

TO: Claudia Geiringer  
Law Commissioner,  
Law Commission/ Te Aka Matua o te Ture  
Level 9, 70 The Terrace, Wellington 6011 | PO Box 2590, Wellington 6140

sgd@lawcom.govt.nz

RE: Submission on *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*

FROM: Emeritus Professor Sue Middleton on behalf of FOWL (Feminist Older Women Lobbyists).

**Sue Middleton** (PhD, Emeritus Professor, Wilf Malcolm Institute for Educational Research, University of Waikato). Sue's teaching and writing has focused on the local and global production, circulation and implementation of educational ideas, including feminism.  
<https://profiles.waikato.ac.nz/sue.middleton>

**Jill Abigail** (BA, Dip.Lib), former Director of Information and Liaison, Ministry of Women's Affairs, worked on women's rights issues in both the government and NGO sectors over several decades.

**Phillida Bunkle** The Hon (MA, MSc), founder of Victoria University's women's studies programme, co-author (with Sandra Coney) of the article that led to the Cartwright Inquiry, Co-founder Women's Health Action, former Green Party MP, Minister of Customs, Consumer Affairs, Associate Minister Women's Affairs, Economic Development, Environment, Conservation.

**Sandra Coney** (BA, QSO) co-authored the article that led to the Cartwright Inquiry, has served on government committees on women's health and was the first chair of the Pharmac consumer advisory committee. She served nine years on the board of Waitemata DHB. She co-founded Women's Health Action.

**Karen Guilliland:** (MNZM, MA) Ex Board Member of PHARMAC, CDHB, Federation of Primary Health Aotearoa and Asia Pacific Rep on the Board of the International Confederation of Midwives for 25 years.

**Carol Hamilton** PhD, M.Ed. Ex Gay liberation activist 1970's. Former lecturer in special education. Researcher in disability, sexuality and inclusive practices. Recovering postmodernist.

**Prue Hyman** (MA), formerly Associate Professor of Economics and Gender/Women's Studies, Victoria University of Wellington.

**Jan Rivers** (PG Dip IT; PG Dip Env Mgt) is a former public servant who has worked in information management and library services. She has a long-standing interest in the quality of the public sector and has been involved in work on open government.  
<https://www.publicgood.org.nz/who-is-behind-public-good/>

**Julie Thompson** (MA, MSc), was engaged in feminist activism in Auckland in the 1970s, which she followed by a long career with the United Nations (New York), most recently heading global communications strategies in conjunction with the Ethiopian-based African Union on issues relating to peace, security and development in Africa.

**We also wish to acknowledge conversations, feedback and support from:**

**Mihirawhiti Searancke**, currently sits within the council of elders, Te Mauri o Maniapoto associated with Maniapoto - Tainui. She is a claimant (Wai 1504), appearing in both the Wai 2700 Mana Wahine and the Wai 3300 Constitution inquires. Radical activist, feminist, trade unionist, tribal researcher. She supports this submission.

**Our international members:**

**Miriam E. David**, BA (Hons.), PhD, FAcSS, FRSA, Professor Emerita of sociology of education at University College London (UCL) Institute of Education. She has been an academic educator, researcher and head of department in the UK and USA. She co-edited The Sage Encyclopaedia of Higher Education and her family memoir *The Locked Safe* has just been published.

**Susan Hawthorne** (BA Hons, MA Prelim., PhD), is former Adjunct Professor, James Cook University, Townsville. She has taught Philosophy, Literature, and Women's Studies in Australia, USA and India. She is a publisher and author of eighteen books. She is Secretary of the Australian organisation, the Coalition of Activist Lesbians (CoAL), the first lesbian NGO in the world to have UN ECOSOC Status.

**Two foundation members who have contributed greatly to this work have died this year:**

**Alison Laurie**, PhD, (1941-2024) was a lesbian activist and an academic at Victoria University of Wellington where she became Director, Gender and Women's Studies. Her areas of research were oral history, lesbian and gay histories and studies, social theory and social policy. She was a trustee of the Lesbian and Gay Archives NZ.

**Judi Pattison** (1945- 2024) came with her family to New Zealand in 1971 from Texas. Her career was in women's and community development, in New Zealand and then on aid and development projects in the Pacific region and Indonesia for the New Zealand and Australian governments as well as United Nations. For five years to 2005 she managed a humanitarian project in Solomon Islands and from there she retired with her husband to Queensland, Australia.

<b>1.</b>	<b>Introduction</b>	<b>4</b>
1.1	<i>Introducing FOWL</i>	4
1.2	<i>Protected categories and the need for clear definitions</i>	7
1.3	<i>Defining sex</i>	11
1.4	<i>Defining gender</i>	14
1.5	<i>Gender categories as external and internal identities</i>	15
<b>2.</b>	<b>Gender wars: Disputed ground</b>	<b>17</b>
2.1	<i>Transsexuals and the sex binary</i>	18
2.2	<i>The origins and trajectories of ‘gender’ and ‘gender identity’.</i>	19
2.3	<i>Sex and gender: Assigned or observed?</i>	21
2.4	<i>Transsexual, queer and transgender perspectives</i>	23
<b>3.</b>	<b>Exceptions: The need for single-sex spaces</b>	<b>26</b>
3.1	<i>Employment</i>	27
3.2	<i>Children and schools</i>	30
3.3	<i>The (re)medicalisation of gender</i>	33
3.4	<i>Health care and Human Rights</i>	35
3.5	<i>Children’s rights</i>	36
3.6	<i>Human rights and patients’ rights</i>	37
3.7	<i>On binaries and language</i>	40
<b>4</b>	<b>Recommendations</b>	<b>43</b>

## 1. Introduction

One of the purposes of Aotearoa/New Zealand's Conversion Practices Prohibition Act 2022 is to 'promote respectful and open discussions regarding sexuality and gender' (S3b). We welcome this opportunity for a conversation with Te Aka Matua o te Ture/ Law Commission about its proposed amendments to the protected categories in the Human Rights Act. This introductory section begins with a brief description of our group, FOWL (1.1). It then raises questions about the documents' interpretations of, and confusion between, the terms 'sex', 'gender', and 'gender identity' (1.2). We distinguish between 'external' and 'internal' identities (1.3) then consider each of the three options the Law Commission suggests for amendments to the Human Rights Act (1.4). We introduce the evidence and arguments concerning Part Two of the HRA that we shall present in Section 3 and that will lay foundations for our conclusions and recommendations in Section 4.

### 1.1. Introducing FOWL

FOWL – Feminist Older Women Lobbyists – is a small private network of researchers and writers with long track records in university and community-based women's studies programmes, feminist research, and associated activism. Membership is by invitation. Members' academic qualifications, research and publications include biological sciences, history, social sciences, humanities, education, midwifery and economics. Our professional experiences include teaching and/or management in universities, schools, government agencies, the health professions, unions and NGOs in New Zealand and as Kiwis working internationally. Our members include a former Green/ Alliance MP and Minister and an elected member of local bodies. Several members have been awarded Royal Honours.

We have all been involved with feminist, and many of us lesbian, organisations and grassroots groups, including the original *Broadsheet* (magazine) collective.<sup>1</sup> Many of us have long histories in left-wing political parties and activism, including environmental, anti-racist, and women's health groups (notably the Cartwright Collective). In all aspects of our lives, the rights, safety and wellbeing of women and girls (the female sex) have been of central concern. Two high-profile wāhine Māori researchers have taken time from their work with their hapu and iwi to advise us from time to time. We are mothers, grandmothers, and aunts. Although officially retired from formal employment, we remain intellectually and politically engaged with current social and political issues both within Aotearoa and overseas. We follow and share information about all sides of the 'gender wars' raging locally and internationally in politics, legislation, and research; as applied in the practices of health professionals, therapists and educators; and as expressed in mainstream and social media.

---

<sup>1</sup> <https://broadsheet.auckland.ac.nz>

We came together as a group in 2020 as we began to experience ‘cancelling’ on social media for expressing concern about the uncritical adoption of the vocabulary and mantras of what is commonly referred to as ‘gender ideology’ (we prefer the term ‘gender theory’)<sup>2</sup> in government, institutional and professional policy.<sup>3</sup> At that time we were closely following the tumultuous events at the UK’s Tavistock Clinic’s Gender Identity Services (GIDS) as whistle-blowers<sup>4</sup> exposed the exponential increase in the numbers of adolescent girls presenting themselves as having been ‘born in the wrong body’. Evidence was emerging that disproportionate numbers of youth experiencing gender incongruence were also same-sex attracted, on the autism spectrum, were in state care, and/or were coping with other complex familial or psychological issues.<sup>5</sup> Researchers, parents, medical doctors and psychotherapists, as well as ‘detransitioners,’<sup>6</sup> were expressing concern that ‘gender affirmation’ practices were channelling adolescents along a medical pathway without adequate exploration of the other – often related – psychological, medical and familial complexities of their young lives. This was life-changing treatment for which they lacked the competence to consent.<sup>7</sup> For raising such issues on social media, we found ourselves accused by lobby groups – some supported by Government funding<sup>8</sup> – of ‘hate speech’, branded as ‘right wing’<sup>9</sup> and even fascists or Nazis.<sup>10</sup> Such lies are deeply offensive to our post-World War Two generation whose parents’ lives were scarred by their experience of fighting Naziism and in the case of our Jewish members, the genocide of the Holocaust.

---

<sup>2</sup> Ideology is a sociological concept. There are two main traditions – one drawing on Mannheim, the other on Marx. There is no need to address the complexities of these usages. So ‘gender theory’ will suffice. Madrigal-Borloz, V. (2021), *The Law of Inclusion: Report of the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity*. <https://digitallibrary.un.org/record/3931132>

<sup>3</sup> Rivers, Jan and Abigail, Jill (2021) ‘Sex, gender and women’s rights’. *Policy Quarterly*, Vol 17, No 4, <https://doi.org/10.26686/pq.v17i4.7316>

<sup>4</sup> Barnes, Hannah (2023) *Time to Think: The inside story of the collapse of the Tavistock’s Gender Service for Children*. Swift Press.

<sup>5</sup> Cass, Hilary (April 2024) *The Cass Review: Independent Review of Gender Identity Services for Children and Young People: Final Report*. Downloaded from <https://cass.independent-review.uk/home/publications/final-report/>. Counting Ourselves, online self-selected survey in Aotearoa, suggested that young New Zealanders identifying as ‘trans’ had a similar population profile. Veale, J., Byre, J., Tan, K., et al. (2019) *The Health and Wellbeing of Transgender and Non-binary People in Aotearoa New Zealand*. University of Waikato.

<sup>6</sup> Royal Courts of Justice (2020, December 1) *Approved Judgment: Quincy Bell and Mrs A vs The Tavistock and Portman NHS Foundation Trust; Case No: CO/60/2020*. London: Royal Courts of Justice. Retrieved August 10, 2021 from <https://www.judiciary.uk/wp-content/uploads/2020/12/Bell-v-Tavistock-Judgment.pdf>.

<sup>7</sup> Cass, Hilary (April 2024) *The Cass Review: Independent Review of Gender Identity Services for Children and Young People: Final Report*. Downloaded from <https://cass.independent-review.uk/home/publications/final-report/>, S16.25 and 16.34.

<sup>8</sup> Gender Minorities Aotearoa (2024) *Anti-Transgender Extremism: Identifying, preventing countering anti-transgender extremism*, acknowledges support from: Community Matters – Preventing and Countering Violent Extremism Fund, [communitymatters.govt.nz/preventing-and-countering-violent-extremism-fund/](http://communitymatters.govt.nz/preventing-and-countering-violent-extremism-fund/).

<sup>9</sup> In an uninformed and unreferenced diatribe of this nature, Gender Minorities Aotearoa’s caricature of a ‘TERF’ lumps opposing groups – radical feminists, right-wing fundamentalists and fascists – together under the fictive entity of a TERF (discussed later) <https://genderminorities.com/glossary-transgender/>.

<sup>10</sup> Gender Minorities Aotearoa (2024) *Anti-Transgender Extremism: Identifying, preventing countering anti-transgender extremism*, acknowledges support from: Community Matters – Preventing and Countering Violent Extremism Fund, [communitymatters.govt.nz/preventing-and-countering-violent-extremism-fund/](http://communitymatters.govt.nz/preventing-and-countering-violent-extremism-fund/).

Younger women questioning the medicalisation of gender non-conforming youth through their professional organisations were being subjected to slander and even formal complaints by trans rights activists (TRAs) and their ‘allies’. Public meetings and professional conferences on these issues were, and continue to be, suppressed by lobby groups who whip up support on X/ Twitter and other social media with lies and tactics of intimidation against the speakers, organisers, venues and ticketing agencies involved.<sup>11</sup>

As a larger group, in smaller groups and as individuals, FOWL’s members have published peer-reviewed papers in books and journals.<sup>12</sup> We have written and presented submissions to government select committees,<sup>13</sup> sent letters to professional organisations (including the Midwifery Council for erasing the words ‘women’ and ‘mothers’ from policy documents);<sup>14</sup> submitted opinion pieces and letters to printed and online media.<sup>15</sup> With a few notable exceptions,<sup>16</sup> mainstream media have refused to publish articles that question the assertions of trans rights activism and/or that advocate ‘watchful waiting’ and psychotherapy as alternatives to the medicalization of gender non-conforming youth. They, as well as transgender organisations and allies, have also misled readers on issues in relation to gender medicine.<sup>17</sup>

---

<sup>11</sup>For one example, see <https://www.newstalkzb.co.nz/news/national/ticketing-company-cancels-services-for-nz-conference-over-unsupported-claims-by-activist/>.

<sup>12</sup> Middleton, Sue (2021) ‘Gender wars and sexuality education in 2021: history and politics.’ *New Zealand Journal of Educational Studies*, Vol 56, No 2, pp.247-243. <https://doi.org/10.1007/s40841-021-00220-5>; Rivers, Jan and Abigail, Jill (2021) ‘Sex, gender and women’s rights’. *Policy Quarterly*, Vol 17, No 4, <https://doi.org/10.26686/pq.v17i4.7316>.; Bunkle, P. (2021) ‘The women’s health movement: Relevant as never before’, in *Not Dead Yet*, Klein, Renate and Hawthorne, Susan, (eds) Spinifex, , pp.243-252; Coney, S. (2021) ‘Never turning back: 50 years of feminism’ in *Not Dead Yet*, op. cit., pp131-138; Hyman, Prue (2021), *Strengthening feminism in Aotearoa/ New Zealand*. Klein et al, Ibid, pp.209-216.

<sup>13</sup> FOWL. Submissions on the Births, Deaths, Marriages and Relationships Amendment Bill. Members also made individual submissions to the Department of Statistics consultation on replacing ‘sex’ with ‘gender’ in the 2020 census.

<sup>14</sup> FOWL. Letter to Dr Shane Reti, Minister of Health, February 12, 2024.

<sup>15</sup> *North and South*, January 2024, published our group letter in support of Emeritus Professor Charlotte Paul’s article on puberty blockers. FOWL, ‘A welcome exposé’, *North and South*, January 2024, p 9; *The Waikato Times*, Thursday December 28, published Sue Middleton’s opinion piece, ‘Sex, gender and listening to each other’; Rivers, J. and Abigail, J. ‘Gender self-ID raises complex questions. It’s not transphobic to ask them’; <https://www.stuff.co.nz/opinion/300453493/gender-selfid-raises-complex-questions-its-not-transphobic-to-ask-them>; ‘The disturbing facts on child conversion therapy in New Zealand: Jan Rivers talks to Sean Plunket’ [https://www.youtube.com/watch?v=Eu1XU8\\_y0dI](https://www.youtube.com/watch?v=Eu1XU8_y0dI).

