment) Regulation 2023 (ACT), reg 3. The following are excluded from the definition of variations of in sex characteristics: bladder exstrophy; epispadias; hypospadias, other than proximal hypospadias with cryptorchidism; polycystic ovary syndrome; and undescended testis. [↑](#footnote-ref-1223)
1223. *Lei n.o 38/2018, de 7 de agosto, Direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa* (Law No 38/2018, 7 August, Law on Right to Self-Determination of Gender Identity and Gender Expression and Protection of Everyone’s Sex Characteristics); and ILGA World *Intersex Legal Mapping Report: Global Survey on Legal Protections for People Born with Variations in Sex Characteristics* (December 2023). [↑](#footnote-ref-1224)
1224. *Ley 4/2023, de 28 de febrero, para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI* (Law No 4/2023, 28 February, Law for the real and effective equality of trans people and to guarantee the rights of LGBTI people). The law allows these practices to be performed on a minor aged 12 or older with their informed consent. [↑](#footnote-ref-1225)
1225. Act on Gender Autonomy No 80/2019 (Iceland); and Gender Identity, Gender Expression and Sex Characteristics Act 2015 (Malta). See, also, ILGA World *Intersex Legal Mapping Report: Global Survey on Legal Protections for People Born with Variations in Sex Characteristics* (December 2023). [↑](#footnote-ref-1226)
1226. Children and Young Persons (Care and Protection) Act 1998 (NSW), s 175. We understand some other Australian jurisdictions have similar rules. [↑](#footnote-ref-1227)
1227. Children and Young Persons (Care and Protection) Act 1998 (NSW), s 175(5). [↑](#footnote-ref-1228)
1228. A complaint of this kind could be brought under either Part 1A or Part 2 of the Human Rights Act, depending on whether the act that was being challenged was done in the exercise of a public function, power or duty. We discussed the division between Part 1A and Part 2 in Chapter 8. If the discrimination was by a health care provider, a complaint could also be made to Te Toihau Hauora, Hauātanga | Health and Disability Commissioner: see Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, right 2, stating that discrimination that is unlawful under Part 2 of the Human Rights Act is in breach of the Code. [↑](#footnote-ref-1229)
1229. Human Rights Act, s 21B. If the challenge was under Part 1A and related to primary legislation, the only available remedy would be a non-binding declaration. [↑](#footnote-ref-1230)
1230. Office of the United Nations High Commissioner for Human Rights *Human Rights Violations Against Intersex People: A Background Note* (24 October 2019) at 12. [↑](#footnote-ref-1231)
1231. Senate Community Affairs References Committee *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013) at [3.80]–[3.95]. [↑](#footnote-ref-1232)
1232. New Zealand Bill of Rights Act 1990, s 11. [↑](#footnote-ref-1233)
1233. Denise Steers “Gender mender, bender or defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics” (PhD Thesis, Ōtākou Whakaihu Waka | University of Otago, 2019) at 227. [↑](#footnote-ref-1234)
1234. See the discussion in Kevin G Behrens “A principled ethical approach to intersex paediatric surgeries” (2020) 21 BMC Med Ethics (#108). [↑](#footnote-ref-1235)
1235. United Nations Human Rights Council *Combating discrimination, violence and harmful practices against intersex persons* UN Doc A/HRC/55/L.9 (21 March 2024) at [3]. [↑](#footnote-ref-1236)
1236. United Nations Human Rights Council *Combating discrimination, violence and harmful practices against intersex persons* UN Doc A/HRC/55/L.9 (21 March 2024) at 2. [↑](#footnote-ref-1237)
1237. United Nations Committee on the Rights of the Child *Concluding observations on the fifth periodic report of New Zealand* UN Doc CRC/C/NZL/CO/5 (21 October 2016) at [25(b)]; United Nations Committee on the Elimination of Discrimination against Women *Concluding observations on the eighth periodic report of New Zealand* UN Doc CEDAW/C/NZL/CO/8 (25 July 2018) at [24(c)]; United Nations Committee on the Rights of Persons with Disabilities *Concluding observations on the combined second and third periodic reports of New Zealand* UN Doc CRPD/C/NZL/CO/2-3 (26 September 2022); United Nations Committee on the Rights of the Child *Concluding observations on the sixth periodic report of New Zealand* UN Doc CRC/C/NZL/CO/6 (28 February 2023); and United Nations Committee against Torture *Concluding Observations on the seventh periodic report of New Zealand* UN Doc CAT/C/NZL/CO/7(24 August 2023) at [53]–[54]. [↑](#footnote-ref-1238)
1238. See ILGA World *Intersex Legal Mapping Report: Global Survey on Legal Protections for People Born with Variations in Sex Characteristics* (December 2023)at 15. [↑](#footnote-ref-1239)
1239. It is, however, possible that individual treatment decisions would be covered by Part 2, particularly if they are made in a private healthcare setting. [↑](#footnote-ref-1240)
1240. Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023 (ACT). [↑](#footnote-ref-1241)
1241. See Te Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Prohibiting Conversion Practices* (15 April 2021) at 5; and Conversion Practices Prohibition Legislation Bill 56-2 (select committee report). [↑](#footnote-ref-1242)
