

He Puka Kaupapa | Issues Paper 53

Ia Tangata

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



CHAPTER 3 – EXPERIENCES WITH DISCRIMINATION

In Chapter 3, we discuss some research about discrimination experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics, and we identify some issues we have heard are of particular concern to people in these groups.

QUESTION

Q1

Is there any other information about discrimination experienced by people in these groups that you think it is important for us to consider?

CHAPTER 4 – KEY REFORM CONSIDERATIONS

In Chapter 4, we identify some key reform considerations we think the Law Commission should bear in mind when proposing law reform in this review.

QUESTION

Q2

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

CHAPTER 5 - THE PERSPECTIVES AND CONCERNS OF MĀORI

In Chapter 5, we explain that we convened a wānanga to improve our understanding of Māori perspectives on issues relevant to this review. We identify some key themes that emerged from the wānanga (as well as from our preliminary research and other engagement). The perspectives identified in this chapter represent just some of the wide-ranging perspectives that Māori people will have on the issues in this review.

QUESTIONS

Q3

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

Q4

Do you have any feedback on the tikanga we identified in Chapter 5 and how we have described them?

Q5

Are there other tikanga that are relevant to this review?

CHAPTER 6 – SHOULD SECTION 21 BE AMENDED?

In Chapter 6, we reach a preliminary conclusion that an amendment to section 21 of the Human Rights Act 1993 is necessary and desirable to ensure adequate protection from discrimination for people who are transgender or non-binary or who have an innate variation of sex characteristics.

QUESTION

Q6

Do you have any feedback on this preliminary conclusion?

In Chapter 6, we ask whether te Tiriti o Waitangi | Treaty of Waitangi has implications for whether people who are transgender or non-binary or who have an innate variation of sex characteristics should be protected from discrimination.

QUESTION

Q7

Do you have any feedback on this issue?

CHAPTER 7 – OPTIONS FOR NEW GROUNDS

In Chapter 7, we identify some options for amending section 21 of the Human Rights Act 1993 to provide express protection from discrimination that is linked to the fact (or the discriminator's belief) that a person is transgender or non-binary or has an innate variation of sex characteristics.

We explain that some of the options are asymmetrical, which means they only extend protection to people in a disadvantaged minority (such as a ground of being transgender). Other options are symmetrical, which means they apply to a characteristic held by everyone (such as the ground of gender identity).

We are consulting separately on the best option to protect people who are transgender or non-binary, versus the best option to protect people who have an innate variation of sex characteristics.

QUESTIONS

Q8

Which of the options that we discussed do you think is best for protecting people who are transgender or non-binary?

- a. Asymmetrical option 1: A stand-alone ground (or grounds) that uses group descriptors (such as “being transgender or non-binary”). Please explain which group descriptors you prefer.
- b. Asymmetrical option 2: A stand-alone ground (or grounds) that uses descriptive language to identify who is covered by the ground (such as “a person whose gender is different to their sex assigned at birth”). Please explain which descriptive language you prefer.

- c. Symmetrical option 1: A stand-alone ground (or grounds) that describes general characteristics held by everyone in the community (such as gender, gender identity or gender expression). Please explain which characteristics you think should be included in a ground.
- d. Symmetrical option 2: Amending the ground of sex to become “sex or gender” and defining it to include characteristics such as gender identity and gender expression. Please explain which characteristics you think should be included in the definition.

Q9

Which of the options that we discussed do you think is best for protecting people who have an innate variation of sex characteristics?

- a. Asymmetrical option 1: A stand-alone ground (or grounds) that uses group descriptors (such as “being intersex”). Please explain which group descriptors you prefer.
- b. Asymmetrical option 2: A stand-alone ground (or grounds) that uses descriptive language to identify who is covered by the ground (such as “a person who has an innate variation of sex characteristics”). Please explain which descriptive language you prefer.
- c. Symmetrical option 1: A stand-alone ground (or grounds) that describes general characteristics held by everyone in the community (such as sex characteristics). Please explain which ground or grounds you prefer.
- d. Symmetrical option 2: Amending the ground of sex to become “sex or gender” and defining it to include sex characteristics.

Q10

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

Q11

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

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

Chapters 8 to 15 discuss Part 2 of the Human Rights Act 1993, which regulates private people and organisations (those not exercising government functions).

In Chapter 8, we explain how Part 2 works and our approach to reviewing it. We also introduce some recurrent issues and challenges we have encountered when analysing potential options for amending Part 2.

QUESTIONS

Q12

An issue we raise in Chapter 8 is the potential for uncertainty as to the scope of any sex exception that is not amended to reflect new grounds. Do you have any feedback on this issue?