<sup>16</sup> See, for example, Paul, Charlotte (September 10, 2022), ‘Age of uncertainty’, *New Zealand Listener*, pp.28-31; Paul, Charlotte (December 2023) ‘A terrible trap’, *North and South*, <https://northandsouth.co.nz/2023/12/24/puberty-blockers-new-zealand/>

<sup>17</sup> Media Council. (2023). ‘Jan Rivers Against Stuff.’ Media Council. <https://www.mediacouncil.org.nz/rulings/jan-rivers-against-stuff-2930/>; Rivers, J. (2024, August 7). *The Spinoff’s Unedifying Approach to the Media Council Complaints Process*. <https://www.publicgood.org.nz/2024/05/25/the-spinoffs-unedifying-approach-to-the-media-council-complaints-process/>

### *1.2 Protected categories and the need for clear definitions*

We acknowledge the contributions to Aotearoa-New Zealand of gender non-conforming people, including those who identify as transsexuals, transgender or non-binary. Examples include Carmen Rupe, whose Balcony Cabaret helped launch the careers of experimental theatre groups such as Red Mole; and Georgina Beyer, the world's first transsexual MP and mayor. We condemn the abuse and negative discrimination described by transsexuals,<sup>18</sup> people who present and describe themselves as non-binary<sup>19</sup> or as one of the other rapidly multiplying identity categories within the 'transgender' constellation of terms. Accordingly, we support clarifying the legislative protections of people who do not conform to the bodily norms and/or the sociocultural stereotypes for their sex. However, such amendments to legislation and policy must not – and need not – be at the expense of biological women, whose rights, safety and freedoms are currently protected on grounds of 'sex.' And they need not, and should not, involve inserting the word 'gender', or the allied but disputed notion of 'gender identity,' into law. In this first section we explain how and why 'gender identity' theory collides with sex-based rights.

This review's terms of reference<sup>20</sup> state that 'Te Aka Matua o te Ture | Law Commission [henceforth LC] has been asked to review the protections in the Human Rights Act 1993 for people who are transgender or non-binary or who have an innate variation of sex characteristics.' Having reached a preliminary conclusion that change is necessary, the consultation documents offer us three options:

1. A new stand-alone ground (or grounds) that uses group descriptors to name the people being protected – for example, 'being transgender', 'being non-binary' or 'being intersex.'
2. Alternatively, there could a new stand-alone ground (or grounds) that provide symmetrical protection – protection that extends to everyone. The options we explore are 'gender', 'gender identity', 'gender expression' and 'sex characteristics.'
3. Instead of adding new stand-alone grounds, another way to extend symmetrical protection might be to clarify the scope of the ground of sex. (Issues Paper 53, 7.2, p 75).

This submission argues that option 3, 'to clarify the scope of the ground of sex', would be appropriate, but only in the context of a broader consensus and an open discussion being facilitated.

---

<sup>18</sup> For an example, see Klanostein, Sarah (2018) *The Trauma Cleaner: One woman's extraordinary life through death, decay and disaster*, St Martin's Press.

<sup>19</sup> Our reading indicates that abuse often features in the stories of those identifying as non-binary. For example, law student and activist Shaneel Lal describes being subjected to violent 'conversion practices' as a youth in Fiji: Lal, Shaneel (2023) *One of Them*, Allen and Unwin.

<sup>20</sup> Te Aka Matua/Law Commission (June 25, 2024) *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*, Terms of Reference, June 25, 2024.

This introductory section explains how and why inserting ‘gender’ and/or ‘identity’ language into law threatens the sex-based rights we currently enjoy.

The writers of the Issues 53 paper [henceforth LCI53] reviewed a wide range of material to inform themselves ‘about the concepts of sex and gender and the range of perspectives in the community about what they mean and how they interact’ (1.50, p, 11). While it is useful to canvas community understandings and usages of such words, they also have technical meanings in biomedical sciences, psychiatry, developmental psychology, sociology and related disciplines. The review did ‘not seek to resolve non-legal questions (for example the meaning of terms such as sex and gender) except to the extent necessary to carry out the review’ (1.51, p. 11). This is a huge oversight. Good laws – and the government, professional and institutional policies that flow from them – require clear, and in this case science-based, definitions. The review documents show no evidence of consultation with biomedical scientists who have specialised knowledge of the biology of sex.<sup>21</sup> They have not considered the views of the Royal Australian and New Zealand College of Psychiatrists, who have professional knowledge and understanding of people’s struggles with ‘identity’, including what they refer to as their ‘gender’.<sup>22</sup>

With respect to those referred to in the documents as ‘children who are transgender or non-binary,’ and several references to their access to ‘gender-affirming’ healthcare, there is no reference to the UK’s NHS-commissioned Cass Report – an international review of the use of experimental drugs to ‘transition’ troubled youth.<sup>23</sup> There is no mention of the emerging case law that in other jurisdictions has been interrogated to anticipate the downsides of implementing such a law or how resolution is being addressed when there has been evidence of overreach. Had they done so, they would have discovered that laws in Canada and Australia have criminalised, and mandated ‘re-education,’ for simply disbelieving in gender identity theory. The judgment in *Miller v College of Policing* said ‘There was not a shred of evidence that the Claimant was at risk of committing a

---

<sup>21</sup> We suggest Emeritus Professor David Gerrard of Otago University Medical School, former Olympic swimmer and consultant to the NZ Olympic team in Paris.

<sup>22</sup> <https://www.otago.ac.nz/healthsciences/expertise/profile?id=713>  
<https://www.ranzcp.org/clinical-guidelines-publications/clinical-guidelines-publications-library/role-of-psychiatrists-working-with-trans-gender-diverse-people#:~:text=The%20RANZCP%20opposes%20conversion%20therapy,Psychotherapy%20is%20not%20conversion%20therapy.>

<sup>23</sup> Cass, Hilary (April 2024) *The Cass Review: Independent review of gender identity services for children and young people: Final Report*. Downloaded from <https://cass.independent-review.uk/home/publications/final-report/>. Counting Ourselves, an online self-selected survey in Aotearoa, suggested that young New Zealanders identifying as ‘trans’ had a similar population profile. Veale, J., Byre, J., Tan, K., et al. (2019) *The Health and Wellbeing of Transgender and Non-binary People in Aotearoa New Zealand*. University of Waikato.



criminal offence. ... In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society.’<sup>24</sup>

Accordingly, we do not agree that the Issues Paper 53 has interrogated or resolved the concepts of ‘sex,’ ‘gender’ and ‘identity’ to ‘the extent necessary’ to provide a sound basis for amendments to our Human Rights Act. In contrast to other LC issues papers, no agreed glossary of terms was created. This opening section of our submission considers the histories, travels, and current divisions and antagonisms concerning the words ‘sex’, ‘gender’ and ‘gender identity’. If Human Rights law is to stand on secure foundations, strong, evidence-based definitions of the categories subject to legal protection are essential.

The Human Rights Act (1993) inscribes into New Zealand law the sex-based protections secured for women by the United Nations’ Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). However, Issues Paper 53 only references it in relation to transwomen (for whom there is no requirement to report). A recent position paper by Reem Alsalem, the UN’s Special Rapporteur on violence against women and girls, reiterated that under CEDAW ‘sex and sex-based discrimination is a biological category’.<sup>25</sup> CEDAW also helps women guard against the dangers of being confined by the harmful effects of the expectations of gender-based stereotypes. Gender identities that align behavioural and presentational stereotypes with sex stereotypes work directly against this and are incompatible with them. Alsalem adds that the CEDAW Committee had also defined ‘gender’ to mean: ‘socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning *for these biological differences* resulting in hierarchical relationships between women and men’ [emphasis added].<sup>26</sup> Female sex-based legal rights must not be obfuscated or undermined by the insertion into law of ‘gender’ language: in Alsalem’s words, ‘international law does not permit any derogation to the prohibition of discrimination against women based on sex’.<sup>27</sup>

As discussed later, we understand that gender dysphoric people may feel ‘as if’ they are in the wrong body. However, we do not need the disputed notion of ‘gender identity’ to protect their legal

---

<sup>24</sup> Ashton, M. (2022, September 21). ‘Nurse faces trial in BC for saying biological sex is real’. *The Post Millennial*. <https://thepostmillennial.com/nurse-faces-trial-in-bc-for-saying-biological-sex-is-real>  
 Miller -v- College of Policing. (Courts and Tribunals Judiciary 14 February 2020); <https://www.judiciary.uk/wp-content/uploads/2022/07/miller-v-college-of-police-judgment-1.pdf>; Sainsbury, M. (2024, April 22) ‘In Australia, women-only app becomes latest front in war over trans rights’. *Al Jazeera*. <https://www.aljazeera.com/news/2024/4/22/in-australia-a-women-only-app-is-latest-front-in-the-war-over-trans-rights>

<sup>25</sup> Alsalem, Reem (April 4, 2024) *Position Paper on the Definition of “Woman” in International Rights Treaties, in Particular the CEDAW*. Attached as an appendix to this submission.

<sup>26</sup> CEDAW Committee, Recommendation No 28. Cited in Alsalem, *ibid*, p.2.

<sup>27</sup> Alsalem, *ibid*, p.2.

rights to non-conformity and self-expression. We suggest that those who present and describe themselves with categories such as transsexual, transgender and non-binary can be included in the protected category of ‘sex’ in ways that do not collide with the rights of women (adult human females). For example, discrimination on grounds of sex also applies to men (biological males). A man in a dress is still a male but violates the social norms (or stereotypes) for *his sex*. A Butch lesbian woman does not conform to the social stereotypes of ‘femininity’ (she violates the norms for *her sex*.) Bodily presentation and behavioural transgressions are observable, so could be covered by sex. This would also serve to protect gender non-conformity in people who are not disassociated from their bodies – an important consideration given the social contagion which may fuel the decision to transition.<sup>28</sup> Males dressing and describing themselves as a woman would have protection from discrimination when for example, renting a house, borrowing money or buying a car. This would not challenge the biological basis of women’s rights to single-sex spaces and services for reasons such as fair competition (in sport), safety (in sports, refuges or prisons), or privacy (including in spaces where women undress). Section 3 of this submission will address the need for continuing protection of such female-only services and spaces.

Is our recommendation to ‘clarify the scope of the ground of sex’ in this way compatible with the LCI53’s suggestion of ‘gender expression,’ which ‘refers to a person’s presentation of *their gender* and can include what they wear and how they speak’ (LCI53, S7.40, p.81, emphasis ours)? We considered this option. However, the LCI53’s use of the phrase ‘their gender’ rests on the writers’ unexamined belief in ‘gender identity theory’ – a disputed psychological belief system that holds that every individual has a gender identity that either accords with or differs from their biological sex.<sup>29</sup> Accordingly, we do not agree with inserting the phrase ‘gender expression.’ ‘Non-conformity to sex stereotypes’ would achieve the same protection without muddying the legal category of sex with the insertion of ‘identity’ categories.

Here, and throughout, Issues Paper 53 largely encodes the terminology and perspectives of transgender lobby groups<sup>30</sup> without subjecting these to intellectual or scientific scrutiny. This

---

<sup>28</sup> Sapir, L., Littman, L., & Biggs, M. (2024). ‘The U.S. Transgender Survey of 2015 Supports Rapid-Onset Gender Dysphoria: Revisiting the “Age of Realization and Disclosure of Gender Identity Among Transgender Adults”’. *Archives of Sexual Behavior*, 53(3), pp.863–868. <https://doi.org/10.1007/s10508-023-02754->

<sup>29</sup> LGB Alliance. (2023, January 10). *Summary of Formal Complaint about Victor Madrigal-Borloz*. <https://lgballiance.org.uk/wp-content/uploads/2023/01/Summary-of-Formal-Complaint-about-Victor-Madrigal-Borloz.pdf>; Madrigal-Borloz, V., & Identity, U. H. R. C. I. E. on P. against V. and D. based on S. O. and G. (2021). *The Law of Inclusion: Report of the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity*, Victor Madrigal-Borloz. <https://digitallibrary.un.org/record/3931132>

<sup>30</sup> As discussed later, the report uses definitions from Gender Minorities Aotearoa, Trans 101: A glossary of trans words and how to use them, <https://genderminorities.com/glossary-transgender/>.

submission aims to restore some balance to the conversation. It is important to begin with clear, evidence-based, working definitions of ‘sex’, ‘gender’ and ‘identity’.

### *1.3 Defining sex*

Referring to proposed reforms of the UK’s Equality Act, Baroness Kishwer Falkner, chair of the UK’s Equality and Human Rights Commission, recently explained:<sup>31</sup> ‘If sex is defined as biological sex for the purposes of the Equality Act this would bring greater legal clarity.’ She continued:

Doing so would not remove existing protections for trans people; it would, rightly, remain unlawful to discriminate against anyone on the basis of gender reassignment when it came to housing, employment or provision of goods and services. It would not stop groups offering trans-inclusive services and spaces. But clarification would strengthen the existing provision in the Equality Act to provide single-sex spaces such as in prisons and rape crisis centres, and allow them to lawfully exclude even those who have a GRC [Gender Recognition Certificate] when there is a legitimate reason for doing so. That might include protecting the dignity of biological women who want to access female-only intimate care.<sup>32</sup>

A science-based definition of sex is essential if we are to defend our current rights as women – the female sex.<sup>33</sup> We need it to secure our female-only spaces (including spaces where women undress); services (health, counselling, intimate care, refuges) and activities (sports). A biological definition of sex is also needed to defend sexual orientation as a protected category. The rights of lesbians and gay men to be ‘same-sex’ (*homo-sexually*) attracted are threatened when sex becomes confused with gender. Reem Alsalem wrote: ‘Building on the implicit understanding that the word “women” refers to biological females, the CEDAW Committee’s reference to lesbian women can only be understood to mean biological females that are attracted to biological females.’<sup>34</sup> The assertions by some transwomen that they are lesbians have resulted in the harassment of lesbians as ‘transphobic’<sup>35</sup> and their exclusion from ‘Rainbow’ events such as Pride that brand them as TERFs and transphobic.<sup>36</sup>

---

<sup>31</sup> *New Statesman*, 7-13 June 2024.

<sup>32</sup> *New Statesman*, *ibid.*

<sup>33</sup> The emerging tensions between ‘gender’ rights as in Britain’s Gender Recognition Act and sex-based rights in their Equality Act are discussed in Foran, ‘Defining sex in law.’ *Law Quarterly Review*, posted March 28, 2022. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4740870](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4740870)

<sup>34</sup> Alsalem, Reem (April 4, 2024), *Position Paper on the Definition of “Woman” in International Rights Treaties, in Particular the CEDAW*. Attached as an appendix to this submission.

<sup>35</sup> Stock, Kathleen (2021) *Material Girls: Why reality matters for feminism*. Fleet.

<sup>36</sup> <https://www.lava.nz/our-case>

Biological definitions of sex centre on mammalian species' (including human) reproductive capacity.<sup>37</sup> Sex is binary because the existence of rare intersex and bodily characteristics do not constitute a 'third sex'. Evolutionary biologist Colin Wright explains,

When biologists claim that 'sex is binary', they mean something straightforward: there are only two sexes. This statement is true because an individual's sex is defined by the type of gamete (sperm or ova) their primary reproductive organs (ie gonads) are organised, through development, to produce. Males have primary reproductive organs organised around the production of sperm; females ova. Because there is no third gamete type, there are only two sexes that a person can be. Sex is therefore binary.<sup>38</sup>

Theorised at the level of a species, this definition does not imply that every individual body is capable of reproduction – variations in sexual development, including reproductive capacity, can occur in utero, as a result of medical conditions, or of medical or surgical interventions. As Wright explains, 'the binary nature of sex is compatible with sex ambiguity because ambiguity itself is not a third sex'.<sup>39</sup>

More broadly, the use of 'sex' to describe a person's body refers to the dimorphic (binary) division of genes, gonads and genitals that defines material bodies as female or male.<sup>40</sup> The female body has XX chromosomes; ovaries that produce few large gametes; and a uterus, fallopian tubes, vagina, labia minora and majora and clitoris. The male body has XY chromosomes; testes that produce many small gametes, prostate, seminal vesicles, scrotum and penis. Academic neuroscientist Daphna Joel describes this as the 3G-sex model, explaining that there is a 'high degree of consistency' between the form of a person's body at all three levels of genes, gonads and genitals. These are *primary* sexual characteristics. In contrast, in *secondary* sexual characteristics there is considerable overlap between the sexes created by variation in hormone levels, male breasts (gynecomastia) and male pattern hair growth in females.<sup>41</sup> These variations do not constitute a disorder any more than does sex variation in average height.