1242. See Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023 (ACT); and *Drucksache 19/24686, 22. November 2020, Entwurf eines Gesetzes zum Schutz von Kindern mit Varianten der Geschlechtsentwicklung* (Circular 19/24686, 22 November 2020, Law on the Protection of Children with Variants of Sex Development). [↑](#footnote-ref-1243)
1243. Peter Hegarty and others “Drawing the line between essential and nonessential interventions on intersex characteristics with European health care professionals” (2021) 25 Rev of Gen Psych 101 at 101, 106 and 110. [↑](#footnote-ref-1244)
1244. See Claire Breen and Katrina Roen “The Rights of Intersex Children in Aotearoa New Zealand: What Surgery is being Consented to, and Why?” (2023) 31 Int J Child Rights 533 at 552, citing Fae Garland and Mitchell Travis *Intersex Embodiment: Legal Frameworks beyond Identity and Disorder* (Bristol University Press, Bristol, 2023) at ch 5; and Yessica Mestre “The Human Rights Situation of Intersex People: An Analysis of Europe and Latin America” (2022) 11 Social Sciences 317. [↑](#footnote-ref-1245)
1245. ILGA World *Intersex Legal Mapping Report: Global Survey on Legal Protections for People Born with Variations in Sex Characteristics* (December 2023)at 61. [↑](#footnote-ref-1246)
1246. ILGA World *Intersex Legal Mapping Report: Global Survey on Legal Protections for People Born with Variations in Sex Characteristics* (December 2023)at 41. [↑](#footnote-ref-1247)
1247. Human Rights Act 1993, s 21B. [↑](#footnote-ref-1248)
1248. See, for example, *Re X* [1991] 2 NZLR 365 (HC); *Long v Steine* [2022] NZFC 251, [2022] NZFLR 73; *Secretary of the Department of Health and Community Services v JWB* (1992) 175 CLR 218; and *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL). [↑](#footnote-ref-1249)
1249. We acknowledge the Human Rights Review Tribunal does, however, have some relevant expertise as it can already hear complaints of breaches of the Code of Health and Disability Services Consumers’ Rights. [↑](#footnote-ref-1250)
1250. Ayesha Verrall “Rainbow health gets funding boost” (press release, 5 June 2022). [↑](#footnote-ref-1251)
1251. New Zealand Government Electronic Tenders Service “Establishment of New Services for a Rights Based Approach to Healthcare for Intersex Children and Young people, and their Whānau” (11 September 2024) <[www.gets.govt.nz](https://www.gets.govt.nz/HEALTHNZ/ExternalTenderDetails.htm?id=28275246)>. [↑](#footnote-ref-1252)
1252. See, for example, United Nations Human Rights Commissioner *Human Rights Indicators: A Guide to Measurement and Implementation* (2012) at iii. [↑](#footnote-ref-1253)
1253. Te Kāhui Tika Tangata | Human Rights Commission *Prism: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 22. See, also, UN Committee on the Rights of the Child *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [48]. [↑](#footnote-ref-1254)
1254. Human Rights Amendment Act 2001, ss 2 and 6. [↑](#footnote-ref-1255)
1255. We discuss the option of bringing High Court proceedings directly under the New Zealand Bill of Rights Act 1990 in Chapter 19. [↑](#footnote-ref-1256)
1256. Human Rights Act 1993, s 20J(1). [↑](#footnote-ref-1257)
1257. Human Rights Act 1993, s 2(1) definition of “act”. [↑](#footnote-ref-1258)
1258. Human Rights Act 1993, s 92J. [↑](#footnote-ref-1259)
1259. Chapters 8 to 15. [↑](#footnote-ref-1260)
1260. See *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459at [46], noting that the test of what amounts to a public function can turn on difficult questions of judgement. [↑](#footnote-ref-1261)
1261. Human Rights Act 1993, s 20J(2). The Part 2 provisions that apply to government are: ss 22–23, 61–63 and 66. [↑](#footnote-ref-1262)
1262. Te Tāhū o te Ture | Ministry of Justice *Briefing on the Human Rights Amendment Bill 2001* (28 August 2001) at [44]. [↑](#footnote-ref-1263)
1263. At [45]. [↑](#footnote-ref-1264)
1264. Human Rights Act 1993, s 20J(3). [↑](#footnote-ref-1265)
1265. Human Rights Act 1993, s 20L. [↑](#footnote-ref-1266)
1266. Section 19(2) contains an affirmative action provision similar to that in section 73 of the Human Rights Act. [↑](#footnote-ref-1267)
1267. For example, *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [109]; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [43]. [↑](#footnote-ref-1268)
1268. Te Kōti Mana Nui | Supreme Court has explained that: “The point of the comparator group exercise is to control for other potentially relevant characteristics in order to isolate the true role of the prohibited ground of discrimination in the challenged decision”. See *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412 at [130]. [↑](#footnote-ref-1269)
1269. *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [121].See, also, *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [51]. [↑](#footnote-ref-1270)
1270. For example, *R v Oakes* [1986] 1 SCR 103 at [69]–[70]; and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J. [↑](#footnote-ref-1271)
1271. See Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 376 and 395. [↑](#footnote-ref-1272)
1272. *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [121] per O’Regan and Ellen France JJ. [↑](#footnote-ref-1273)
1273. At [122] per O’Regan and Ellen France JJ. [↑](#footnote-ref-1274)
1274. At [122] per O’Regan and Ellen France JJ. [↑](#footnote-ref-1275)