Q13

An issue we raise in Chapter 8 is how people would prove their sex assigned at birth if any sex exceptions are amended to clarify that they allow different treatment on that basis. Do you have any feedback on this issue?

Q14

An issue we raise in Chapter 8 is the potential for intrusions on people's privacy if exceptions are tied to a person's sex assigned at birth, the fact they are transgender or non-binary, or their sex characteristics. Do you have any feedback on this issue?

CHAPTER 9 – EMPLOYMENT

In Chapter 9, we outline and seek feedback on the protections in Part 2 of the Human Rights Act 1993 that relate to employment and some closely related contexts.

QUESTIONS

Q15

Are the existing protections in the Human Rights Act 1993 relating to employment (and closely related contexts) sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?

Q16

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

(Later in Chapter 9, and in Chapter 13, we discuss existing exceptions in the Act that balance relevant rights and interests. You may want to read about these before answering.)

QUESTIONS**Q17**

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

Q18

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 26 for work performed outside New Zealand be amended to reflect those new grounds?

Q19

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

Q20

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(1) that applies where sex is a genuine occupational qualification for reasons of authenticity be amended to reflect those new grounds?

Q21

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

Q22

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

Q23

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

Q24

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the privacy exception in section 27(3)(a) be amended to reflect those new grounds?

Q25

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

QUESTIONS**Q26**

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exceptions in sections 27(3)(b) and 27(5) for employer-provided accommodation be amended to reflect those new grounds?

Q27

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

Q28

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(4) for counsellors on highly personal matters be amended to reflect those new grounds?

Q29

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

Q30

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exceptions in sections 28(1) and 39(1) for organised religions be amended to reflect those new grounds?

Q31

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

Q32

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

CHAPTER 10 – GOODS, SERVICES, FACILITIES AND PLACES

In Chapter 10, we outline and seek feedback on the protections in Part 2 of the Human Rights Act 1993 that relate to access to places and vehicles, and to provision of goods, services and facilities.

QUESTION**Q33**

Are the existing protections in the Human Rights Act 1993 relating to goods, services, facilities and places sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?

QUESTIONS**Q34**

Do you have any practical concerns about what the protections for goods, services, facilities and places in the Human Rights Act 1993 would cover if new prohibited grounds of discrimination are added to the Act?

(Later in Chapter 10, and in Chapters 13 and 14, we discuss existing exceptions in the Act that balance relevant rights and interests. You may want to read about these before answering.)

Q35

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

Q36

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the courses and counselling exception in section 45 be amended to reflect those new grounds?

Q37

Do you have any additional feedback on the practical implications of amending section 45?

Q38

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

- a. The exception should be retained in its current form (option 1).
- b. There should be an exception providing that, where a skill differs depending on a person's sex characteristics, a person does not breach the Human Rights Act 1993 by only offering a service in relation to persons with particular sex characteristics (option 2).
- c. There should be an exception that applies to services where the customer would be fully or partially unclothed (option 3).
- d. Another option (please specify).

Q39

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

QUESTIONS**Q40**

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the insurance exception in section 48 that allows different terms and conditions on the basis of sex be amended to clarify that it entitles insurers to differentiate based on a customer's sex assigned at birth or sex characteristics?

Q41

If new grounds of discrimination are added to the Human Rights Act 1993, should there be a new exception to allow insurers to offer different terms and conditions based on whether someone is transgender or non-binary or has an innate variation of sex characteristics?

Q42

Do you have any additional feedback on the practical implications of amending the insurance exception in section 48 or creating a new insurance exception?

CHAPTER 11 – LAND, HOUSING AND ACCOMMODATION

In Chapter 11, we outline and seek feedback on the protections in Part 2 of the Human Rights Act 1993 that relate to land, housing and accommodation.

QUESTIONS**Q43**

Are the existing protections in the Human Rights Act 1993 relating to land, housing and accommodation sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?

Q44

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

(Later in Chapter 11, we discuss existing exceptions in the Act that balance relevant rights and interests. You may want to read about these before answering.)

Q45

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

QUESTIONS**Q46**

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

Q47

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

Q48

Do you have any feedback about the implications of this review for the Residential Tenancies Act 1986?

CHAPTER 12 – EDUCATION

In Chapter 12, we outline and seek feedback on the protections in Part 2 of the Human Rights Act 1993 that relate to education, including vocational training.

QUESTIONS**Q49**

Are the existing protections in the Human Rights Act 1993 relating to education sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?

Q50

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

(Later in Chapter 12, and in Chapter 13, we discuss existing exceptions in the Act that balance relevant rights and interests. You may want to read about these before answering.)

Q51

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

QUESTIONS**Q52**

If new prohibited grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 58(1) for single-sex schools be amended to reflect any new grounds we propose?