---

<sup>37</sup> For example, Richard Dawkins, <https://www.newstatesman.com/ideas/2023/07/biological-sex-binary-debate-richard-dawkins>. For an overview, see Soh, Deborah (2020) *The End of Gender: Debunking the myths about sex and gender in our society*. Simon and Shuster.

<sup>38</sup> Wright, Colin (March 20, 2023) 'Understanding the sex binary'. *City Journal* <https://www.city-journal.org/article/understanding-the-sex-binary>.

<sup>39</sup> Wright, *ibid*.

<sup>40</sup> Joel, Daphna (2012) 'Genetic-gonadal-genitals sex (3G-sex) and the misconception of brain and gender, or, why 3G-males and 3G-females have intersex brain and intersex gender'. In *Biol Sex Differ* 3 (1), p. 27. DOI: 10.1186/2042-6410-3-27. <https://bsd.biomedcentral.com/articles/10.1186/2042-6410-3-27>.

<sup>41</sup> Joel, *ibid*.

A global survey of medical literature<sup>42</sup> estimated the incidence of intersexuality (formerly known as ‘true hermaphroditism’) – people with both ovarian and testicular tissue – to be 0.0117% of live births. This same survey calculated that the proportion of the population with DSDs – Differences (previously known as Disorders) of Sexual Development – averaged around 1.7%.<sup>43</sup> This latter group had unusual genitalia or internal sexual organs, chromosomal, hormonal or other ‘deviations’ from the ‘Platonic ideal’ of the male or female body. The protected category of ‘sex’ in the Human Rights Act [henceforth HRA] already covers this group. We are happy with the LCI53’s use of the phrase ‘innate variation of sex characteristics’. We condemn the abuse (including non-consensual childhood surgical and medical interventions) that intersex people and others ‘with innate variations of sexual characteristics’ have experienced.<sup>44</sup> Aware that some people born with such variations prefer the term ‘intersex’, and that most people with DSDs are biologically male or female, and describe themselves as such, we suggest that a clearer definition might be ‘people with intersex or other variations of sex characteristics’.

There are a group of rare disorders of sexual development [DSDs] that result in a very small percentage of persons with bodies that have ‘variations of [primary] sexual characteristics’.<sup>45</sup> The impact of a DSD on a person ranges from minor divergence from appearance norms to suffering, pain and/or failure of function. At the extreme this is life-threatening<sup>46</sup> and highlights the fact that these disorders are not evidence of a benign sex spectrum or continuum. The protected category or ‘disability’ is relevant to this small group. This point is reinforced by increasing awareness from medical professionals and transmen of the negative impact of dosing female bodies with the hormone testosterone. If testosterone levels similar to those of males are maintained, impacts may include atrophy of the internal reproductive organs, painful cramps on orgasm and a high likelihood of incontinence.<sup>47</sup>

---

<sup>42</sup> Blackless, M., Charuvastra, A., Derryk, A., et al. (2000) ‘How sexually dimorphic are we? Review and synthesis’. *American Journal of Human Biology*, 12, pp.151–166

<sup>43</sup> Blackless et al, *ibid*.

<sup>44</sup> Germon, J. (2010) *Gender: A genealogy of an idea*. Palgrave Macmillan; Gill-Peterson, J. (2018) *Histories of the Transgender Child*. University of Minnesota Press.

<sup>45</sup> Estimates of prevalence vary from 0.018% to 1-2% depending on definitions, with disagreement about what is a VSC/Intersex/DSD. Sax, Leonard (2002) ‘How common is intersex? a response to Anne Fausto-Sterling’. *Journal of Sex Research* 39 (3), pp.174–178. DOI: 10.1080/00224490209552139. Warne, Garry L., Mann, Annabelle (2011) ‘Ethical and legal aspects of management for disorders of sex development’. *Journal of Paediatrics and Child Health* 47 (9), pp.661–663. DOI: 10.1111/j.1440-1754.2011.02164.x.

<sup>46</sup> Steers, Denise Marion (2024) *Gender Mender, Bender or Defender: Understanding decision making in Aotearoa/New Zealand for people born with a variation in sex characteristics*. PhD. Dunedin: University of Otago. Available online at <https://ourarchive.otago.ac.nz/esploro/outputs/doctoral/Gender-mender-bender-or-defender-Understanding/9926480198201891>, checked on 8/4/2024. E.g. p.326 and throughout.

<sup>47</sup> Hilary Cass warned “It is much easier to masculinise a woman than to feminise a man—and [testosterone] really acts very quickly”. <https://www.genderclinicnews.com/p/think-hard>  
<https://unherd.com/newsroom/why-is-the-guardian-ignoring-the-risks-of-testosterone-on-trans-people/>  
<https://www.theguardian.com/society/article/2024/jul/05/prescribing-of-testosterone-for-middle-aged-women-out-of-control> ; Miller, Elaine. ‘Episode 175 – What really happens to a female body on testosterone?’ In

The LCI53's confusion of sex, gender and identity arises from its inadequate scoping of expertise while trying to reconcile the needs of two distinct groups of people: those with physical or medical variations of sexual development and those who hold a belief that they have a gender which differs from their birth sex. The conflation appears to be a politically expedient tool – WPATH SOC 8 includes transgender people with no endorsement from intersex groups, for example.<sup>48</sup> The circumstances and the needs of the two groups are quite different. But rather than engaging with the science, the LCI53 document reduces scientific categories of 'binary sex' to a belief held by gender critical feminists:

2.56 Some core beliefs that we understand are held by many people who are gender critical are that sex is binary, innate and immutable and that the rights of cisgender<sup>49</sup> women are being diluted by a focus in public policy and social discourse on gender identity (p.25).

By avoiding engagement with this issue, the Issues Paper rips through the tightly woven fabric of women's sex-based legal rights, which we thought had been stitched into New Zealand and international law since the later decades of the twentieth century.

#### 1.4. Defining gender

LCI53 offers a twofold definition of 'gender' (2.9 and 2.10, p. 16). In its sociological sense, gender refers to social and cultural constructs – the roles, bodily presentation and personality types a society or culture expects or requires of its males (men) and females (women). With respect to tikanga, we are aware of traditional cultural practices, including marae protocols,<sup>50</sup> 'where men and women have different roles or where sex is significant in particular' (Summary, S37, p.8). We agree that 'state law should not intervene on these questions of tikanga'. (Summary, S44, p. 9). Some cultures offer what anthropologists refer to as a 'third gender role'. This legitimises a space for biological males and females to present and live 'as if' they were the opposite sex: the faa'afafine of Samoa<sup>51</sup> and the hijra of India are examples.<sup>52</sup> Traditionally, they did not claim to 'be' actual females, but wanted – and

---

O'Malley, Stella and Ayad, Sasha. *Gender: A Wider Lens Podcast*. Genspect.

<https://genspect.org/resources/gender-a-wider-lens/>

<sup>48</sup> <https://www.wpath.org/soc8>

<sup>49</sup> We discuss our concerns about the use of 'cisgender' later.

<sup>50</sup> Pere, R. (1988) 'Te wheke: Whaia te maramatanga me te aroha'. In Middleton, S (ed) *Women and Education in Aotearoa, Vol 1*. Port Nicholson Press, pp. 6-19.

<sup>51</sup> Natural History Museum, Los Angeles County. *Beyond Gender: Indigenous Perspectives, Fa'afafine and Fa'afatama*. <https://nhm.org/stories/beyond-gender-indigenous-perspectives-faafafine-and-faafatama>;

<sup>52</sup> Harvard Divinity School, Religion and Public Life. *The Third Gender and Hijras*.

<https://rpl.hds.harvard.edu/religion-context/case-studies/gender/third-gender-and-hijras#:~:text=While%20the%20third%20gender%20includes,to%20Hindu%20goddess%20Bahuchara%20Mat>  
a.

were enabled – to live, dress and perform artistically or work ‘like women.’ We are aware that many of those who occupy traditional ‘third gender roles’ reject western/ colonial identity labels such as ‘transgender’. As we explain later (Section 2.2 ), the use of ‘gender’ in a psychological (personal or individual) sense has only recently moved from its original medical settings into wider public usage. In this sense, gender refers to an individual’s ‘personal identity’ as a man, woman or neither.

The consultation documents distinguish between symmetrical and asymmetrical categories for protection. Asymmetrical protections ‘single out for protection a group that has experienced a history of disadvantage, discrimination or marginalisation’. (Summary, clause 54, p.10). Symmetrical protections, on the other hand, single out characteristics held by everyone. To illustrate this point, the summary document and the full Issues53 papers give different examples. The summary document correctly claims that ‘everyone has a sex, race and sexual orientation’ (clause 55, p. 10). The Issues Paper 53 concurs that ‘everyone has a sex’ and adds the further category of ‘sex characteristics’, which would align with biological definitions. However, the document also asserts that everyone has a ‘gender identity’ and ‘gender expression’ (clause 7.53, p 84). Gender identity is not a universal human characteristic but part of a belief system (or ideology), so cannot stand as a protected legal category. Similarly, ‘gender expression’ implies a lexicon of ‘gender identity’ categories, sometimes reminiscent of the regressive stereotypes against which feminists fought so hard in the 1970s-80s.

### *1.5 Gender categories as external and internal identities.*

In the social sciences, ‘identity’ is sometimes used in two senses: internal and external.<sup>53</sup> An ‘external identity’ is a category imposed on a person, or suggested to them by ‘others’. Such categories may be embedded in the policies and documents of administrative and government authorities, including legislation.<sup>54</sup> The diagnostic vocabularies of medical doctors, psychotherapists, teachers and other professionals are examples of ‘external identities’. ‘Gender dysphoria’ and ‘autism’ are examples. As poststructuralist theorists such as Judith Butler remind us,<sup>55</sup> such language is ‘productive’. The LCI53 document claims that ‘everyone has a gender identity’ (7.53, p 84), and thus creates categories based on the idea of the normalcy of body dissociation. Embedding ‘gender identity’ in law, regulations, and/or institutional policy ‘produces’ it in individuals, as in census questions, or in organisational and employment policies requiring students and/or employees to ‘identify their

---

<sup>53</sup> Bernstein, B. (2000) *Pedagogy, Symbolic Control and Identity: Theory, research, critique*. Lanham, MA: Rowman and Littlefield; For an example of the application of this dualism, see Middleton, Sue (2008) ‘Research assessment as a pedagogical device: Bernstein, professional identity and education in New Zealand’. *British Journal of Sociology of Education*, Vol 29, No 2, pp.125-136.

<sup>54</sup> Beck, J. and Young, M.F.D. (2005) The assault on the professions and the restructuring of academic and professional identities: A Bernsteinian analysis. *British Journal of Sociology of Education* 26, no. 2: pp.183–97.

<sup>55</sup> Butler, Judith (1993) *Bodies that Matter: On the discursive limits of ‘sex’*. Routledge; Butler, Judith (1986) ‘Sex and gender in Simone de Beauvoir’s *Second Sex*’. *Yale French Studies*, 72, pp.35–49.

pronouns'. In Foucault's terms, as 'discourse' – language embedded in apparatuses of power – language produces its own object.<sup>56</sup>

We object to the LCI53's adoption of the phrase 'people who *are* transgender' or '*are* non-binary'. These imply that personal identities are fixed, even in-born. The LCI53 does not engage with this issue, referring to it only as a belief of gender critical feminists, who 'consider gender identity to be a matter of ideology or belief rather than something innate' (7.39, p.81). The psychological concept of 'identity' as individual and personal has been evolving at least since the mid twentieth century, when Erik Erikson and his team began their longitudinal studies of the human life cycle.<sup>57</sup> Developmental psychologists see 'identity formation' as a continuous and life-long process and as the key project of adolescence. People identifying themselves as 'transsexual' or 'transgender' describe feelings of disassociation from their biological bodies, sometimes claiming that their sex was (wrongly) 'assigned' at birth.<sup>58</sup> Children experiencing gender incongruence often describe feeling as if they had been 'born in the wrong body'.<sup>59</sup> While accepting that people identified, or identifying, as transsexual or transgender or non-binary may feel this way, gender critical feminists such as British philosopher Kathleen Stock reject the assertion that *everyone* 'has' a gender identity. She writes, 'Most non-trans people don't feel this strongly either way, so don't have gender identities at all: most people don't have a strong psychological identification with either their own sex or with the opposite one, or with androgyny.'<sup>60</sup> The label 'cisgender' is an external identity – few people, if any, would experience feelings of 'cis-ness' because most of us do not dissociate our sexed bodies from our lived sense of self. We *are* our bodies.

Identity categories such as 'transgender' and 'gender identity' are too fluid and subjective to work as legally protected categories. To illustrate, we cite American historian, Susan Stryker (who identifies as a transsexual woman):<sup>61</sup>

Transgender is a word that has come into widespread use only in the past couple of decades, and its meanings are still under construction. I use it ... to refer to people who move away from the gender they were assigned at birth, people who cross over (trans-) the boundaries constructed by their culture to define and contain that gender. Some people move away from

---

<sup>56</sup> Foucault, Michel (1977) *Discipline and Punish*. Harmondsworth: Penguin.

<sup>57</sup> Erikson, Erik H. (1959) *Identity and the Life Cycle*. New York and London: Norton.

<sup>58</sup> We discuss this use of 'assigned' later.

<sup>59</sup> Cass, Hilary (April 2024) *The Cass Review: Independent Review of Gender Identity Services for Children and Young People: Final Report*. Downloaded from <https://cass.independent-review.uk/home/publications/final-report/> Counting Ourselves, an online self-selected survey in Aotearoa, suggested that young New Zealanders identifying as 'trans' had a similar population profile. Veale, J., Byre, J., Tan, K., et al. (2019) *The Health and Wellbeing of Transgender and Non-binary People in Aotearoa New Zealand*. University of Waikato.

<sup>60</sup> Stock, Kathleen (2021), *Material Girls: Why reality matters for Feminism*, Fleet, p120.

<sup>61</sup> Fireside with Blair Hodges: 'Transitions, with Susan Stryker'. <https://www.firesidepod.org/episodes/stryker>.



their birth-assigned gender because they feel strongly that they properly belong to another gender through which it would be better for them to live; others want to strike out toward some new location, some space not yet clearly described or concretely occupied; still others simply feel the need to challenge the conventional expectations bound up with the gender that was initially put upon them. In any case, it is the movement across a socially imposed boundary away from an unchosen starting place, rather than any particular destination...<sup>62</sup>

Note that Stryker refers to ‘gender’ (not sex) ‘assigned’ at birth. In Section 2 of this submission, we explain the senses in which ‘gender’ may reasonably be described as assigned. But, with the very rare exceptions of intersexed or anatomically ambiguous infant bodies, ‘sex’ is not ‘assigned.’ It is ‘observed’, often in utero, and recorded at birth.<sup>63</sup> For legal clarity it is essential to unravel such confusions.

## 2. Gender Wars: Disputed Ground

Trans rights advocacy groups often conflate the terms ‘sex’, ‘gender’ and ‘gender identity’. To illustrate, we quote Gender Minorities Aotearoa’s [GMA’s] definition of binary sex:

A scientifically incorrect theory in which sex, gender, or both are viewed as consisting solely of two categories, termed male and female, with two sets of typical matching sex characteristics. The gender/sex binary assumes that sex and/or gender are unchangeable, that male and female are inherently separate, and asserts that other possibilities are non-existent, inferior, disordered, or dangerous.<sup>64</sup>

By interchanging and confusing sex and gender, the writers conclude, or at least imply, that it is possible to change sex. In their terms, this might amount to no more than rejecting the stereotyped bodily presentations, occupations and interests expected or required of females or males in a particular historical and cultural setting. Previous generations of feminists dealt with this sense of alienation from ‘femininity’ and the spectre of adult womanhood by rebelling against the conventions and limitations of the ‘woman’s role’ that so many of our mothers were confined to.<sup>65</sup>

---

<sup>62</sup> Stryker, Susan (2017) *Transgender History*. (Kindle edition, second edition, 2017, Location 118).