1275. *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [89]. [↑](#footnote-ref-1276)
1276. At [89]. [↑](#footnote-ref-1277)
1277. *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [45]. [↑](#footnote-ref-1278)
1278. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at [16.2] and [16.4]. [↑](#footnote-ref-1279)
1279. This would likely require an amendment to section 20J(2) of the Human Rights Act 1993. [↑](#footnote-ref-1280)
1280. Although Resist Gender Education also said that schools should be exempt from Part 2 exceptions and that, instead, the test in section 5 of the New Zealand Bill of Rights Act 1990 should apply. [↑](#footnote-ref-1281)
1281. See, for example, Te Tāhū o te Ture | Ministry of Justice *Briefing on the Human Rights Amendment Bill 2001* (28 August 2001) at [38]. [↑](#footnote-ref-1282)
1282. Issues Paper at [16.17]–[16.19]. [↑](#footnote-ref-1283)
1283. Issues Paper at [16.20]–[16.29]. [↑](#footnote-ref-1284)
1284. As we explain below, Te Kāhui Tika Tangata | Human Rights Commission shares this view. [↑](#footnote-ref-1285)
1285. Education and Training Act 2020, s 127(1)(b) and (c). See, also, Te Tāhuhu o te Mātauranga | Ministry of Education *The Statement of National Education and Learning Priorities (NELP) & Tertiary Education Strategy (TES)* (2020) at priority 1. [↑](#footnote-ref-1286)
1286. For example, Te Tari o te Pirimia me te Komiti Matua | Department of the Prime Minister and Cabinet “CabGuide: Human Rights implications in bills and Cabinet papers”(16 July 2019) <[www.dpmc.govt.nz](https://www.dpmc.govt.nz/publications/human-rights-implications-bills-and-cabinet-papers)>; Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at chs 6–7­; and Cabinet Office *Cabinet Manual* *2023* at [7.68]–[7.70]. [↑](#footnote-ref-1287)
1287. New Zealand Bill of Rights Act 1990, s 7. [↑](#footnote-ref-1288)
1288. See, for example, Te Tāhū o te Ture | Ministry of Justice *Legal Advice* – *Consistency with the New Zealand Bill of Rights Act 1990: Births, Deaths, Marriages, and Relationships Registration Bill* (26 July 2017) at [27]; and Te Tāhū o te Ture | Ministry of Justice *Legal Advice* – *Consistency with the New Zealand Bill of Rights Act 1990: Pae Ora (Healthy Futures) (Provision of Breast Cancer Screening Services) Amendment Bill* (14 August 2023) at [16]. [↑](#footnote-ref-1289)
1289. See Te Kāhui Tika Tangata | Human Rights Commission *Prism: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOCIESC) in Aotearoa New Zealand – A report with recommendations* (June 2020) at 14. [↑](#footnote-ref-1290)
1290. For example, we are aware of one case where a transgender prisoner brought a claim in Te Taraipiunara Mana Tangata | Human Rights Review Tribunal about access to hormone treatment and it was referred to Te Kāhui Tika Tangata | Human Rights Commission for mediation: *Forrest v Chief Executive of the Department of Corrections* [2014] NZHRRT 47. We are unaware how it was resolved. Another example is a complaint that was made about passport application forms requiring more steps for a person to obtain a passport with a gender classification of ‘X’. The complaint was resolved through mediation, with an agreement to change aspects of the application form: Te Kāhui Tika Tangata | Human Rights Commission *Pūrongo ā Tau: Annual Report* (2020) at 23.  [↑](#footnote-ref-1291)
1291. Letter from Te Kāhui Tika Tangata | Human Rights Commission to Te Aka Matua o te Ture | Law Commission regarding complaints data (1 March 2024); and email from Te Kāhui Tika Tangata | Human Rights Commission to Te Aka Matua o te Ture | Law Commission regarding further complaints data (14 April 2025). [↑](#footnote-ref-1292)
1292. Human Rights Act 1993, s 76(1)(b). [↑](#footnote-ref-1293)
1293. For example, by 2012, Te Kāhui Tika Tangata | Human Rights Commission had received around 3,000 complaints of discrimination under Part 1A but only five cases had been substantively considered by Te Taraipiunara Mana Tangata | Human Rights Review Tribunal: see *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [120]. [↑](#footnote-ref-1294)
1294. The courts have, however, held that some rights, such as the right to be free from torture, are absolute. [↑](#footnote-ref-1295)
1295. Corrections Regulations 2005, reg 65(1). [↑](#footnote-ref-1296)
1296. Corrections Regulations 2005, reg 65(2). See, also, Ara Poutama Aotearoa | Department of Corrections *Prison Operations Manual* at [M.03.05.01]. [↑](#footnote-ref-1297)
1297. Corrections Regulations 2005, regs 65(2A) and 65C(3). This list must be taken into account if the chief executive is required to review a prisoner’s placement under the regulations. [↑](#footnote-ref-1298)
1298. Corrections Act 2004, s 5(1)(a). [↑](#footnote-ref-1299)
1299. Corrections Act 2004, s 6(1)(f). [↑](#footnote-ref-1300)
1300. See Ara Poutama Aotearoa | Department of Corrections *Response to Official Information Act request regarding information about transgender individuals in prisons* (C184700, 2 September 2024). [↑](#footnote-ref-1301)
1301. Ara Poutama Aotearoa | Department of Corrections *Response to Official Information Act request* *regarding information about transgender individuals in prisons* (C184700, 2 September 2024). [↑](#footnote-ref-1302)