- a. The exception should be retained in its current form (option 1).
- b. The exception should clarify that it does not entitle single-sex schools to refuse to admit transgender students whose gender identity aligns with the school's designated sex (option 2).
- c. The exception should clarify that it entitles schools to refuse to admit students whose sex assigned at birth does not align with the school's designated sex (option 3).
- d. The exception should clarify that it entitles schools to refuse to admit students whose sex recorded on their birth certificate does not align with the school's designated sex (option 4).
- e. Another option (please specify).

Q53

Are additional amendments to section 58(1) required to accommodate students who have a gender identity that is not exclusively male or female?

Q54

Do you have any additional feedback on the practical implications of amending section 58(1)?

Q55

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 59 for courses and counselling be amended to reflect those new grounds?

Q56

Do you have any additional feedback on the practical implications of amending section 59?

Q57

Do you have any feedback about practical implications of this review for the Education and Training Act 2020?

CHAPTER 13 – SINGLE-SEX FACILITIES

In Chapter 13, we outline and seek feedback on two exceptions in the Human Rights Act 1993 that allow for single-sex facilities when private people or organisations are providing certain kinds of facilities to the public. We also seek feedback on some related issues:

- whether an additional amendment to the Act is desirable to encourage the provision of single-stall unisex facilities; and
- whether the position that is settled on for the two existing exceptions relating to single-sex facilities should also be the position taken elsewhere in the Act.

QUESTIONS

Q58

Is an amendment to the Human Rights Act 1993 desirable to encourage the provision of unisex facilities and, if so, what should it require?

Q59

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

- a. The exceptions should be retained in their current form (option 1).
- b. The Act should clarify that it is lawful to use a single-sex facility aligned with your gender identity (option 2).
- c. The Act should clarify that service providers can exclude people from single-sex facilities that do not align with their sex assigned at birth (option 3).
- d. The Act should clarify that service providers can exclude people from single-sex facilities that do not align with their sex recorded on their birth certificate (option 4).
- e. Another option (please specify).

In Chapter 13, we suggest that, if options 3 or 4 are adopted, it may be worth considering additional reforms to mitigate the potential risks of these options for people who are transgender or non-binary. We give the examples of changing the threshold for the exception or a requirement to provide unisex facilities.

QUESTIONS

Q60

If options 3 or 4 were adopted, do you think other reforms would be desirable alongside these?

Q61

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

QUESTIONS**Q62**

Do you have any feedback on the implications of this review for single-sex facilities in education?

Q63

Do you have any feedback on the implications of this review for single-sex facilities in employment?

CHAPTER 14 – COMPETITIVE SPORTS

In Chapter 14, we outline and seek feedback on the exception in section 49(1) of the Human Rights Act 1993, which allows competitive sports to be limited to one sex in some circumstances.

QUESTION**Q64**

Do you think the exception for competitive sports in section 49(1) of the Human Rights Act 1993 should be amended to reflect any new grounds we propose?

- a. The exception should be retained in its current form (option 1).
- b. The exception should be amended to clarify that it does not allow an organisation to exclude people from a competitive sporting activity on the basis of their gender identity or the fact they have an innate variation of sex characteristics (option 2).
- c. The exception should be amended to allow people to be excluded from a competitive sporting activity on the basis of their gender identity or the fact they have an innate variation of sex characteristics if strength, stamina or physique is relevant to that activity (option 3).
- d. There should be a new exception that allows organisations to exclude people from competitive sporting activities on the basis of their gender identity or the fact they have an innate variation of sex characteristics in any circumstances (option 4).
- e. The exception should be amended so it only applies to women's sport (option 5).
- f. The exception should be extended to new grounds of discrimination but it should only apply where required to meet policy objectives such as securing fair competition (having regard to the level of the sport and the public interest in participation), ensuring physical safety of participants, and complying with international rules (option 6).
- g. Another option (please specify).

CHAPTER 15 – OTHER ISSUES IN PART 2

In Chapter 15, we examine issues arising under three subparts at the end of Part 2 of the Human Rights Act 1993 that do not sit within any particular area of life.

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

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

- a provision to prohibit harassment that is directed at someone because they are transgender or non-binary or they have an innate variation of sex characteristics; and
- a provision to clarify the circumstances in which medical interventions on children and young people with an innate variation of sex characteristics are allowed (although we explain some reasons why this might be difficult).

QUESTIONS

Q65 Do you have any feedback on the implications of this review for section 62 of the Human Rights Act 1993, which prohibits sexual harassment?

Q66 Are there sufficient legal remedies available to address harassment that is directed at a person because they are transgender or non-binary or they have an innate variation of sex characteristics?