<sup>63</sup> Wright, Colin (March 20, 2023) ‘Understanding the sex binary’. *City Journal* <https://www.city-journal.org/article/understanding-the-sex-binary>

<sup>64</sup> Gender Minorities Aotearoa (2023) Trans 101: A glossary of trans words and how to use them. <https://genderminorities.com/glossary-transgender/>

<sup>65</sup> See Klein, Renate and Hawthorne, Susan (eds) (2021) *Not Dead Yet: Feminism, passion and women’s liberation*. Spinifex. Three FOWL members contributed to this volume.

As we argued in Section 1.2, biological definitions of sex as binary allow for variations within (DSDs) and a tiny overlap between (intersex) the (binary) male and female. However, GMA assert: ‘Sex is not fixed or immutable, but a socially constructed system for assignment and classification of people, typically as male or female.’<sup>66</sup> Because this confusion is so prevalent, and even surfaces in the LCI53 (which sees sex as ‘assigned’ at birth), it is important to interrogate beliefs and propaganda that asserts that sex is little more than a social construction and explain why this oversimplification of medical history is not only inadequate but dangerous.

### *2.1 Transsexuals and the sex binary*

Transgender historian Susan Stryker writes: ‘Generally speaking, gender is considered to be cultural, and sex, biological. It’s usually a safe bet to use the words man and woman to refer to gender just as male and female are used to refer to sex.’<sup>67</sup> The mantra ‘transwomen are women’ is based on this assertion that ‘woman’ is a ‘gender identity’, not a matter of sex (ie. female embodied lived reality). Gender critical feminists reject this. Women are adult human females and it is our sex, not ‘felt identity’ that is, and must continue to be, protected in international as well as New Zealand law.

Many of those who describe themselves as ‘transsexual’ accept the sex binary, but with the help of medicines and surgeries configure their bodies and live their lives ‘as if’ they were the opposite sex, i.e. on the ‘other side’ of the binary. Citing Gender Minorities Aotearoa,<sup>68</sup> the LCI53 document dismisses transsexuals as follows: ‘We understand that many people consider this term to be outdated’ (2.25, p. 19). The LC has overlooked the personal stories and ethnographic research accounts of transsexuals who just want to live quietly ‘as if’ they were the opposite sex (on the ‘other side’ of the sex binary) without getting involved in today’s vitriolic gender politics.<sup>69</sup> Transsexual women have sometimes expressed support for gender critical and other biological women. For example, British science teacher Debbie Hayton has written:

The fury is unleashed because when women are defined by their biology, trans women are excluded from womanhood. To trans women, desperate to be validated as actual women, this is an existential rebuff. While it might be tempting to look the other way, for me this is personal. I

---

<sup>66</sup> Gender Minorities Aotearoa (2023) Trans 101: A glossary of trans words and how to use them. <https://genderminorities.com/glossary-transgender/>

<sup>67</sup> Stryker, Susan (2017) *Transgender History* (Kindle edition, second edition, 2017, Location 308).

<sup>68</sup> See Gender Minorities Aotearoa (2023) Trans 101 Glossary: Transgender terms and how to use them. Wellington.

<sup>69</sup> Bates, D. (2001). *Someone Else's Gender? Locating the transsexual narrative in the gendered landscape*. Doctoral thesis, University of Waikato. The University of Waikato Research Commons; Roen, K. (1998) *Constructing Transsexuality: Discursive manoeuvres through psycho-medical, transgender and queer texts*. Doctoral thesis, University of Canterbury. University of Canterbury Research Repository. <https://ir.canterbury.ac.nz/handle/10092/4636>.

am a trans woman, so it is my identity – supposedly – that is being denied. However, I am also a high school science teacher and I know magical thinking when I see it. *Trans women are male – I certainly am as I fathered three children – while women are female.* Male people are not female people and therefore trans women are not women.<sup>70</sup>[Emphasis added]

Similarly, Georgina Beyer said in an interview, ‘I have always called myself a transexual who was born a biological male. Some now want to call themselves trans women and deny they were born a biological male. Sure, be whatever you want to be but don’t deny reality.’<sup>71</sup>

## 2.2. *The origins and trajectories of ‘gender’ and ‘gender identity’*

The current sociological, psychological and activist appropriations of the word ‘gender’ originated in mid-twentieth century medical settings. In the aftermath of World War Two, western government policies were focussed on the fair distribution of opportunities and the protection and promotion of democracy. Infused with ‘progressive’ or ‘child centred’ theories, government policies on ‘the family’ and on schooling were oriented to produce the ‘democratic citizen’.<sup>72</sup> Although girls and boys were viewed as equally intelligent and shared a common core of school subjects, there was sex differentiation in the elective packages provided to prepare the young for the ‘sex-roles’ (homemakers or breadwinners) thought to be based on ‘natural’ sex differences – more sciences and machine-work for the boys; more humanities and domestic science for the girls.<sup>73</sup> The concept of ‘gender’ – in either its sociological (societal) or its psychological (personal) sense – had not yet come into common use.

In postwar educational settings, the word ‘gender’ was used in foreign language grammar lessons: French nouns, both animate and inanimate, were ‘gendered’ as masculine or feminine. By the late 1970s, when the post-World War Two baby boom generation were entering academia in increasing numbers, ‘gender’ had become a sociological and feminist concept.<sup>74</sup> In academic, as in grassroots settings, liberal feminists sought economic, political, professional and intellectual equality

---

<sup>70</sup> Hayton, Debbie (2020, July 29). ‘The word ‘woman’ is already taken’. *Publico*. Retrieved August 28, 2021 from <https://debbiehayton.com/2020/07/29/the-word-woman-is-already-taken>. Hayton is referring to JK Rowling’s essay (2020, June 10). ‘J.K Rowling speaks out about her reasons for speaking out about sex and gender issues.’ <https://www.jkrowling.com/opinions/j-k-rowling-writes-about-her-reasons-for-speaking-out-on-sex-and-gender-issues>.

<sup>71</sup> Georgina Beyer, interview in *Redline*, Nov 10, 2019. <https://rdln.wordpress.com/2019/11/10/georgina-beyer-we-need-to-be-able-to-talk-without-being-offended/>.

<sup>72</sup> Middleton, S. (2013) ‘Clare Soper’s Hat’: New education fellowship correspondence between Bloomsbury and New Zealand, 1928-1946.’ *History of Education* (UK), 42(1) 92-114. First published online June 27 2012. <http://dx.doi.org/10.1080/0046760X.2012.678889>.

<sup>73</sup> Middleton, S. (1986) ‘Workers and homemakers: Contradictions in the education of the New Zealand ‘post-war woman’’. *New Zealand Journal of Educational Studies*, 21, 13–28.

<sup>74</sup> Oakley, A (1972), *Sex, gender and society*. London: Temple Smith; Jaggar, Alison M and Struhl, Paula Rosenberg (eds) (1978), *Feminist Frameworks; Alternative theoretical accounts of the relations between women and men*. McGraw Hill.

with men. Radical feminists studied how women as a ‘sex-class’ were dominated by men as a sex-class. Socialist feminists researched what today would be termed the ‘intersection’ between socio-economic class and patriarchal relations under capitalism. Māori women critiqued these and wrote from ‘mana wāhine’ perspectives.<sup>75</sup> In the social sciences, ‘gender’ was often assumed to be a feminist invention. It distinguished between (immutable) bodily ‘sex’ and the expectations a society imposed on its men (i.e. males) and women (females). Unlike ‘sex’, ‘gender’ was changeable. Critiquing and overthrowing ‘gender’ was a feminist objective. In today’s terms, second wave feminism was, and remains, ‘gender critical’.

At that time, few would have heard ‘gender’ described in psychological terms, as an aspect of ‘personal identity’. The word flowed from linguistics into feminism via ‘biomedical sciences.’<sup>76</sup> In the 1950s, ‘gender’ had been imported into medical terminology by New Zealand-born, Harvard-educated, Dr John Money. Based at Johns Hopkins University in Baltimore, his team treated over sixty genitally non-conforming (known then as ‘hermaphroditic’) patients, mainly children. The LCI53 writers cite Money’s work in the medical reconfiguration of infant bodies ‘with innate variations of sex characteristics’ (LCI53 3.52, p. 38):

During the second half of the twentieth century, the dominant approach to infants born with a variation of sex characteristics was surgical correction. This approach was heavily influenced by the work of psychologist John Money, who thought that gender was entirely a social construct. Money thought a child could be nurtured into a gender assigned to them by doctors so long as their genitals were altered to conform to that gender.

Although partly right, this statement confuses sex with gender. The surgery was intended to ‘normalise’ an ambiguous infant body to make it conform to the templates of biological *sex*. But the statement that Money saw gender as a ‘social construct’ is correct. In fact, Money was largely responsible for introducing gender into the vocabularies of medicine and psychology.

---

<sup>75</sup> Ngahuia te Awekotuku, Mira Szazy, Ripeka Evans, Donna Awatere and others wrote for *Broadsheet* magazine. See for example <https://teara.govt.nz/en/object/42351/broadsheet-october-1982> For a useful research project, see Hayes, Kimberley (2013), *Race Relations in New Zealand Through an Analysis of Broadsheet Magazine 1972-1989*. History 480 dissertation, University of Canterbury, <https://ir.canterbury.ac.nz/server/api/core/bitstreams/fb54f2e5-0686-4721-a7c1-2ecdf1271ec9/content>. For a vivid account of being Māori, a lesbian and a feminist see Te Awekotuku, Ngahuia (2024) *Wahine Toa: a story of bravery*. Harper Collins.

<sup>76</sup> Cortez, M., Gaudenzi, P. and Maksud, I. (2019) ‘Gender: Pathways and dialogues between feminist and biomedical studies from the 1950s to 1970s’. *Physis*. <https://doi.org/10.1590/s0103-73312019290103>

Because the LCI53 repeatedly confuses sex and gender, and because such confusion threatens to muddy the protected category of sex in the Human Rights Act, it is important to trace the origins and trajectories of these terms and to challenge the LCI53's repeated statements that sex is 'assigned' at birth. Sex is 'assigned' only in the case of intersex bodies, which have historically been subjected to non-consented childhood surgical and medical interventions.

### 2.3 Sex and gender: Assigned or observed?

In the post-World War Two western world, there was little tolerance for bodily deviation from the male-female templates. Non-conforming infant bodies were often surgically reconfigured. This was consistent with a wider political and social-scientific conservatism across the western world, including New Zealand.<sup>77</sup> At Harvard, Money had been taught by Talcott Parsons, a 'founding father' of functionalist sociology.<sup>78</sup> Functionalists conceptualised a society as analogous with a human body: like bodily organs, social institutions (the male-headed 'nuclear family,' the school and so on) must 'function' harmoniously to ensure social cohesion. Together, family and school 'socialised' boys and girls to perform their allocated 'sex roles.' 'Deviant' behaviours – including 'juvenile delinquency' and homosexuality – might be 'corrected' with behavioural psychology, aversion therapy or even electroconvulsive shock treatment.<sup>79</sup> As Jemima Repo explains, ideas of behavioural conditioning, socialisation, and social order were 'central to the biomedical invention of gender'.<sup>80</sup> Gender provided a rationale through which 'the disciplinisation of the material, sexually different, and reproductive body is established'.<sup>81</sup> Money's key question was, 'To which sex should the infant be designated?'.<sup>82</sup> Largely on the basis of genital inspection, they chose 'a "best sex" rather than a "true sex"'.<sup>83</sup> Sometimes they assigned an intersex baby to the female sex because it would be surgically easier.<sup>84</sup>

Money insisted that a child's sense of being a male or a female, their 'psychological sex,' would be consistent with any surgical reassignment, provided it was done in the first eighteen months of life. Richard Green, a protégé of Money's, later wrote that he 'showed that gender identity (not yet so named) followed the sex to which the infant was designated. This ascription would trump any

<sup>77</sup> Middleton, S. (1986) 'Workers and homemakers: Contradictions in the education of the New Zealand 'post-war woman''. *New Zealand Journal of Educational Studies*, 21, pp.13–28.

<sup>78</sup> Germon, J. (2010) *Gender: A genealogy of an idea*. Palgrave Macmillan, p.24.

<sup>79</sup> Glamuzina, J. and Laurie, A. (1991) *Parker and Hume: A lesbian view*. New Women's Press.

<sup>80</sup> Repo, J. (2013) 'The biopolitical birth of gender: Social control, hermaphroditism, and the new sexual apparatus'. *Alternatives: Global Local Political*, 38, p. 231.

<sup>81</sup> Repo, *ibid*.

<sup>82</sup> Green, R. (2010). 'Robert Stoller's sex and gender: 40 years on'. *Archives of Sexual Behaviour*, 39, p.1462.

<sup>83</sup> Germon, J. (2010). *Gender: A genealogy of an idea*. Palgrave Macmillan, p.164.

<sup>84</sup> Gill-Peterson, J. (2018) *Histories of the Transgender Child*. University of Minnesota Press, p.138.

biological variables.’<sup>85</sup> There were tragic mistakes, including the case of David Reimer, a twin Canadian boy whose penis was destroyed by a botched circumcision. It was easier, said Money, to bring him up as a girl. But the experiment did not work. The child ‘knew’ something was wrong. Effectively, what Money was attempting to achieve by ‘assigning’ a boy to girlhood – to induce what he called a ‘psychological sex’ – was to induce ‘dissociation’ (or dysphoria) from a body that ‘knew’ instinctively it was not female. This resulted in David’s suicide.

Seeking a medical term for ‘psychological sex’, Money ‘borrowed gender from linguistics’.<sup>86</sup> He used ‘gender role’ to describe ‘all those things that a person does or says to disclose himself as having the status of a boy, or man, girl or woman’.<sup>87</sup> In 1962, Robert Stoller – a psychiatrist at the UCLA Medical School – coined the term ‘gender identity’, arguing that ‘sex and gender are not inevitably bound...each may go in its quite independent way’.<sup>88</sup> As a psychiatrist, Stoller wanted to explore ‘a person’s self-image as a sexed being and leave aside issues pertaining to roles. The task of theorising gender at the level of social expectations was one that Stoller left to social researchers’.<sup>89</sup> This is where the notions of ‘gender identity’ and the ‘assignment’ of sex originated

By the early 1970s, ‘baby boom’ women were entering postgraduate studies and/or academic employment in unprecedented numbers. Promised equality, we experienced inequality. Functionalist ‘sex role’ theory provided both a resource and an object of critique.<sup>90</sup> The first comprehensive feminist account of gender was Ann Oakley’s *Sex, Gender and Society*.<sup>91</sup> She reviewed Money’s and Stoller’s psychological theories of gender, then transformed it into a sociological category. Citing anthropological studies, she explained that every society had ‘rules about which activities are suitable for males and which for females: but these rules vary a great deal from one society to another’.<sup>92</sup> When Oakley wrote, ‘A newborn baby is not only classified immediately by sex: it is also assigned a gender,’ she was not referring to ‘personal identity’ but to social roles in a Parsonian sense.<sup>93</sup> By the 1980s, in sociology, Oakley wrote, “‘gender differences’ came to be substituted for “sex roles” and “socialisation” – terms that resonated with a latent functionalism and biologism’.<sup>94</sup> Meanwhile, in

<sup>85</sup> Green, R. (2010) ‘Robert Stoller’s sex and gender: 40 years on’. *Archives of Sexual Behaviour*, 39, p.1462.

<sup>86</sup> Germon, J. (2010) *Gender: A genealogy of an idea*. Palgrave Macmillan, p.32.

<sup>87</sup> Germon, *ibid*.

<sup>88</sup> Stoller, R. cited in Green, R. (2010) ‘Robert Stoller’s sex and gender: 40 years on’. *Archives of Sexual Behaviour*, 39, p.1457.