1302. Ara Poutama Aotearoa | Department of Corrections *Response to Official Information Act request regarding information about transgender individuals in prison* (C174172, 15 November 2023). [↑](#footnote-ref-1303)
1303. For example, in *Kavanagh v Canada (Attorney General)* [2001] 41 CHRR D/119 (Canadian Human Rights Tribunal) at [166] and [196], the Canadian Human Rights Tribunal found that, although the prison had demonstrated it was justified in not placing pre-operative transgender prisoners in prisons aligning with their gender identity, the policy failed to recognise the particular vulnerability of this group of inmates. See, also, *R (on the application of AB) v Secretary of State for Justice* [2009] EWHC 2220 (Admin), [2010] 2 All ER 151 at [80]–[81], in which the England and Wales High Court made obiter comments that it would have been difficult to establish discrimination. It pointed to the fact that the plaintiff was treated as a woman in the male prison and that the prison treated transgender prisoners according to their individual circumstances. [↑](#footnote-ref-1304)
1304. For example, *DiMarco v Wyoming Department of Corrections* 300 F Supp 2d 1183 (D Wyo 2004) at 1197, in which an intersex female prisoner who was described as having male reproductive organs was housed in segregation. The United States District Court found that the defendant’s actions were rationally connected to the purpose of ensuring the safety of the plaintiff and other inmates and the security of the prison facility. See, also, *Kavanagh v Canada (Attorney General)* [2001] 41 CHRR D/119 at [155]–[160]. [↑](#footnote-ref-1305)
1305. Corrections Regulations 2005, reg 65B. [↑](#footnote-ref-1306)
1306. See Corrections Act 2004, ss 153–154; and Ara Poutama Aotearoa | Department of Corrections *Prison Operations Manual* [PC.01.01]–[PC.01.15]. [↑](#footnote-ref-1307)
1307. See Corrections Act 2004, ss 155–159. [↑](#footnote-ref-1308)
1308. See, for example, *Stevens v Chief Executive of the Department of Corrections* [2024] NZCA 153, in which a transgender prisoner unsuccessfully sought judicial review of the decision to place her in directed segregation. [↑](#footnote-ref-1309)
1309. For an example of a judicial review claim involving prison placement, see *Wallace v Chief Executive of the Department of Corrections* [2023] NZHC 2248. In this case, a group of female prisoners successfully sought judicial review of the decision to transfer them to other prisons. The grounds of review included a claim of unlawful sex discrimination. [↑](#footnote-ref-1310)
1310. *R (on the application of FDJ) v Secretary of State for Justice* [2021] EWHC 1746 (Admin), [2021] 1 WLR 5265 at [86]. The England and Wales High Court said the policy required careful case-by-case assessment of how any risks should be managed so cisgender prisoners only had contact with transgender prisoners when it was safe. [↑](#footnote-ref-1311)
1311. See, for example, *R (on the application of FDJ) v Secretary of State for Justice* [2021] EWHC 1746 (Admin), [2021] 1 WLR 5265 at [87]. [↑](#footnote-ref-1312)
1312. As noted earlier, if the challenge was to primary legislation, the only remedy would be a non-binding declaration that the law is inconsistent with the New Zealand Bill of Rights Act 1990. [↑](#footnote-ref-1313)
1313. For example, *Waters v British Columbia (Ministry of Health Services)* 2003 BCHRT 13, (2003) 46 CHRR 139 at [164] and [186]. In this case, a transgender male plaintiff succeeded in sex discrimination claim because a transgender woman who had been approved for a similar procedure would have had the procedure fully funded. See, also, *Brodeur v Ontario (Health and Long-Term Care)* 2013 HRTO 1229 at [34]–[35] and [37]–[39]; and *R (on the application of AC) v Berkshire West Primary Care Trust* [2010] EWHC 1162 (Admin), [2010] All ER (D) 229 (May) at [36]. In both these cases, transgender plaintiffs failed to prove that a cisgender person would have received funded treatment in similar circumstances. [↑](#footnote-ref-1314)
1314. For example, *R (on the application of AA (a child)) v National Health Service Commissioning Board (NHS England)* [2023] EWHC 43 (Admin), [2023] All ER (D) 68 (Jan) at [145]. In this case about long wait times for “gender identity disorder services”, the England and Wales High Court said a comparison with other specialist services would not be comparing like for like. That was because the long wait list was due to a combination of factors and there was no evidence that any other specialist service had that particular combination of factors. [↑](#footnote-ref-1315)
1315. For example, in a United Kingdom case, the plaintiffs unsuccessfully sought judicial review of regulations that limited the prescription of puberty blockers to young people for gender-affirming purposes: *R (on the application of Transactual CIC) v Secretary of State for Health and Social Care* [2024] EWHC 1936 (Admin), [2024] All ER (D) 130 (Jul). The three grounds of challenge did not include discrimination. The England and Wales High Court said it should be careful not to second-guess the government’s decision in this area, commenting (at [228]) that it “required a complex and multi-factored predictive assessment, involving the application of clinical judgment and the weighing of competing risks and dangers, with which the Court should be slow to interfere”. [↑](#footnote-ref-1316)