Q67 Should there be a new provision inserted into Part 2 of the Human Rights Act 1993 to protect people from harassment that is directed at them because they are transgender or non-binary or they have an innate variation of sex characteristics?

Q68 Should there be a new provision added to the “Other forms of discrimination” subpart to clarify the circumstances in which medical interventions on children and young people with an innate variation of sex characteristics are allowed?

Q69 Should there be any additional provisions added to the subpart on “Other forms of discrimination” to address issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics (and that are not captured by other provisions in the Human Rights Act 1993)?

Special provisions relating to superannuation

One of the subparts in the Human Rights Act 1993 that we examine in Chapter 15 is called “Special provisions relating to superannuation”. It contains an exception that relates to superannuation schemes (section 70(2)).

QUESTION

Q70

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

Other matters

One of the subparts in the Human Rights Act 1993 that we examine in Chapter 15 is called “Other matters”. We outline and seek feedback on one provision: section 74 of the Act, which concerns measures related to pregnancy, childbirth and childcare responsibilities.

QUESTION

Q71

Should section 74 be amended to clarify that it applies to anybody who is pregnant or who is giving birth regardless of their gender identity?

CHAPTER 16 – DISCRIMINATION BY PUBLIC ACTORS

In Chapter 16, we discuss the implications of this review for Part 1A of the Human Rights Act 1993 and for the New Zealand Bill of Rights Act 1990. Together, these contain the rules that protect people against discrimination by government departments and by people and bodies exercising government functions.

QUESTION

Q72

Do you agree with our assessment of the implications of this review for Part 1A of the Human Rights Act 1993 and section 19 of the New Zealand Bill of Rights Act 1990?

CHAPTER 17 – CROSS-CUTTING ISSUES

In Chapter 17, we discuss three cross-cutting issues that have implications for both Parts 1A and 2 of the Human Rights Act 1993.

Potential for interference with tikanga

One cross-cutting issue we explore in Chapter 17 is the potential impacts of any reforms we propose on the ability of Māori to live in accordance with tikanga.

We suggest in Chapter 17 that amendments to section 21 of the Human Rights Act 1993 along the lines we are exploring in this Issues Paper may make little difference in practice to the potential for state law to interfere with sex-differentiated tikanga activities.

QUESTIONS

Q73

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

Q74

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

- a. There should be no reform (option 1).
- b. The Act should not apply to some or all marae-based activities (option 2). Please explain what you think an exception should cover and why.
- c. There should be an exception that lists specific tikanga activities that are exempt from scrutiny under the Human Rights Act 1993 (option 3). Please explain which tikanga practices should be listed and why.
- d. There should be a more general exception for differences in treatment that are required by tikanga (option 4). Please explain what you think an exception should cover and why.
- e. There should be amendments to the composition and process of the Human Rights Review Tribunal when it considers matters of tikanga (option 5).
- f. Another option (please specify).

Misgendering and deadnaming

One cross-cutting issue we explore in Chapter 17 is the potential impacts of this review for the regulation of misgendering and deadnaming.

QUESTION

Q75

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

- a. The Act should provide that misgendering and deadnaming are unlawful under Part 2 (option 1).
- b. The Act should provide that misgendering and deadnaming are never unlawful under Part 2 (option 2).
- c. The Act should specify the situations in which misgendering and deadnaming are unlawful under Part 2 (option 3).
- d. There is no need for reform (option 4).
- e. Another option (please specify).

Binary language in the Human Rights Act 1993

One cross-cutting issue we explore in Chapter 17 is the use in the Human Rights Act 1993 of the binary language “him or her”, “his or her” and “he or she”.

QUESTION

Q76

Should this binary language “him or her”, “his or her” and “he or she” in the Human Rights Act 1993 be replaced by gender-neutral language?

CHAPTER 18 – OTHER MATTERS

In Chapter 18, we discuss other Parts of the Human Rights Act 1993 not covered elsewhere. These are Part 1 (which states the membership, powers and functions of Te Kāhui Tika Tangata | Human Rights Commission) and Parts 3 and 4 (which deal with the resolution of disputes). We also consider the consequential implications of this review for other laws (especially laws that refer directly to the Human Rights Act).

QUESTIONS

Q77

Are the membership, powers and functions of the Human Rights Commission sufficient to promote and protect the rights of people who are transgender or non-binary or who have an innate variation of sex characteristics?

Q78

Do you have any feedback on the implications of this review for the dispute resolution process in Part 3 of the Human Rights Act 1993?

Q79

If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, are there implications for other legislation that we need to consider?

Q80

Are there any other issues relevant to this review or options for reform that we have not identified or anything else you would like to tell us?