<sup>89</sup> Germon, J. (2010) *Gender: A genealogy of an idea*. Palgrave Macmillan, p.66.

<sup>90</sup> Cortez, M., Gaudenzi, P. and Maksud, I. (2019) ‘Gender: Pathways and dialogues between feminist and biomedical studies from the 1950s to 1970s’. *Physis*. <https://doi.org/10.1590/s0103-73312019290103>.

<sup>91</sup> Oakley, A. (1972) *Sex, Gender and Society*. London: Temple Smith.

<sup>92</sup> Oakley, *op.cit*, p.128.

<sup>93</sup> Oakley, *op.cit.*, p. 173.

<sup>94</sup> Oakley, A. (1998) ‘Science, gender, and women’s liberation: An argument against postmodernism. *Women’s Studies International Forum*, 21, p.135.

sociology and also in everyday speech, Stoller's notion of a psychological 'gender identity slipped under the analytical radar'.<sup>95</sup> However, it simmered 'underground' in gender clinics and amongst intersex and transsexual populations.

#### 2.4 *Transsexual, queer and transgender perspectives*

From the 1990s, the psychological model of gender gained visibility as people whose bodily and emotional 'selves' were in conflict formed advocacy groups. Objecting to childhood surgeries, intersex groups demanded the right to choose as adults whether or not to remain 'between' the binary sex categories.<sup>96</sup> Transsexuals lobbied for easier access to surgical and/or hormonal treatments to address what they saw as 'a body-problem, not a gender problem'.<sup>97</sup> Their desire was to 'move (within the existing sex/gender dichotomy) from the sexual phenotype of birth (body) to that of the other gender (mind)'.<sup>98</sup> Although often 'passing' as the opposite sex, bodily 'sex change' was never complete. Biological markers of birth sex would always remain. Furthermore, the cultural 'gendering' of their birth sex left them with 'different histories, whether they choose to disclose them, or not'.<sup>99</sup> Bates concluded that it was 'possible to be an *ordinary* woman/man without being a *real* woman/man'.<sup>100</sup>

As noted earlier, since the turn of the millennium a new cluster of 'identity categories' has been created, influenced by activists, including academics in 'gender studies'. Katrina Roen explains that "“Transgender” agendas might prioritise the possibility of crossing without passing; of validating points of transition and gender fluidity."<sup>101</sup> University students have taken up arms to support what they see as 'trans rights' and to force cancellation (or at least disruption) of professional and/or political conferences where experts can express and hear a range of views. To understand their thinking, it is important to engage with what they might read or hear – on-line, at work, school or university, or in the youth wings of political parties.<sup>102</sup>

---

<sup>95</sup> Germon, J. (2010) *Gender: A genealogy of an idea*. Palgrave Macmillan, p.94.

<sup>96</sup> Germon, *ibid*.

<sup>97</sup> Bates, D. (2001) *Someone Else's Gender? Locating the transsexual narrative in the gendered landscape*. Doctoral thesis, University of Waikato, p. 29. The University of Waikato Research Commons. <https://researchcommons.waikato.ac.nz/handle/10289/14162>.

<sup>98</sup> Bates, *op. cit.* p. 22.

<sup>99</sup> Bates, *op.cit.* p.291.

<sup>100</sup> Bates, *op.cit.* p.247.

<sup>101</sup> Roen, K. (1998) *Constructing Transsexuality: Discursive manoeuvres through psycho-medical, transgender and queer texts*. Doctoral thesis: University of Canterbury, p.162. University of Canterbury Research Repository. <https://ir.canterbury.ac.nz/handle/10092/4636>; <https://www.iglyo.org/resources/only-adults>.

<sup>102</sup> Hamilton, J. (2019) 'Dentons campaigns for kids to switch gender without parental approval'. *Roll on Friday*, November 29, 2019. Accessed March 12, 2020. <https://www.rollonfriday.com/news-content/dentons-campaigns-kids-switch-gender-without-parental-approval>; IGLYO. (2019) *Only Adults? Good practices in legal gender recognition for youth*. International Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Youth Organisation <https://www.iglyo.org/resources/only-adults>

Academic transgenderism draws heavily on ‘queer theory’. Its focus is ‘the deconstruction and disruption of binary oppositions such as heterosexual/ homo-sexual, gender/sex, and man/woman’.<sup>103</sup> Radical transgender activists ‘refuse to identify as either male or female, they are visibly, vocally, loudly transsexual, and they challenge other transsexuals to “come out” as trans, rather than “passing” as male or female’.<sup>104</sup> Following Judith Butler, queer theorists sometimes quote a passage from Simone de Beauvoir’s *The Second Sex* (published in France in 1949): ‘One is not born, but rather becomes a woman.’<sup>105</sup> Here, Butler argues, de Beauvoir ‘distinguishes sex from gender and suggests that gender is an aspect of identity gradually acquired’.<sup>106</sup> She continues,

The presumption of a causal or mimetic relation between sex and gender is undermined. If being a woman is one cultural interpretation of being female, and if that interpretation is in no way connected with being female, then it appears that the female body is the arbitrary locus of the gender ‘woman’, and there is no reason to preclude the possibility of that body becoming the locus of other constructions of gender.<sup>107</sup>

The identity ‘woman’ can attach to a male body, ‘man’ to a female body and ‘other genders’ become possible. New questions arise: ‘How, for example, are we to understand the pregnant man?’<sup>108</sup>

Butler’s appropriation of de Beauvoir and other historical writings has been criticised from within and outside the trans movement. Noting the Parisian post-war setting in which de Beauvoir wrote, Jemima Repo writes: ‘We cannot examine the history of gender before gender itself came into existence’.<sup>109</sup> Sociologist Raewyn Connell (a transwoman) adds that when de Beauvoir wrote “‘One is not born, but rather becomes, a woman” she did not have trans women in mind’.<sup>110</sup> To explain how we become identified as men or women, Butler uses Althusser’s notion of ‘interpellation.’<sup>111</sup> Even before children are born, their identities ‘exist’ in language and the objects chosen for them: names, clothes, toys and bedroom decor. She writes, ‘the pronouncement “It’s a girl” is “the initiary

---

<sup>103</sup> Johnston, L. and Longhurst, R. (2010) *Space, Place and Sex: Geographies of sexuality*. Rowman and Littlefield, p.13.

<sup>104</sup> Roen, p. 162.

<sup>105</sup> De Beauvoir cited in Butler, J. (1986) ‘Sex and gender in Simone de Beauvoir’s *Second Sex*’. *Yale French Studies*, 72, p.35.

<sup>106</sup> Butler, *ibid.*

<sup>107</sup> Butler, *ibid.*

<sup>108</sup> Johnston, L. and Longhurst, R. (2010) *Space, Place and Sex: Geographies of sexuality*. Rowman and Littlefield, p.13.

<sup>109</sup> Repo, J. (2013) ‘The biopolitical birth of gender: Social control, hermaphroditism, and the new sexual apparatus’. *Alternatives: Global Local Political*, 38, p.229.

<sup>110</sup> Connell, R. (2021) ‘Transgender health on a world scale’. *Health Sociology Review*, 30, p. 88.

<sup>111</sup> Althusser, L. (1971) ‘Ideology and ideological state apparatuses’. In Althusser, L. (ed.) *Lenin and Philosophy*, Monthly Review Press, pp.127-186.



performative”<sup>112</sup> She elaborates, ‘The “I” only comes into being through being called, named, interpellated’.<sup>113</sup> Butler continues:

I can only say ‘I’ to the extent that I have first been addressed, and that address has mobilised my place in speech; paradoxically, the discursive condition of social recognition precedes and conditions the formation of the subject: recognition is not conferred on a subject, but forms that subject.<sup>114</sup>

This is what is meant by the phrase ‘gender is assigned’.

However, TRAs argue that *sex* is similarly assigned. Infused with this idea, the LCI53 repeats the phrase ‘sex assigned at birth’ over and over again. Here it echoes Stryker’s assertion that: ‘although it is true that sex typically is used to determine gender categorisation, it is also true that what counts as sex is a cultural belief’.<sup>115</sup> We have addressed some of the ‘cultural’ aspects of biomedicine in the treatment of non-conforming infant bodies (Sections 2.2- 2.3). We have cited the incidence of physiological variations *within* the categories ‘male and ‘female’ and the tiny overlap between the categories (Section 1.1). Our evidence does not support the view that we should, as Stryker advocates, ‘understand sex being just as much a social construct as gender’.<sup>116</sup> It is this that ‘gender critical’ feminists refer to as ‘gender ideology’<sup>117</sup> or ‘gender theory’.<sup>118</sup>

In everyday life, we use ‘feminine’ and ‘masculine’ to describe a person’s conformity or non-conformity with gender stereotypes: ‘feminine’ boys, ‘masculine’ women and so on. In clinical language, ‘Gender non-conformity refers to behaviours and an appearance that are considered atypical of an individual’s assigned gender’.<sup>119</sup> ‘Tomboys’, ‘butch’ lesbians and ‘effeminate’ boys exemplify ‘gender non-conformity’, but tomboys and butch lesbians are female, and effeminate boys are male. Gender critical feminists define ‘woman’ as an ‘adult human female’ and ‘girl’ as a ‘juvenile human female’. While trans people may have the (legal and cultural) right to appear and live *as if* they are the opposite sex, they can never completely erase birth sex. And birth sex matters for some (but by no means all) social, institutional and professional interactions. In Kathleen Stock’s words: ‘Gender identity theory doesn’t just say that gender identity exists, is fundamental to human beings, and

---

<sup>112</sup> Butler, J. (1993) *Bodies That Matter: On the discursive limits of ‘sex’*. Routledge, p.232.

<sup>113</sup> Butler, op.cit., p.225.

<sup>114</sup> Butler, op.cit.

<sup>115</sup> Stryker, S. (2017) *Transgender History* (second edition) (Kindle IOS version). Seal. Loc 321.

<sup>116</sup> Stryker, op.cit., Loc 332.

<sup>117</sup> Brunskell-Evans, H. (2020) *Transgender Body Politics*. Spinifex.

<sup>118</sup> Stock, K. (2021) *Material Girls: Why reality matters for feminism*. Fleet.

<sup>119</sup> Kaltiala-Heino, R., Bergman, H., Tyolajarvi, M., et al. (2019) ‘Gender dysphoria in adolescence: Current perspectives’. *Adolescent Health, Medicine and Therapeutics*, 9, p. 31.

should be legally and politically protected. It also says that biological sex is irrelevant and needs no such legal protection.<sup>120</sup>

### 3. Exceptions: The Need for Single-sex Spaces and Services

The LC's Summary of its Issues Paper 53 [henceforth LCI53Summary] clarifies the 'areas of life' that are regulated in Part 2 of the Human Rights Act [HRA]. These include 'employment, accommodation, and provision of goods and services' (Clause 68, p.12). It notes that Part 2 of the Act

... also sets out numerous exceptions – where different treatment linked to a prohibited ground is lawful even though it falls within a regulated activity. Many exceptions only apply to one or some of the prohibited grounds. For example, they might allow for differences of treatment in certain circumstances based on a person's sex. (Clause 69, p. 12)

Although bodily presentation and self-defined identity descriptors should not in many public contexts be grounds for discrimination (borrowing money, renting an apartment, and so on), they must not override the right to single-sex spaces and services that the HRA currently secures for women and girls (the female biological sex). Trans-identifying people and those with intersex and other innate bodily variations might also want the right to private spaces and services that exclude those they describe as 'cis'. We defend their right to these.

In its present form the HRA allows the following

- equal access 'to places, vehicles, and facilities'(S42). However, this 'shall not prevent the maintenance of separate facilities for each sex on the ground of public decency or public safety' (S43);
- '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' (S45);
- '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'. (S45)

The definition of sex as biological underpins these rights. We do not want these rights changed.

---

<sup>120</sup> Stock, K. (2021) *Material Girls: Why reality matters for feminism*. Fleet, p.39.

### *3.1 Employment*

Section 9 of the Issues Paper discusses the protections in Part Two of the Human Rights Act that relate to employment and seeks feedback on the implications for these protections of adding new prohibited grounds of discrimination. Adding transgender in any form of words has implications for the protections of the rights of women. If both sex and transgender were to be groups for whom there are prohibited grounds of discrimination, there could arise a clash of rights with no clear way of choosing between them. Similarly, where there are exemptions, a clash could arise. For example, 9.25 of the Paper refers to Section 27(1) of the Human Rights Act which allows different treatment based on sex where, for reasons of authenticity, being a particular sex is a genuine occupational qualification for the role. It would be essential, for example, for prison staff administering strip searches, for women to continue to be the only groups permitted to carry out such searches on women prisoners. Female beauty therapists should not be required to Brazilian wax male genitals.<sup>121</sup>

In section 9.7. (p.100), the writers of the LCI53 state that: ‘We are interested to understand better whether the scope of sections 22 and 23 is sufficient to capture employment issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics’. They give examples of these issues. However, they do not give the same consideration to their later statement that:

We would also like to understand any implications of sections 22 and 23 applying to new prohibited grounds of discrimination such as the implications for employers and co-workers. We also want to know whether any new exceptions to the provisions about employment and related contexts would be necessary and desirable to ensure the Act appropriately balances relevant rights and interests (s 9.10, p.101).

This acknowledges, but does not explore, the potential conflict we have identified.

The discussion in sections 9.44 and thereafter on section 27(3)(a) of the Human Rights Act, which allows different treatment in employment based on sex where the position needs to be held by one sex to preserve reasonable standards of privacy, is also relevant here. Section 9.52 states:

We are interested to understand whether the exception in section 27(3)(a) should be amended to reflect any new grounds we propose. We think the issue here is whether the exception should be amended to clarify that? whether? people are entitled to treat someone differently based on

---

<sup>121</sup> <https://globalnews.ca/news/6068486/transgender-woman-genital-waxing-discrimination-tribunal/>

their sex characteristics or sex assigned at birth. The argument in favour of amending the exception is that there may be situations where a person is not comfortable with someone of a different sex assigned at birth or sex characteristics providing them with very personal and private services. If the rationale for the exception is to allow the individual to feel comfortable in a highly private situation, an exception might be justified even if the person's lack of comfort is based on prudishness, irrational fear or prejudice.

We explained our objections to 'sex assigned at birth' in Section 2 of this submission. But putting that aside, this statement shows understanding that personal services may be a sensitive area. The exception would not need to be changed were sex to be understood in this manner, as it should be, although the clash of rights might appear if transgender was introduced as a prohibited ground of discrimination. The reference to prudishness, irrational fear or prejudice is somewhat objectionable: the lack of comfort may be totally justified. Numerous surveys and polls demonstrate the overwhelming desire among women to be able to use single-sex services, including for recovery following violence.<sup>122</sup> However, this section does at least, unlike most of the Issues Paper, admit that sex as we understand it can stand alone as a rationale.