1316. Some of these laws refer specifically to section 21 and some refer more generally to discrimination that is unlawful under Part 2 of the Human Rights Act. [↑](#footnote-ref-1317)
1317. For example, some laws require consultation with Te Kāhui Tika Tangata | Human Rights Commission, allow for complaints to the Human Rights Commission in respect of something other than discrimination or have specific exclusions that mean the Human Rights Act protections do not apply in specific statutory contexts. See, for example, Children and Young People’s Commission Act 2022, s 35(4)(d); Contraception, Sterilisation, and Abortion Act 1977, s 15; Defence Act 1990, s 33A; Financial Markets Conduct Act 2013, s 183; Immigration Act 2009, s 392; and Public and Community Housing Management Act 1992, ss 81, 95 and 129. [↑](#footnote-ref-1318)
1318. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at [18.23]. [↑](#footnote-ref-1319)
1319. Broadcasting Act 1989, s 21(e)(iv); Extradition Act 1999, s 7(c); Harmful Digital Communications Act 2015, s 6(1); Sentencing Act 2002, s 9(1)(h); Misuse of Drugs Act 1975, s 35DDE(2)(a); and Mutual Assistance in Criminal Matters Act 1992, s 27. As well, some statutes incorporate a list of grounds directly from an international treaty. [↑](#footnote-ref-1320)
1320. Employment Relations Act 2000, s 103(1)(c). [↑](#footnote-ref-1321)
1321. Employment Relations Act 2000, s 104(1). Alternatively, the discrimination can be by reason of the employee’s union membership status or involvement in union activities. [↑](#footnote-ref-1322)
1322. The scope of protection is, however, broader than the Human Rights Act 1993. It covers independent contractors and volunteers: s 2 definition of “employer”. The Employment Relations Act 2000 does not: s 6. [↑](#footnote-ref-1323)
1323. A person cannot pursue the same complaint in both Te Taraipiunara Mana Tangata | Human Rights Review Tribunal and Te Ratonga Ahumana Taimahi | Employment Relations Authority: Employment Relations Act 2000, s 112; and Human Rights Act 1993, s 79A. [↑](#footnote-ref-1324)
1324. This is the technique used in section 19 of the New Zealand Bill of Rights Act 1990. Prior to the enactment of the Human Rights Act 1993, section 19 stated that “Everyone has the right to freedom from discrimination on the ground of” and listed the grounds that existed under the Human Rights Commission Act 1977 and Race Relations Act 1971 when the NZ Bill of Rights Act enacted. Section 19 was amended by the Human Rights Act 1993 to instead refer to freedom from discrimination “on the grounds of discrimination in the Human Rights Act 1993”, without listing any grounds. [↑](#footnote-ref-1325)
1325. Employment Relations Act 2000, s 106. The exception that is not imported is Human Rights Act 1993, s 30A (concerning retirement benefits). [↑](#footnote-ref-1326)
1326. These are in Employment Relations Act 2000, ss 67A–67B. [↑](#footnote-ref-1327)
1327. Employment Relations Act 2000, s 67B(3). Some other kinds of personal grievance are, however, excluded. [↑](#footnote-ref-1328)
1328. Corrections Act 2004, s 108(1)(d)(viii). [↑](#footnote-ref-1329)
1329. Education and Training Act 2020, s 127(1)(b)(ii). [↑](#footnote-ref-1330)
1330. Education and Training Act 2020, s 217(e). [↑](#footnote-ref-1331)
1331. A briefing to the Minister of Education in November 2022 said the Ministry expected the panels could be operational in 2025: Te Tāhuhu o te Mātauranga | Ministry of Education *Briefing Note: Update on Dispute Resolution Panels* (3 November 2022) at 2. [↑](#footnote-ref-1332)
1332. Issues Paper at [12.41]. [↑](#footnote-ref-1333)
1333. Education and Training Act 2020, s 127(1). The Education and Training Amendment Bill (No 2) 2025 (140-1), which had its first reading in April 2025, proposes to make these “supporting objectives”, with educational achievement being the “paramount objective”. [↑](#footnote-ref-1334)
1334. Education and Training Act 2020, ss 5 and 127(2)(a). [↑](#footnote-ref-1335)
1335. Te Tāhuhu o te Mātauranga | Ministry of Education *The Statement of National Education and Learning Priorities (NELP) & Tertiary Education Strategy (TES)* (2020) at 4. The Education and Training Amendment Bill (No 2) 2025 (140-1) proposes to remove the ability for the Minister of Education to issue a Statement. [↑](#footnote-ref-1336)
1336. We explained the ways we received feedback in this review in Chapter 1. [↑](#footnote-ref-1337)
1337. Films, Videos, and Publications Classification Act 1993, ss 3(3)(e) and 46F(1)(d)(ii); and Films, Videos, and Publications Classification Regulations 1994, reg 10(2)(d)(ii). [↑](#footnote-ref-1338)
1338. Issues Paper at [18.14] and [18.17]. [↑](#footnote-ref-1339)
1339. Films, Videos, and Publications Classification Act 1993, s 3(1). See *Living Word Distributors Ltd v Human Rights Action Group (Wellington)* [2000] NZLR 570 (CA) at [28]–[29], clarifying that “sex” in this context refers to the “activity” rather than an “opinion” or “attitude”. Decisions about labelling films and commercial video on-demand content do not require the same threshold to be met under section 3(1). However, these decisions do not allow a publication to be classified as objectionable or to be restricted. [↑](#footnote-ref-1340)