There are also macro level implications of including transwomen in the category of women. This may be beyond the scope of the Issues Paper but is important to note, especially since the Paper presents as untested the Crown Law opinion that regarded transgender people as being covered by the sex-based provisions of the HRA.<sup>123</sup> It has however led policy since 2006. Its significant impact has been the creation of new 'inclusive' policy that has had ramifications across Government. For example, the decision to include gender identities in the census was a result of this, effectively mandating a belief in gender identities. Statistics NZ is already including transwomen as women in its statistics. In calculating the pay gap between women and men, this may well bias the result and make the gap appear narrower than it really is.<sup>124</sup> Transwomen brought up as men and being subject to most

---

<sup>122</sup> Dillon, S. (2021). *TERF BIGOT TRANSPHOBE. 'We found the witch, burn her!'* PhD. University of Portsmouth. <https://researchportal.port.ac.uk/en/studentTheses/terfbigottransphobe-we-found-the-witch-burn-her>; Miller -v- College of Policing (Courts and Tribunals Judiciary 14 February 2020). <https://www.judiciary.uk/wp-content/uploads/2022/07/miller-v-college-of-police-judgment-1.pdf>; Single-sex-services-full-report. (n.d.). Sex Matters. Retrieved 6 August 2024, from <https://sex-matters.org/wp-content/uploads/2022/07/Single-sex-services-full-report.pdf>; Women's National Commission. (2010). Women's National Commission Legacy Document. Women's National Commission. [www.equallyours.org.uk/wp-content/uploads/2011/02/WNC-Legacy-Documents-Dec101.docx](http://www.equallyours.org.uk/wp-content/uploads/2011/02/WNC-Legacy-Documents-Dec101.docx) Women's National Commission. (2011). Women-only services. Women's National Commission. [https://web.archive.org/web/20110818091228/http://wnc.equalities.gov.uk/publications/doc\\_view/451-findings-from-the-wnc-survey-on-women-only-services.raw?tmpl=component](https://web.archive.org/web/20110818091228/http://wnc.equalities.gov.uk/publications/doc_view/451-findings-from-the-wnc-survey-on-women-only-services.raw?tmpl=component)

<sup>123</sup> Crown Law. (2006, August 23) Crown Law Opinion on Transgender Discrimination. *Beehive Press Release 23 August 2006*. <http://www.beehive.govt.nz/release/crown-law-opinion-transgender-discrimination>

<sup>124</sup> Stats NZ, Ministry for Women and State Services Commission. (2020) *Organisational Gender Pay Gaps: Measurement and analysis guidelines* (No. Second Edition (First published 2018)). Stats NZ.

of the factors which incline men to earn more than women will influence the result. Included here is the likelihood of them not taking parental leave, which depresses women's earnings and access to superannuation.

Section 10 of the HRA discusses goods, services, provisions and places. We point out here that it is essential to maintain the rights of women to have single sex clubs (10.12), preserve women-only sports (10.13) and allow courses and counsellors to be restricted to women-only groups (10.25). This requires the HRA to secure a legal definition of sex as biological. And it requires clarification of 'proof of sex'.

In 2022, FOWL presented a submission to the Parliamentary Select Committee on the Births, Deaths, Marriages and Relationships Registration Amendment Bill. We opposed allowing transgender- identifying people, including children, to 'self-affirm' a new gender identity and without medical transition. This has erased truthful information about biological sex from the birth certificate. As the Crown Law Office advice at the time pointed out,

Birth certificates are used as identity documents in a wide range of official and community settings. They can be important for an individual to access a variety of entitlements, facilities, services, roles and opportunities.<sup>125</sup>

Citing Section 71 of the Bill, they comment,

A birth certificate shall in any proceedings be received as prima facie evidence of the truth of the information it contains.<sup>126</sup>

'Gender identity' is not a 'scientific truth,' but a personal, psychological statement about 'felt identity.' The birth certificate is no longer a record of a birth, but some other kind of identity document. It allows a transgender woman (or man) to live 'as if' they were an actual biological woman or man and to identify as such in public spaces. However, in situations where single-sex spaces and facilities are at issue for reasons of fairness, safety, dignity or privacy, who is responsible

---

<https://www.stats.govt.nz/assets/Uploads/Methods/Organisational-gender-pay-gaps-measurement-and-analysis-guidelines/organisational-gender-pay-gaps-measurement-analysis-guidelines.pdf>

CLOSE UP THIS SPACE

<sup>125</sup> Crown Law Office. (2019) 'Births, Death, Marriages and Relationship Registration Bill 2017' (296-2): Self-identification of sex. Ref: ATT114/2011, p.2. Accessed 24 January, 2021

from: [https://www.beehive.govt.nz/sites/default/files/2019-02/Crown%20Law%20advice%20BDMRR%20Bill%20\\_0.pdf](https://www.beehive.govt.nz/sites/default/files/2019-02/Crown%20Law%20advice%20BDMRR%20Bill%20_0.pdf)

<sup>126</sup> Ibid.

for ascertaining proof of sex? And, in the absence of reliable ID documents, how? We suggest that revisiting the policies for birth certificates will be in order.

### 3.2 *Children and schools*

The implications of access to single-sex schools and access to ‘gender neutral’ or ‘unisex’ bathrooms in schools for ‘children who are transgender or non-binary’ are discussed in the Paper. However, immersed in gender identity theory, the Paper is unable to problematise its phrase ‘children who *are*’ transgender or non-binary (our emphasis). Accordingly, it fails to refer to the wider context in which schools have to operate and in which the identity fluctuations characteristic of adolescence are inflamed by social media groups and ‘influencers’ who can gain power over disturbed young people.<sup>127</sup> The review claims to have ‘only indirect implications for access to gender-affirming health care (including puberty blockers)’ (Summary, p 5, S 18.) However, in assuming that children enrolling in or attending a school (already) *are* trans, (have a fixed ‘gender identity’), the report also refers to access to ‘gender-affirming health care (including puberty blockers),’ although it regards these as ‘marginal’ to the review’s human rights focus (Summary, p 5, S 18.). This is despite the Law Commission describing affirmative medical care as the ideal (2.31d and 2.4; 3.44-3.46) and much of the case law described in the Issues Paper covering legal cases related to demands for access to gender medicine (16.3 a-d).

The exponential growth in the numbers of children and young people identifying as ‘trans’ has only occurred since around 2010, with the growth of social media and the opening of gender clinics with their promotion of ‘off label’ use of puberty blocking drugs (currently approved by medical licensing authorities only for precocious puberty in small children).<sup>128</sup> However, although rare, child self-diagnoses as ‘trans’ were not unknown in the 1950s. Jules Gill-Peterson’s archival research in mid-twentieth century American gender clinics<sup>129</sup> gives examples of children dressing as, and being treated at school ‘as if’ they were, the opposite sex. A few even obtained access to hormones. In 1952, newspaper headlines like ‘Ex-GI Becomes Blonde Beauty’ publicised Christine Jorgensen’s surgical transitioning. ‘Sex change’ surgeon Harry Benjamin’s collaboration with Jorgensen attracted ‘a huge number of letters from trans writers, among whom were children as young as thirteen’.<sup>130</sup> Child letter-writers self-diagnosed their condition in the clinical vocabulary used in news media: ‘I have felt for a long time like a girl trapped in a boy’s body, trying to get out.’<sup>131</sup> They hoped that ‘their investment in

---

<sup>127</sup> Littman, L. (2018) ‘Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria’. *Plos One*. <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0202330>; Lukianoff, Greg and Haidt, Jonathon (2018) *The Coddling of the American Mind*. Penguin, 2018.

<sup>128</sup> Cass, op. cit.

<sup>129</sup> Gill-Peterson, J. (2018) *Histories of the Transgender Child*. University of Minnesota Press, p.6.

<sup>130</sup> Gill-Peterson, *ibid.*, p.174.

<sup>131</sup> Gill-Peterson, *ibid.*

medical narratives would be returned with help'.<sup>132</sup> In Butler's (Althusserian) terms, they were 'interpellated' into medical discourse. If interpellation is 'a process whereby the subject is "recruited" as, for instance, "transsexual", then the process of diagnosis plays an important role in that interpellation'.<sup>133</sup> 'Affirming' a child's self-diagnosis can lock them into a medical pathway from which it is difficult, and in some cases impossible, to return.

Children will self-diagnose using the linguistic categories made available to them. In the late twentieth century, medical language classified trans identities and conditions as pathological: as 'Gender Identity Disorder' (GID). Trans advocates countered this 'by positioning trans people as "healthy"'.<sup>134</sup> They argued that trans people, including children, 'know who they are' and should therefore have easier access to 'gender affirming' healthcare, including cross- sex hormones and surgery.<sup>135</sup> The current diagnostic category is 'Gender Dysphoria' (GD). The criteria for Gender Dysphoria in Children (GDC) are listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5).<sup>136</sup> GDC is described 'as a marked incongruence between one's experienced/expressed gender and assigned gender, lasting at least 6 months.' It must include: 'A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one's assigned gender)'. The condition 'must also be associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning'. In addition, a child 'must exhibit strong preferences for at least five of the following: clothes of the other gender, cross-gender roles in play, playmates and toys of the other gender, dislike of one's sexual anatomy and a 'strong desire for the physical sex characteristics that match one's experienced gender'. As Lisa Davis observed, all of these except the last two are also 'common for tomboys or gender non-conforming people'.<sup>137</sup> Trans identification amongst adolescents is occurring in friendship groups.<sup>138</sup> Exacerbated by social isolation during COVID lockdowns, social media groups and influencers have played an

---

<sup>132</sup> Gill-Peterson, op.cit., p.176.

<sup>133</sup> Roen, K. (1998) *Constructing Transsexuality: Discursive manoeuvres through psycho-medical, transgender and queer texts*. Doctoral thesis: University of Canterbury, p.245. University of Canterbury Research Repository. <https://ir.canterbury.ac.nz/handle/10092/4636>.

<sup>134</sup> Ker, A., Fraser, G., Fleming, T., et al. (2021) 'A little bubble of utopia: Constructions of a primary care-based pilot clinic providing gender affirming hormone therapy'. *Health Sociology Review*, 30, p.32.

<sup>135</sup> Ker et al, ibid; see also Oliphant, J. (2018) *Hauora Tāhine: Pathways to Transgender Health Services. Guidelines for gender affirming healthcare for transgender children, young people and adults*. Northern Region Clinical and Consumer Advisory Group. Retrieved August 28, 2021 from <https://researchcommons.waikato.ac.nz/handle/10289/12160>

<sup>136</sup> American Psychiatric Association. (2021). *What is Gender Dysphoria?* Retrieved June 7, 2021 from <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

<sup>137</sup> Davis, L. S. (2020) *Tomboy: The surprising history and future of girls who dare to be different*. Hachette, p.215.

<sup>138</sup> Littman, L. (2018) 'Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria'. *PLoS One*, 13, pp.1–44.

increasingly powerful role in facilitating trans identifications and self-diagnoses in vulnerable adolescents.<sup>139</sup>

A study at Britain's Tavistock Clinic showed high rates of same-sex attraction in both sexes: 88% of the girls were either attracted to females or bisexual.<sup>140</sup> Similarly, in Paechter's ethnography, some schoolgirls 'appeared to be in flight from masculinity, fearing a future butch or lesbian identity if they continued to be tomboys'.<sup>141</sup> Homophobia, then, may play a role in pressuring some adolescents to identify as the opposite sex: their sexual orientation would then appear to be heterosexual. As Shrier describes it, 'Many of the girls now being cornered into a trans identity might, in an earlier era, have come out as gay'.<sup>142</sup> She worries that 'the "new" idea is that lesbians do not exist; girls with more masculine presentations are "really" boys'. When gender identity theory enters the regulations of schools or the curriculum itself,<sup>143</sup> schools are complicit in the 'solidifying' of what maybe would have been transient feelings. Accordingly, we object to the report's suggestions that schools and teachers 'affirm' a child's self-diagnoses (even without parental knowledge or support).<sup>144</sup>

For some young people, the taking up of a new 'gender identity' (an avatar?) may be a political resistance to sex-based stereotypes. In a British ethnography, boys criticised how 'the genders have been really rigidly defined. If you're a man you must do this and if you're a woman you must be this.'<sup>145</sup> Rather than widening the social category of 'boy', they self-identified as 'non-binary.' Influenced by American post-structuralists such as Judith Butler, transgender activists treat the language of gender identifications as at once individualised and independent of bodily sex: it is

---

<sup>139</sup> Bragg, S., Renold, E., Ringrose, J., et al. (2018) 'More than boy, girl, male, female: Exploring young people's views on gender diversity within and beyond school contexts'. *Sex Education*, 18, pp.420–434; Littman, L. (2018) 'Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria'. *Plos One*. <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0202330>; Lukianoff, Greg and Haidt, Jonathon (2018) *The Coddling of the American Mind*. Penguin, 2018.

<sup>140</sup> Holt, V., Skagerberg, E., and Dunsford, M. (2016) 'Young people with features of gender dysphoria: Demographics and associated difficulties'. *Clinical Child Psychology and Psychiatry*, 21, pp.108–118.

<sup>141</sup> Paechter, C. (2010) 'Tomboys and girly-girls: Embodied femininities in primary schools'. *Discourse: Studies in the Cultural Politics of Education*, 31, p.232.

<sup>142</sup> Shrier, A. (2020) *Irreversible Damage: The transgender craze seducing our daughters*. Renery Publishing, p.13.

<sup>143</sup> Middleton, Sue (2021) 'Gender wars and sexuality education in 2021: history and politics.' *New Zealand Journal of Educational Studies*, 56(2) pp.247-243. <https://doi.org/10.1007/s40841-021-00220-5>

<sup>144</sup> Chumko, A. (2020) 'Aotearoa in 20: Alex Ker wants his life to look beyond the rainbow'. *Stuff*.

<https://www.stuff.co.nz/national/122384493/aotearoa-in-20-alex-ker-wants-his-life-to-look-beyond-the-rainbow>;

Resist Gender Education. (2023a). *Secret Transition at School*. Resist Gender Education. <https://www.resistgendereducation.nz/information/secret-transition-at-school>;

Resist Gender Education. (2023b). *The Responsibilities of Boards of Trustees*. Resist Gender Education.

<https://www.resistgendereducation.nz/information/the-responsibilities-of-boards-of-trustees>

<sup>145</sup> Bragg, S., Renold, E., Ringrose, J., et al. (2018) 'More than boy, girl, male, female: Exploring young people's views on gender diversity within and beyond school contexts'. *Sex Education*, 18, p.426.



viewed ‘not simply as descriptor, but as actor’.<sup>146</sup> In this view, language ‘creates something qualitatively new. Change the language, change the meaning.’<sup>147</sup> Giving up on the feminist project of widening what counts as ‘masculine’ and ‘feminine,’ transgenderists see their multiple identity categories (‘gender fluid,’ ‘non-binary’) as ‘an opening of new futures for young people to claim, including the potential of gender transition while young, as well as life outside of typical gender categories’.<sup>148</sup> Transgenderism’s growing lexicon of ‘genders’ interpellates, or attracts, adolescents.

However, there is evidence that, for 80% of children who meet the criteria for GDC, it recedes with puberty.<sup>149</sup> Data from Germany show that as many as 72% of young women diagnosed with gender identity disorders desist within five years, as do more than 50% of boys.<sup>150</sup> Internationally an informal web-based community of detransitioners now numbers more than 54,000.<sup>151</sup> Across the world there are now legal cases against clinicians.<sup>152</sup> Another legal case has demonstrated multiple concerns about the performance of WPATH (the World Professional Association for Transgender Health and therefore its local chapter PATHA (Professional Association for Transgender Health Aotearoa)).<sup>153</sup> Whether it is appropriate to protect gender identities in law when much identification appears to be short term is not addressed.

### 3.3. *The (re)medicalisation of Gender*

Medical researchers have warned that ‘virtually nothing is known regarding adolescent-onset GD, its progression and factors that influence the completion of the developmental tasks of adolescence among young people with GD and/or trans identity’.<sup>154</sup>

For over a decade, puberty blocking drugs have been prescribed with the rationale of opening up an ‘extended diagnostic phase’ to gain time for a child and their doctor to ‘consider further

---

<sup>146</sup> Pyne, J. (2014). ‘Gender independent kids: A paradigm shift in approaches to gender non-conforming children’. *Canadian Journal of Human Sexuality*, 23, p.3.

<sup>147</sup> Pyne, *ibid.*

<sup>148</sup> Pyne, *ibid.*

<sup>149</sup> Kaltiala-Heino, R., Bergman, H., Tyolajarvi, M., et al. (2019). Gender dysphoria in adolescence: Current perspectives. *Adolescent Health, Medicine and Therapeutics*, 9, p. 33

<sup>150</sup> Bachmann, C., Golub, J., Holstiege, J., and Hoffmann, F. (2024) ‘Gender identity disorders among young people in Germany: Prevalence and trends, 2013–2022. An analysis of nationwide routine insurance data’. *Deutsches Ärzteblatt*, 31.05.2024. <https://www.aerzteblatt.de/int/archive/article?id=239563>.

<sup>151</sup> Reddit. (2019, April 22). Reddit / page for formerly transgender people who are or have detransitioned. <https://www.reddit.com/r/detrans/>.

<sup>152</sup> Anonymous. (2024). ‘Ongoing international litigation relating to patient injury due to ‘gender affirming care’ to April 2024 as supplied to the Queensland Children’s Gender Services Enquiry.’ Public Good. <https://www.publicgood.org.nz/wp/wp-content/uploads/2024/08/Ongoing-international-litigation-relating-to-patient-injury-due-to-gender-affirming-care-1.pdf>

<sup>153</sup> Tegg, S. (2023, May 17) Letter to New Zealand media on WPATH, PATHA, and the Cass Review. <https://blog.fullyinformed.nz/p/letter-to-new-zealand-media-on-wpath>.

<sup>154</sup> Kaltiala-Heino, R., Bergman, H., Tyolajarvi, M., et al. (2019) ‘Gender dysphoria in adolescence: Current Perspectives’. *Adolescent Health, Medicine and Therapeutics*, 9, p.31.

treatment wishes without distress caused by unwanted pubertal changes.’<sup>155</sup> Before around 2010 the majority of children referred to Gender Identity Services (GIDS) clinics in the UK and Europe were boys, whose gender dysphoria had started mainly in the preschool years. But then the sex ratios suddenly reversed.<sup>156</sup> Rapidly increasing numbers of teenage girls who had not previously shown symptoms of such a condition were referred to GIDS. This apparently new condition was termed Rapid Onset Gender Dysphoria (ROGD). A doctor surveyed ‘transitioners’ and their parents who were speaking out on social media;<sup>157</sup> a Jungian psychotherapist warned of a ‘psychic epidemic,’<sup>158</sup> and a journalist whipped up public outrage at the ‘craze seducing our daughters’.<sup>159</sup>

Denying the existence of RODG, transgender activists retorted that improved access to medical services was making it easier for females to access treatment.<sup>160</sup> As in Gill-Peterson’s archival study, puberty is for some ‘a trigger for seeking out a doctor’s opinion’.<sup>161</sup> The average age of first menstruation has fallen: girl children have to cope with bodily changes and sexualised social interactions. As highlighted in Denise Bates’s interviews with female to male transsexuals, ‘menstruation, along with developing breasts brought the freedoms of a tomboyish childhood to an abrupt close’ with ‘tangible reminders of the realities of sexual embodiment’.<sup>162</sup> Adolescent ‘transitioners’ usually proceed from puberty blockers to cross-sex hormones. Female-to-male transitioners have undergone double mastectomies in their teens.<sup>163</sup> Those who later had regrets and ‘de-transitioned’ have had to face irreversible bodily changes, including sterility. Doctors have expressed ‘concerns about the physical, neurocognitive, and psycho-social effects of this treatment’.<sup>164</sup> In the UK and Scandinavia, use of puberty blockers is increasingly restricted.<sup>165</sup>

---

<sup>155</sup> Brik, T., Lieke, J. V., de Vries, M., et al. (2020). ‘Trajectories of adolescents treated with Gonadotropin-releasing hormone analogues for gender dysphoria’. *Archives of Sexual Behaviour*, 49, p.2611.

<sup>156</sup> Holt, V., Skagerberg, E., & Dunsford, M. (2016) ‘Young people with features of gender dysphoria: Demographics and associated difficulties’. *Clinical Child Psychology and Psychiatry*, 21, pp.108–118.

<sup>157</sup> Littman, L. (2018) ‘Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria’. *PLoS One*, 13, pp.1–44.

<sup>158</sup> Marchiano, L. (2017) ‘Outbreak: On transgender teens and psychic epidemics’. *Psychological Perspectives*, 60, pp.345–366.

<sup>159</sup> Shrier, A. (2020) *Irreversible Damage: The transgender craze seducing our daughters*. Renery Publishing.

<sup>160</sup> Ashley, F. (2020) ‘A critical commentary on’ ‘rapid onset gender dysphoria’. *The Sociological Review Monographs*, 68, pp.779–799.

<sup>161</sup> Gill-Peterson, J. (2018) *Histories of the Transgender Child*. University of Minnesota Press., p.175.

<sup>162</sup> Bates, D. (2001) *Someone Else’s Gender? Locating the transsexual narrative in the gendered landscape*, Doctoral thesis, University of Waikato. The University of Waikato Research Commons. <https://researchcommons.waikato.ac.nz/handle/10289/14162>, p.236.

<sup>163</sup> Royal Courts of Justice. (2020, December 1) *Approved Judgment: Quincy Bell and Mrs A vs The Tavistock and Portman NHS Foundation Trust; Case No: CO/60/2020*. London: Royal Courts of Justice. Retrieved August 10, 2021 from <https://www.judiciary.uk/wp-content/uploads/2020/12/Bell-v-Tavistock-Judgment.pdf>.

<sup>164</sup> Brik, T., Lieke, J. V., de Vries, M., et al. (2020) ‘Trajectories of adolescents treated with Gonadotropin-releasing hormone analogues for gender dysphoria’. *Archives of Sexual Behaviour*, 49, p.2611.

<sup>165</sup> Cass, H. (2024) *Cass Review Final Report* <https://cass.independent-review.uk/home/publications/final-report/>.

In contrast, in New Zealand, children are medicated with puberty blockers at ten times the rate of the disgraced, and now closed, Tavistock GIDS clinic.<sup>166</sup> The Cass review rated the New Zealand Guidelines for the treatment of young people experiencing gender incongruence at less than 25%; the second to lowest score in the national policies surveyed.<sup>167</sup> The York University researchers who carried out the systematic reviews said the clinical and research data on the outcomes of these medical treatments was the poorest that they had ever worked with.<sup>168</sup>

### 3.4 Health care and human rights

The issues paper refers to ‘affirmative’ approaches to treatments and therapies for transgender people, including medical care, social transition, non-surgical options such as hormone treatment or hair removal, and access to surgical procedures such as breast or genital surgery [2.3.1]. It implies that failing to provide it could be discriminatory; and indeed another section [3.44-3.46] explains this as discrimination.

A clinician’s, a parent’s or a teacher’s refusal to ‘affirm’ without question a child’s self-diagnosis as transgender is increasingly equated by activists with ‘conversion therapy’. Conversion therapy was/ is a brutal process of ‘aversion treatment’ often run by conservative churches to turn ‘gays’ straight.<sup>169</sup> It is (rightfully) increasingly banned. However, psychotherapists working with gender dysphoric children have argued that affirmation versus conversion is a false binary based on a misunderstanding of the complexity of psychotherapy: ‘It is not uncommon for agenda-free, neutral therapy interventions to be experienced by the subjects as non-affirmative. However, non-affirmative is not the same as “conversion,” as the latter implies a therapist agenda and an aim for a fixed outcome.’<sup>170</sup> The Law Commission Review chose not to review section 63A of the Human Rights Act, which relates to conversion practices. The LCI53 says ‘This provision was enacted in 2022 after extensive consultation. We think it is too soon to reconsider the policy on which the section was based or to evaluate how it is working in practice.’ (1.47b, p.11). That is an oversight.

<sup>166</sup> Paul, C. (2023, December 23). ‘A Terrible Trap’. *North & South*.

<https://northandsouth.co.nz/2023/12/24/puberty-blockers-new-zealand/>.

<sup>167</sup> Taylor, J., Hall, R., Heathcote, C., Hewitt, C. E., Langton, T., and Fraser, L. (2024) ‘Clinical guidelines for children and adolescents experiencing gender dysphoria or incongruence: A systematic review of guideline quality (part 1)’. *Archives of Disease in Childhood*, archdischild-2023-326499.

<https://doi.org/10.1136/archdischild-2023-326499>, see Table 1.

<sup>168</sup> Cass, H. (2024) *Cass Review Final Report*. . <https://cass.independent-review.uk/home/publications/final-report/>.

<sup>169</sup> Craig Hoyle describes his experience of ‘gay conversion’ by the Exclusive (aka Plymouth) Brethren in Hoyle, Craig (2023), *Excommunicated: A multigenerational story of leaving the Exclusive Brethren*, Auckland: HarperCollins. Shaneel Lal describes brutal beatings by a sect associated with his childhood village in Fiji: Lal, Shaneel (2023) *One of Them*, Allen and Unwin.

<sup>170</sup> D’Angelo, R., Syrulnik, E., Ayad, S., et al. (2021) ‘One size does not fit all: In support of psychotherapy for gender dysphoria’. *Archives of Sexual Behaviour*, 59, p.10.

The new law has had a demonstrably chilling effect on the ability of clinicians to discuss, speak publicly or hear about issues in relation to gender transition, despite the desire in the law to support respectful conversations. We are aware of multiple vexatious complaints and we have been privy to the level of violent hostility directed at doctors,<sup>171</sup> counsellors and psychotherapists who have spoken out. The Free Speech Union has commissioned a legal opinion to demonstrate that health practitioners are not breaking their organisational code of ethics by speaking, or even reading, about these issues.<sup>172</sup> This is an astounding situation for a branch of medicine. Medicine progresses by safeguarding, evidence evaluation and peer review. New Zealand is also heading in precisely the opposite direction from much of the rest of the world. The UK and several European democracies are prioritising psychosocial approaches and greater caution before any medical treatment.<sup>173</sup> That affirmative approaches are being withdrawn in country after country on the basis of systematic, evidence-based reviews that demonstrate that there is only poor evidence for their efficacy is not mentioned in the Issues Paper. New Zealand's refusal to engage in 'respectful and open discussions' about this controversy raises related issues of children's human rights and (in)ability to give informed consent.

### 3.5 Children's rights

New Zealand is signatory to international conventions that cover the rights of children and the need to protect them from harm, for example the United Nations Convention on the Rights of the Child.<sup>174</sup> Children's rights include considering their competence to consent to medical interventions with potentially life-long impacts. Commissioned by the UK's National Health Service, the Cass Review (whose Final Report was published on 10 April 2024)<sup>175</sup> had conducted eight independent systematic reviews of the global research literature to underpin its recommendations.<sup>176</sup> It reveals there is no clear evidentiary basis for medical gender affirmation interventions in children and confirms that the evidence for social conversion, puberty suppression and cross-sex hormone treatment is of such poor quality that no foundation exists for clinical decisions and informed consent. The NHS's decision to

---

<sup>171</sup> Emeritus Professor Charlotte Paul refers to the threats to their livelihood that have silenced some New Zealand doctors: Paul, C. (2023, December 23). 'A terrible trap'. *North & South*. <https://northandsouth.co.nz/2023/12/24/puberty-blockers-new-zealand/>.

<sup>172</sup> Levy, N. (2023). *Genspect – Countering Hate Speech Aotearoa complaints to RNZCGP and others*—Free Speech Union.

<https://www.fsu.nz/genspect-countering-hate-speech-aotearoa-complaints-to-rnzcgp-and-others>  
<sup>173</sup> Cass, H. (2024) *Cass Review Final Report*. <https://cass.independent-review.uk/home/publications/final-report/>.

<sup>174</sup> <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/crc/>

<sup>175</sup> Cass, Hilary. (April 2024) *The Cass Review: Independent Review of Gender Identity Services for Children and Young People: Final Report*. Downloaded from <https://cass.independent-review.uk/home/publications/final-report/>. Counting Ourselves, an online self-selected survey in Aotearoa, suggested that young New Zealanders identifying as 'trans' had a similar population profile. Veale, J., Byre, J., Tan, K., et al. (2019) *The Health and Wellbeing of Transgender and Non-binary People in Aotearoa New Zealand*. University of Waikato.

<sup>176</sup> Kingdon, C. C. (2024) 'Holistic approach to gender questioning children and young people'. *Archives of Disease in Childhood*. <https://doi.org/10.1136/archdischild-2024-327100>.

restrict the use of puberty blockers to formal research trials was upheld following a change of government and a legal challenge.<sup>177</sup> In New Zealand paediatric gender medicine is highly devolved to hospital based gender clinics, youth clinics and primary care practices. All are yet to conform to the clinical standards established by the competent authority of the Cass Review Final Report.

The United Nations Convention clearly places responsibility and care for children with their parents and not the state.<sup>178</sup> Whilst puberty blockers continue to be provided outside of an ethics-approved clinical research trial in New Zealand, and cross-sex hormones are prescribed to minors, children are – as were the Tavistock Clinic’s patients – being given unproven treatments that often have long term, even life-long, adverse effects. Children are prescribed puberty blockers and cross-sex hormones at an age when they are unable to provide free and informed consent because they are unable to comprehend the implications of risking lifelong infertility, impairment in sexual functioning, and serious physical health problems. Article 16 of the Universal Declaration of Human Rights states that ‘Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family’.<sup>179</sup>

### 3.6 Human rights and patients’ rights

The Human Rights Act 1993 and the Health and Disability Commissioner Act 1994 and 2002 are intimately connected.<sup>180</sup> The Code of Health and Disability Consumers Rights<sup>181</sup> is an essential element of human rights legislation in New Zealand. Ultimate adjudication of both Acts is to the Human Rights Tribunal. Thus, changes to the human rights legislation necessarily affect patient rights and vice versa. The Acts are designed to run in parallel. For example, the Code of Health and Disability Consumers Rights states ‘Discrimination means discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993’.

A concurrent review of Review of the Health and Disability Commissioner Act 1994 proposes to rewrite the Act in ‘inclusive terms’ which fundamentally alter the provisions of the Code of Patient’s Rights – for example changing pronouns and replacing ‘individual’ with ‘whanau’ into each

---

<sup>177</sup> *TransActual CIC v Secretary of State for Health and Social Care* (High Court 29 July 2024). <https://www.judiciary.uk/wp-content/uploads/2024/07/Approved-Judgment-RTransActual-CIC-and-Anor-v-SSHSC-and-Anor.pdf>

<sup>178</sup> <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

<sup>179</sup> Rivers, J. (2024). *Comments on the Human Rights Conventions in Relation to Gender Medicine in New Zealand*. Genspect New Zealand. <https://www.publicgood.org.nz/wp/wp-content/uploads/2024/08/Genspect-New-Zealand-Human-Rights-summary-final-no-watermark.pdf>

<sup>180</sup> Health and Disability Commissioner (2024), *Review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers’ Rights | Ko te arotakenga o Te Ture Toihau Hauora, Hauātanga 1994 me te Tikanga o ngā Mōtika Kiritaki mō ngā Ratonga Hauora, Hauātanga: A consultation document | He tuhinga uiui*, April 2024 | Āpereira 2024, <https://www.hdc.org.nz/your-rights/review-of-the-act-and-code-2024/>

<sup>181</sup> <https://www.hdc.org.nz/disability/the-code-and-your-rights/>.

article of the Code. These definitions replace the explicit protections for women. Taken together these changes make access to gender medicine a human right, without consideration of the extreme medical risks involved.<sup>182</sup> These provisions will amplify the risks of New Zealand's "No fault" environment for medical injury and unsafe practice.<sup>183</sup>

Section 44 of the Human Rights Act is concerned with 'provision of services' and states that it is illegal to refuse services to a category of persons included in the list of 'prohibited grounds for discrimination'. Section 3.44-3.46 of the Issues Paper suggests that trans-identified persons should be included in this list. This is consistent with New Zealand's gender-affirming health policy.<sup>184</sup> If, however, a practitioner who does not automatically 'affirm' trans identity is acting in an illegally 'discriminatory way' it will inhibit medical practitioners from openly discussing the risks and benefits of transition medicine. This undermines the protection of providing 'fully informed consent' as required by Right 6 and 7 of the Code for extremely vulnerable youthful patients.

Systemic reviews are the gold standard of evidence-based medicine. No systemic review anywhere has found evidence that puberty blockers are a safe and effective treatment for gender distressed children or young people. This absence of safety data places people seeking transition medicine in a very vulnerable and dangerous situation. If medical inaction based on this lack of evidence is interpreted as discriminatory under the Human Rights Act it will legally compromise the professionalism of cautious doctors seeking to practice evidence-based medicine. And, if withholding transition medication is discriminatory, it will also inhibit access to appropriate medical care for the growing number of patients seeking to de-transition.