1340. The Integrity Sport and Recreation Act 2023 came into effect on 1 July 2024, which was after our Issues Paper was published. For this reason, we did not discuss it in the Issues Paper. [↑](#footnote-ref-1341)
1341. Integrity Sport and Recreation Act 2023, s 12. [↑](#footnote-ref-1342)
1342. Integrity Sport and Recreation Act 2023, s 5(d). [↑](#footnote-ref-1343)
1343. Integrity Sport and Recreation Act 2023, s 19. The Integrity Code is binding on organisations that choose to adopt it: Code of Integrity for Sport and Recreation, cl 5(3). [↑](#footnote-ref-1344)
1344. Code of Integrity for Sport and Recreation, sch 1, cl 5(3). [↑](#footnote-ref-1345)
1345. See Integrity Sport and Recreation Act 2023, s 13(g). [↑](#footnote-ref-1346)
1346. Te Kahu Raunui | Sport Integrity Commission “Racism and unlawful discrimination” [<sportintegrity.nz>](https://sportintegrity.nz/integrity/participant-protection-and-safeguarding/participant-protection/racism-and-unlawful-discrimination). As noted in earlier chapters, this is consistent with the approach taken by the New Zealand government and by other agencies such as the Human Rights Commission. [↑](#footnote-ref-1347)
1347. The values and principles promoted in the Integrity Code include treating participants with dignity and respect (manaakitanga) and contributing to participants’ wellbeing (hauora): Code of Integrity for Sport and Recreation, cl 3(2)(b). As well as discrimination, the meaning of “threat to integrity” includes racism, bullying, violence, abuse, sexual misconduct, intimidation and harassment: Integrity Sport and Recreation Act 2023, s 5(d). Organisations are required to prohibit participants from engaging in these behaviours: Code of Integrity for Sport and Recreation, sch 1, cl 5. [↑](#footnote-ref-1348)
1348. Integrity Sport and Recreation Act 2023, s 5(d); and Code of Integrity for Sport and Recreation, sch 1, cl 5(3). [↑](#footnote-ref-1349)
1349. New Zealand Bill of Rights Act 1990, s 3. [↑](#footnote-ref-1350)
1350. We also explained in that chapter the tests for a finding of unjustified discrimination under the New Zealand Bill of Rights Act 1990 and Part 1A (including the allowance in section 5 of the NZ Bill of Rights for limits on rights that are “demonstrably justified”). [↑](#footnote-ref-1351)
1351. Human Rights Act 1993, ss 92I–92P. [↑](#footnote-ref-1352)
1352. See *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA). [↑](#footnote-ref-1353)
1353. See *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213. Many of these remedies have counterparts under the Human Rights Act. [↑](#footnote-ref-1354)
1354. Community Law Centres o Aotearoa said in its submission that using Part 1A was likely to be more accessible for complainants, describing Te Kōti Matua | High Court processes as “expensive, time consuming, daunting and complex”. [↑](#footnote-ref-1355)
1355. New Zealand Bill of Rights Act 1990, s 19(1). These were: colour, race, ethnic or national origins, sex, marital status and religious or ethical belief. In 1992, the ground of age was added to anti-discrimination legislation (in relation to some areas of life only). This was not added to section 19(1) at the same time. [↑](#footnote-ref-1356)
1356. Human Rights Act 1993, s 145. For discussion, see Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 368. [↑](#footnote-ref-1357)
1357. Residential Tenancies Act 1986, s 109. [↑](#footnote-ref-1358)
1358. See Chapter 11. [↑](#footnote-ref-1359)
1359. A person cannot bring proceedings about the same complaint in both the Tenancy Tribunal and Te Taraipiunara Mana Tangata | Human Rights Review Tribunal: Residential Tenancies Act 1986, s 12A. [↑](#footnote-ref-1360)
1360. Residential Tenancies Act 1986, s 51(1). Previously, landlords could only terminate a periodic tenancy based on one of the specific grounds set out in the Residential Tenancies Act. [↑](#footnote-ref-1361)
1361. Terrorism Suppression (Control Orders) Act 2019, s 33(3). [↑](#footnote-ref-1362)
1362. Terrorism Suppression (Control Orders) Act 2019, s 33(5)(a). [↑](#footnote-ref-1363)
1363. See Terrorism Suppression (Control Orders) Bill 2019 (183-2) (select committee report) at 6; and Te Tāhū o te Ture | Ministry of Justice “Submission to the Foreign Affairs, Defence and Trade Committee on the Terrorism Suppression (Control Orders) Bill 2019”. [↑](#footnote-ref-1364)
1364. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, right 2, 4 and definition of “discrimination”. [↑](#footnote-ref-1365)
1365. A person alleging discrimination by a health or disability service provider in breach of the Code can complain to Te Toihau Hauora, Hauātanga | Health and Disability Commissioner: Health and Disability Commissioner Act 1994, s 31. [↑](#footnote-ref-1366)
1366. For example, Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, rights 1–3 and 4(2). [↑](#footnote-ref-1367)
1367. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, rights 1(2) and 3. [↑](#footnote-ref-1368)
1368. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, rights 3 and 4(3). [↑](#footnote-ref-1369)
1369. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, right 7(8). [↑](#footnote-ref-1370)
1370. Health and Disability Commissioner (Code of Health and Disability Services Consumers’ Rights) Regulations 1996, right 7(7). [↑](#footnote-ref-1371)
1371. Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 1.2 definition of “discrimination”, 3.1, 4.1.1 and 10.3. The Rules also convey an entitlement to refuse to complete legal services for which a lawyer has been retained if they face discrimination from the client: r 4.2.1. [↑](#footnote-ref-1372)
1372. Lawyers who practice on their own account must have effective policies and practices to protect people in their workplaces from discrimination: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 11.2. The practice must notify Te Kāhui Ture o Aotearoa | New Zealand Law Society if disciplinary action is taken against an employee on grounds of discrimination: r 11.4. [↑](#footnote-ref-1373)
1373. Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 3.1, 4.1.1(a), 4.1.1(b), 5.2 and 10.3. [↑](#footnote-ref-1374)
1374. However, we discuss the desirability of replacing gendered pronouns in the Human Rights Act in Chapter 20. [↑](#footnote-ref-1375)
1375. See Human Rights Act 1993, s 5. [↑](#footnote-ref-1376)
1376. Human Rights Act 1993, s 5(1)(c)–(e). [↑](#footnote-ref-1377)
1377. Te Tāhū o te Ture | Ministry of Justice *Human Rights Amendment Bill – Initial Briefing* (22 January 2014) at [9]–[12]. [↑](#footnote-ref-1378)
1378. Te Tāhū o te Ture | Ministry of Justice *Human Rights Amendment Bill – Departmental Report* (17 March 2014) at [26]. [↑](#footnote-ref-1379)
1379. For example, Te Kāhui Tika Tangata | Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* | *Kia noho au ki tōku anō ao: He Pūrongo mō te Uiuitanga mō Aukatitanga e Pāngia ana e ngā Tāngata Whakawhitiira* (2008); Te Kāhui Tika Tangata | Human Rights Commission *Trans rights are human rights: A guide to your rights and protections as a transgender person* (June 2024); and Te Kāhui Tika Tangata | Human Rights Commission *Intersex Roundtable Report 2016: The practice of genital normalisation on intersex children in Aotearoa New Zealan*d (November 2016). [↑](#footnote-ref-1380)
1380. See Crown Entities Act 2004, s 28. [↑](#footnote-ref-1381)
1381. For example, Crown Entities Act 2004, ss 62–72; Te Kawa Mataaho | Public Service Commission *Te Aratohu mō te Kopou me te Whakauru Mema Poari* | *Board Appointment and Induction Guidelines* (December 2021); and Tumuaki o te Mana Arotake | Controller and Auditor-General *Managing conflicts of interest: A guide for the public sector* (June 2020). [↑](#footnote-ref-1382)
1382. See Te Tāhū o te Ture | Ministry of Justice *Guidance: Appointment of the Human Rights Commissioners* (September 2020*)* at [7]–[11]. The Human Rights Commission was re-accredited with ‘A’ status in March 2022, indicating full compliance: Te Kāhui Tika Tangata | Human Rights Commission *Pūrongo-ā-tau: Annual Report* (2024) at 30. [↑](#footnote-ref-1383)
1383. *Principles relating to the status of national institutions* GA Res 48/134 (1993). [↑](#footnote-ref-1384)
1384. See Te Tāhū o te Ture | Ministry of Justice *Human Rights Amendment Bill – Departmental Report* (17 March 2014) at [26]. These are also the three areas that have been singled out in the Human Rights Commission’s primary functions. [↑](#footnote-ref-1385)
1385. See Human Rights Act 1993, s 92 for a list of factors Tumuaki Whakatau Take Tika Tangata | Director of Human Rights Proceedings must take into account when deciding whether to provide free legal representation. [↑](#footnote-ref-1386)
1386. Human Rights Act 1993, s 92I. [↑](#footnote-ref-1387)
1387. Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) [Issues Paper] at [18.9]. [↑](#footnote-ref-1388)
1388. For example, the Act already contains: protections against retaliation (s 66); the power to grant a broad range of remedies (s 92I); and provisions enabling Te Taraipiunara Mana Tangata | Human Rights Review Tribunal to regulate its procedure as it thinks fit and to act according to the substantial merits of the case without regard to technicalities (ss 104(5) and 105(1)). [↑](#footnote-ref-1389)
1389. Te Kāhui Tika Tangata | Human Rights Commission was given additional funding for its work on the conversion practices prohibition reform: Te Kāhui Tika Tangata | Human Rights Commission *Conversion Practices in Aotearoa New Zealand: Insights and Recommendations from a Human Rights Perspective* (June 2024) at 18. [↑](#footnote-ref-1390)
1390. Human Rights Act 1993, s 5(2)(a). [↑](#footnote-ref-1391)
1391. Human Rights Act 1993, s 5(2)(e). [↑](#footnote-ref-1392)
1392. We have found 12 instances in the Human Rights Act of the phrase “him or her”, 43 of the phrase “his or her” and 30 of the phrase “he or she”. [↑](#footnote-ref-1393)
1393. See, for example, Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 10. [↑](#footnote-ref-1394)
1394. See, for example, Human Rights Act, ss 22, 80, 90(1)(a) and 90(1)(c). [↑](#footnote-ref-1395)
1395. For example, the following organisations supported the use of gender-neutral language: Chinese Pride New Zealand; DLA Piper New Zealand; Te Kāhui Tika Tangata | Human Rights Commission; ICONIQ Legal Advocates; Identify Survey; Te Kāhui Ture o Aotearoa | New Zealand Law Society; OutLine Aotearoa; Te Whare Āwhina Mō Ngā Wāhine Puawai | Nelson Women’s Centre; Qtopia; Paekākāriki Pride; Rainbow Support Collective; Te Ngākau Kahukura; InsideOUT Kōaro; Meredith Connell’s Rainbow Alliance; Rainbow Wellington; Tīwhanawhana Trust; Wellington Community Justice Project — Law Reform Team; Community Law Centres o Aotearoa; Te Pūkenga Here Tikanga Mahi | Public Service Association; Professional Association for Transgender Health Aotearoa; Rotorua Chamber of Pride; and Law Association of New Zealand. The following organisations opposed the use of gender-neutral language: Women’s Declaration International NZ; Lesbian Resistance New Zealand; Resist Gender Education; Feminist Older Women Lobbyists; and Women’s Rights Party. [↑](#footnote-ref-1396)