The primary provision of the Code of Health and Disability Services Consumers' Rights (section 20a) in the Health and Disability Commissioner Act 1994 is the principle that 'no health care procedure shall be carried out without informed consent.' However, it is impossible for children, youth and immature young people to fulfil the requirements of informed consent to gender medicine because they can meet neither the requirement for 'consent' nor the requirement for 'informed.' Right 6 (1.b) of the Code, 'the Right to be Fully Informed', requires the patient to have 'an explanation of his or her condition and an explanation of the options available including an assessment of the expected risks, side-effects, benefits and costs of each option'.<sup>185</sup> Health policy demanding 'affirmation' of trans identity and unquestioned access to trans medicine is contrary to this

---

<sup>182</sup> As 174 above

<sup>183</sup> Wallis, Katherine (2017) 'No-fault, no difference: non-fault compensation for medical injury and healthcare ethics and practice'. *British Journal of General Practice*, 76 (654) pp.38-39. Health Consumer Advocacy Alliance (2023) *Are Our Medical Harm Reporting Systems Effective? Are people safe?* pp.1-44

<sup>184</sup> Oliphant, Jeannie et al. Op.cit.

<sup>185</sup> <https://www.hdc.org.nz/disability/the-code-and-your-rights/>.

definition because there is no scientifically valid evidence for the safety or effectiveness of transition medicine. No systemic reviews of gender medicine have shown that that transition medicine is a safe and effective treatment for gender distressed young people. Without this information it is impossible for a patient to give fully informed consent to treatments purporting to change their sex.

Consent of minors raises fundamental issues of law. Courts usually strive to keep the minor person's options open as long as possible until they reach the level that they can fully exercise the conditions of consent. Among those conditions is an understanding of the implications of the information given. This is the Gillick standard of competence, which originated in the United Kingdom and which has been adopted in New Zealand, Code Right 7.3.<sup>186</sup> The law as applied in New Zealand makes a presumption of competence of very young people on the threshold of puberty to make decisions which fundamentally change their adult bodies. *Unlike decisions about contraception or abortion which keep future options open, trans medicine has far-reaching irreversible effects closing off future options.* From the age of 16, patients are assumed to be competent to give self-consent but children are required to "have the intelligence and understanding to be competent to give consent". New Zealand has no clinical guidelines for this process. In practice, it is a question "for the doctor to determine in each case".<sup>187</sup> There is no legally accepted standard for when a person reaches the ability to understand all the information or to exercise the degree of foresight required. Without a definitive test for Gillick competence, health practitioners are in a difficult position.

The situation in New Zealand is unclear, inconsistent, and incoherent. Practitioners are not educated in making decisions of competence; nor are educators. Yet how competence is interpreted vitally affects the treatment of children in schools, health and care institutions. Such confusion is likely to lead to many practitioners avoiding treating young people at all. The policy of gender-affirming transition medicine in New Zealand places a presumption of affirmation on the practitioner. Children and young people are allowed to be self-consenting to this life-changing medicine that will fundamentally alter their future choices and about which there is evidence of many people coming to deeply regret their decisions. The conduct of longitudinal follow-up studies is a specialist task but New Zealand has the appropriate expertise. Given the exceptionally high use of puberty blockers in this country we recommend that scientists with appropriate epidemiological and methodological expertise be immediately contracted to conduct a long term evaluation of safety. FOWL members ask that the Law Commission take on the vital role of protecting children and young people by fundamentally reviewing 'competence' as it relates to transition medicine because it affects

---

<sup>186</sup> Royal Courts of Justice. (2020, December 1) *Approved Judgment: Quincy Bell and Mrs A vs The Tavistock and Portman NHS Foundation Trust; Case No: CO/60/2020*. London: Royal Courts of Justice. Retrieved August 10, 2021 from <https://www.judiciary.uk/wp-content/uploads/2020/12/Bell-v-Tavistock-Judgment.pdf>.

<sup>187</sup> *Ibid.* p554.

everything about the future of the children and young people who are currently subjected to gender-affirming medical and educational policy.

### 3.7. *On binaries and language*

We are asked to comment on the use of binary and ‘gendered’ language in the report (S. 17.68, p. 199). Feminist writers have long tried to establish gender neutral language. Continually writing ‘he or she,’ or even ‘s/he,’ becomes tiresome. The singular ‘they’ is acceptable if referring to a generic, rather than a sex-dependent, identity – a farmer, a cyclist, a customer etc. Such neutral terminology has helped women challenge ‘the male as norm’ in workplaces and in public life. ‘They’ can also usefully serve as third-person pronoun for a trans-identified person: ‘they’ encompasses the person’s personae before, during, and after transition. However, in situations in which *sex* – the biological body – is relevant (in childbirth for example), the imposition of ‘neutral’ language as demanded by gender identity theory erases female embodiment and reproductive labour. The Issues Paper’s bias towards gender identity theory blinds it to some fundamental, yet largely unaddressed, human rights issues. The 2006 Crown Law opinion has been the driver for much policy change in favour of gender theory. This remains unacknowledged in the paper and has taken place with little to no consultation.

The Report’s bias towards gender identity theory blinds it to some fundamental, yet largely unaddressed, human rights issues. These include the erasure of the words ‘woman’ and ‘mother’ from government and professional policy documents and information materials – presumably to appease the very tiny minority of females who ‘self-identify’ as men. New Zealand’s Midwifery Council removed such female-identified words from its draft Scope of Practice [SOP, re-added women/persons to its recently gazetted SOP<sup>188</sup> and is now having to respond to complaints to the Regulatory Review Select Committee.<sup>189</sup> This deliberate obfuscation of science is objectively harmful to other women, to children and to society more broadly. In organisations, students and/or staff are increasingly expected to ‘state your pronouns’. Pronoun choice effectively categorises participants according to glossaries of ‘identity’ terms (external identities).

There are considerable benefits to centering women and language about women, for example in childbirth and maternity care. Removing the terms ‘women’ and ‘mothers’ from public and/or professional policies and replacing them with ‘people who menstruate’ or ‘people who have cervixes’

---

<sup>188</sup> New Zealand Government. (2024). *Midwifery Scope of Practice and Qualifications Notice 2024* gs1575. New Zealand Government. <https://gazette.govt.nz/notice/id/2024-gs1575>

<sup>189</sup> Midwifery Council. (2024). *Response to complaints about the Midwifery Scope of Practice and Qualifications Notice 2024*. [https://www.parliament.nz/resource/en-NZ/54SCREGR\\_EVI\\_99b32fd1-e4d4-4a2e-13b7-08dc8056d984\\_REGR1003/06331d20e086f9c072c7f9a01f88a71206f8ef6f](https://www.parliament.nz/resource/en-NZ/54SCREGR_EVI_99b32fd1-e4d4-4a2e-13b7-08dc8056d984_REGR1003/06331d20e086f9c072c7f9a01f88a71206f8ef6f)



reduces the complexity of gestation and birth of a child to a set of disembodied parts.<sup>190</sup> Refusing to use the word ‘woman’ in this context is a form of gross discrimination against the female body and the reproductive health needs it requires. Reproduction is a whole-body experience. Blurring language in this way also obscures a more general derogation of women's bodies as the ‘producers’ of new life.

So-called ‘gender neutral’ vocabularies are often inequitably applied in government and professional policies and regulations. While women are often reduced to body parts, men are seldom described as ‘people with a penis’, ‘sperm ejaculators’, or ‘people with scrotums/prostates’. The 21<sup>st</sup> November 2023 Te Whatu Ora Newsletter provides an example from the health sector which has enthusiastically taken up gendered language.<sup>191</sup> It highlighted men’s health by promoting binary sex when offering health services for men but not for women. Their health messages highlighted men, fathers, brothers: ‘We know what works for men’. Conversely, its write up of a maternity services survey never identifies ‘women’ or ‘girls’ but instead refers to ‘consumers’, ‘whanau/families’, and ‘birthing parents’. It uses the word ‘mothers’ only once. The same publication advertises their new podcast on ‘Neurobirth’, which refers to ‘neuro diverse people’ - neither ‘women’ nor ‘mothers’ are mentioned. Neuro diverse ‘people’ must all be biological women in order to be pregnant. Previous publications referred to ‘people with a cervix’ when offering cervical screening services.

Language holds socio-historical ways of seeing/knowing through which people make sense of their lives and their experiences. Language is critical to how these meanings are explored and (re)enacted in day-to-day circumstances. Meaning makings are also critical sites of struggle over the outcome of the power these meanings hold.<sup>192</sup> This is why it is important that reviews of the evidence for and against legislative change bring to the public’s attention the most scientifically and intellectually rigorous material. Poor quality resources are often cited. The Yogyakarta Principles are the product of a Canadian NGO and yet they are cited as if they are binding on the NZ government. At the time of their initial publication two of the participants wrote that states adopting them would not allow women’s rights also to exist and a law professor has disassociated himself from the project more recently on this basis.<sup>193</sup> Michael O’Flaherty, the convenor of the original Yogyakarta Principles

---

<sup>190</sup> Donovan, S. (2022, November 6). ‘NZ Midwifery Council drops the words ‘mother’ and ‘woman’. *Scoop News*. <https://www.scoop.co.nz/stories/GE2211/S00011/nzmidwifery-council-drops-the-words-mother-and-woman.htm>; Hocking, J. J., Dahlen, H. G., Gribble, K. D., Bartick, M. C., Mathisen, R., Walker, S., Gamble, J., Bergmann, N. J., Gupta, A., & Bewley, S. (2022) ‘Effective communication about pregnancy, birth, lactation, breastfeeding and newborn care: The importance of sexed language.’ *Frontiers in Global Women’s Health*. <https://www.frontiersin.org/articles/10.3389/fgwh.2022.818856/full>.

<sup>191</sup> <https://www.tewhatauora.govt.nz/for-health-professionals/health-sector-updates/stakeholder-newsletters/>

<sup>192</sup> Court, M. (2001) *Sharing Leadership In Schools: Narratives of Power*. Thesis presented in partial fulfillment for the requirements for the degree of Doctor of Philosophy in Social Policy and Social Work at Massey University, P.O Box 11222, Palmerston North, New Zealand

<sup>193</sup> Bindel, J., & Newman, M. (2021). *The Yogyakarta Principles: Women’s rights were not considered* (No. 9 April 2021). *Sex Matters*. <https://sex-matters.org/posts/updates/yogyakarta-principles/>

Group, openly admits the Group chose to bypass any steps that needed to be taken to (re)enact meaning at community level as they brought the ideas underpinning the Principles together:

... the ... Principles are expressed in exclusively gender-neutral terms. The approach was deliberately adopted in order to ensure the application of all aspects of the Principles with regard to the life experience of people regardless of and with full respect for whatever gender identity they may have, while also avoiding binary constructions of gender.<sup>194</sup>

Adopting gender neutral terms, according to O'Flaherty, was done to 'explicitly protect the rights of transgender people.'<sup>195</sup> However, he also admitted that enabling clarity ... came 'at the price of the invisibility in the text of any reference to the particular situation and issues of women.'<sup>196</sup> It is important that legal documents do not provide yet another linguistic means through which the lives and experiences of women are compromised. it is important that legal documents 'get it right'.

Widespread adoption of gender theory/gendered language in both legislation and policy in this country has enhanced the potential for the law to undermine women's sex-based human rights and legal protections. In law, as in society, sex matters at times when women, as females, need specific recognition of their sex. When sex does matter, that any individual might identify as something other than their sex (determined either at birth or during the gestational period) is irrelevant. When sex does NOT matter, that individuals may have adopted a legally binding trans or non-binary persona is also irrelevant.

As a community we are still nowhere near resolving the real-time impact of 'gender' & 'sex/sexuality' on our bodies. We fully agree with the statement "Law reform should only be undertaken if it is necessary and if it is the most appropriate way to achieve a policy objective" (NZLC, p53). 'No debate' and deliberate attempts to sidestep the 'issues of women' has resulted in modes of being reinforced by policy diktat rather than achieved by general agreement. Law changes to achieve a policy objective only feed into the existing difficulties previous 'gender' policy pronouncements have created. We see no reason to amend Section 21 until we have fully debated the effects of gender theory on the lives and experiences of women at local and national level.

---

<sup>194</sup> O'Flaherty, Michael and Fisher, John (2008) 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles'. *Human Rights Law Review*, 8(2), pp. 207-248; <https://doi.org/10.1093/hrlr/ngn009>.

<sup>195</sup> Ibid, p. 236.

<sup>196</sup> Ibid, p. 236.

**4. FOWL recommends that:**

1. Section 21 not be amended at this time. However, it is necessary to ‘clarify the scope of the ground of sex’ by means of a clear science-based definition. Baroness Kishwer Falkner, chair of the UK’s Equality and Human Rights Commission, supports the need for such a definition in proposed reforms of the UK’s Equality Act. We suggest consulting her. Women’s rights are covered under CEDAW on grounds of sex. The rights of people with intersex or other innate variations of sex characteristics are covered under sex. Those who present and describe themselves with categories such as transsexual, transgender and non-binary can be included in the protected category of sex in ways that do not collide with the rights of women (adult human females). A clear science-based definition of sex is required. The next stages of the review must include consultation with biomedical scientists with specialised knowledge of the biology of sex.

2. The next stage of the review must include consultation with the Royal Australian and New Zealand College of Psychiatrists, who have professional knowledge and understanding of people’s struggles with ‘identity’, including what they refer to as their ‘gender.’ <https://www.ranzcp.org/clinical-guidelines-publications/clinical-guidelines-publications-library/role-of-psychiatrists-working-with-trans-gender-diverse-people#:~:text=The%20RANZCP%20opposes%20conversion%20therapy,Psychotherapy%20is%20not%20conversion%20therapy>.

3. The next stage of the review must consult with Dr Hilary Cass and take account of the findings of the scientific evidence-based Cass Report. <https://cass.independent-review.uk/home/publications/final-report/>

4. The next stage of the review should consult with therapists who are offering ‘exploratory psychotherapies’ as an alternative to medical pathways for troubled gender dysphoric youth. We suggest Stella O’Malley of GenSpect International <http://www.stellaomalley.com>; <https://genspect.org>

5. The next stage of the review should reach out to women’s groups of differing political, religious/philosophical and geographical backgrounds – Muslim women, church groups, rural women, Lesbian Action for Visibility in Aotearoa, the Māori Women’s Welfare League, for example.

6. The Commission must examine the international examples of jurisdictions that have implemented protections based on a conflation of gender identity with sex.

7. The Commission should develop the research programme and discussion related to the ability for New Zealanders to disbelieve in gender identity in the way that legal cases in the UK have protected gender critical beliefs as eligible for protection in a free and democratic society.

8. Section 10 discusses goods, services, provisions and places. For reasons of fairness, dignity, privacy and safety, it is important to maintain the rights of women to have single sex clubs (10.12), women only sports (10.13), to allow courses and counsellors to be restricted to women only groups (10.25), to allow single sex hostels and schools. People with innate variations of sex characteristics and/or who identify as 'trans' might want similar rights to exclude others from therapeutic, medical and/or residential spaces and services. We support these rights.

9. The recent addition of 'gender self ID' clauses in the Birth, Deaths, Marriages and Relationships Act have resulted in difficulties for groups and organisations requiring proof of sex – competitive sports, women's refuges, therapy groups for rape survivors and so on. A birth certificate is now no 'proof of sex.' The rules for access to original birth records may need to be modified.

10. Given the exceptionally high use of puberty blockers in this country we recommend that scientists with appropriate epidemiological and methodological expertise be immediately contracted to conduct a long-term evaluation of safety.

11. We ask that the Law Commission take on the vital role of protecting children and young people by fundamentally reviewing 'competence' as it relates to transition medicine because it affects everything about the future of the children and young people who are currently subjected to gender-affirming medical and educational policy. This should include work to clarify the meaning of Gillick competence in relation to the commencement of medical interventions leading to opposite sex imitation. This decision could hardly be more material to a young person's future.

12. We ask that the Commission survey the population of New Zealand women to identify the importance that they attach to the provision services provided for them as a sex-class.