1396. For example, Feminist Older Women Lobbyists said the use of “gender theory/gendered language” in law “has enhanced the potential for the law to undermine women’s sex-based human rights and legal protections”. Women’s Declaration International NZ said removing binary language from the Act would be an “insult to the dignity of women”. [↑](#footnote-ref-1397)
1397. One submitter commented that there is a health need for gendered language because certain conditions are exclusive to men or to women. The issue we are examining here is the use of gendered pronouns in the Human Rights Act and has no relevance to gender-neutral language in health care. [↑](#footnote-ref-1398)
1398. See, also, Te Tari Tohutohu Pāremata | Parliamentary Counsel Office “Plain Language Standard: 8.2 Gender-neutral language” <[www.pco.govt.nz](https://www.pco.govt.nz/making-secondary-legislation/plain-language/supporting-documents/8.2)>, commenting that gender-neutral language is important because it makes writing “accessible and relevant to everyone”. [↑](#footnote-ref-1399)
1399. See Te Tari Tohutohu Pāremata | Parliamentary Counsel Office “Plain Language Standard: 8.2 Gender-neutral language” <[www.pco.govt.nz](https://www.pco.govt.nz/making-secondary-legislation/plain-language/supporting-documents/8.2)>, commenting that “legislation needs to communicate effectively to all those to whom it applies, regardless of gender” and that: “Effective communication to users is important to enable it to achieve the desired regulatory outcomes.” [↑](#footnote-ref-1400)
1400. See, for example, Te Tari Tohutohu Pāremata | Parliamentary Counsel Office “Plain Language Standard: 8.2 Gender-neutral language” <[www.pco.govt.nz](https://www.pco.govt.nz/making-secondary-legislation/plain-language/supporting-documents/8.2)>. [↑](#footnote-ref-1401)
1401. See, generally, Helene Seltzer Krauthamer “Neopronouns: The Final Act of Self-Actualization” in *The Great Pronoun Shift: The Big Impact of Little Parts of Speech* (Routledge, New York, 2021) 90. [↑](#footnote-ref-1402)
1402. Transgender Health Research Lab *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (Te Whare Wānanga o Waikato | University of Waikato, 2025) at 103. A further 6 per cent had been pregnant before identifying as transgender or non-binary: at 103. [↑](#footnote-ref-1403)
1403. Human Rights Commission Act 1977, s 30. [↑](#footnote-ref-1404)
1404. See Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 49, describing the purpose of the provision as to ensure “any preferential treatment granted by reason of pregnancy, childbirth or family responsibilities is lawful” (underlining in original). [↑](#footnote-ref-1405)
1405. We are aware of one case where section 74 has been applied. It does not address whether section 74 applies to people other than women who give birth, although it commented that breastfeeding is “an exclusively female function” and is “part of a woman’s responsibility to her child”: *Kerr v Victoria University of Wellington* (1997) 3 HRNZ 702 (Complaints Review Tribunal) at 706. [↑](#footnote-ref-1406)
1406. See Legislation Act 2019, s 10. [↑](#footnote-ref-1407)
1407. For example, the following organisations supported reform: ICONIQ Legal Advocates; Te Ngākau Kahukura; Rainbow Wellington; Women’s Health Action; Community Law Centres o Aotearoa; Te Kāhui Ture o Aotearoa | New Zealand Law Society; InsideOut Kōaro; Sexual Wellbeing Aotearoa; DLA Piper New Zealand; and Professional Association for Transgender Health Aotearoa. The following organisations clearly opposed reform: Lesbian Resistance New Zealand; Women’s Declaration International NZ; and Speak Up for Women. [↑](#footnote-ref-1408)
1408. Women’s Declaration International NZ made a similar point. [↑](#footnote-ref-1409)
1409. See Anneke Smith “Coalition directs Health NZ to stop saying ‘pregnant people’” (15 April 2025) RNZ <[www.rnz.co.nz](https://www.rnz.co.nz/news/political/558168/coalition-directs-health-nz-to-stop-saying-pregnant-people)>. See, also, Komiti Whiriwhiri Take Petihana | Petitions Committee *Petition of Deb Hayes: Investigate Midwifery Council’s removal of ‘woman & baby’ from Scope of Practice* (March 2025), voicing similar concerns in relation to midwifery. [↑](#footnote-ref-1410)
1410. See, for example, *Doria v Diamond Laser Medispa Taupo Ltd & Ors* [2025] NZHRRT 12; and *Beauchamp v B & T Co (2011) Ltd* [2022] NZHRRT 10. [↑](#footnote-ref-1411)
1411. George Parker and others *Warming the Whare for trans people and whānau in perinatal care* (Otago Polytechnic Press, 2023). [↑](#footnote-ref-1412)
1412. Elias G Thomas and others “Pregnancy experiences of transgender and gender-expansive individuals: A systematic scoping review from a critical midwifery perspective” (2024) Birth 1. [↑](#footnote-ref-1413)
1413. *Doria v Diamond Laser Medispa Taupo Ltd & Ors* [2025] NZHRRT 12 at [67]. [↑](#footnote-ref-1414)