



Submission	Te Aka Matua o te Ture /The Law Commission Issues Paper #53: Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics.
Due date	5 September 2024
Links to further information	<p>Full Issues Paper: https://www.lawcom.govt.nz/assets/Publications/IssuesPapers/NZLC-IP53.pdf</p> <p>Summary Paper: https://www.lawcom.govt.nz/assets/Publications/IssuesPapers/NZLC-IP53-SUMMARY.pdf</p> <p>Human Rights Act: https://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304475.html</p>

Background

Te Aka Matua o te Ture | Law Commission was asked in November 2022 by then Minister of Justice Kiri Allan, to review the protections in the Human Rights Act 1993 (HRA or the Act) for transgender and non-binary people, as well as people who have an innate variation of sex characteristics.

The Commission will report to the Minister of Justice (Paul Goldsmith) by the end of June 2025. The Law Commission (Commission) will advise the Government on whether and what amendments should be made.

The Issues Paper identifies and explores potential options for reform and poses 80 questions for feedback. This is a complex 211-page report with a lot of cross-referencing and multiple options. There is a 21-page Summary document. If you are interested in a particular topic, this will help you to find the relevant chapter in the Issues Paper.

You might find it helpful to read the Women's Rights Party submission (available on our website), the FOWL submission, and The Ministry Has Fallen substack, 20 August.

Feedback can be provided via the Law Commission website at <https://ia-tangata.lawcom.govt.nz/online-submission/>

Submissions are due by **5pm, on 5th September 2024**.

Definitions

The Commission argues there is confusion with the terms 'sex', 'gender', and 'gender identity', often being used interchangeably and reflecting different perspectives, including cultural beliefs. The Commission strongly supports inclusion of 'transgender and non-binary people' as well as those with 'innate variations of sex characteristics' in the prohibited grounds of discrimination contain in s21 of the Act.

The definitions used by the Commission in the review (Chapter 2) are attached as Appendix 1.

Women's Rights Party focus

We recommend that Women's Rights Party members focus on the following issues in your submissions:

- A. Whether the prohibited grounds of discrimination should be amended to include people who are transgender, non-binary, or have an innate variation of sex characteristics (differences or disorders of sex development, DSDs).
- B. Whether the definition of 'sex' in the HRA should be amended to spell out that it refers to biological sex.
- C. If protection under s21 of the HRA was extended on the basis that 'sex' could include self-identified gender identity, what implications would there be for the protected ground of sex?
- D. Whether the sex-based exceptions in Part 2 of the HRA in services, facilities and competitive sport, should be retained, amended or abolished.
- E. Examples of issues that you have experienced or know of that are relevant to the review. You might want to give examples of how women and men are being harassed and discriminated against for their 'gender critical' views. You could raise this in relation to **Q 80** of the Review.

Women's Rights Party Policy on Inclusion of 'Gender' in Legislation

The Women's Rights Party opposes the inclusion of "gender identity and gender expression" as a protected ground for discrimination in the Human Rights Act 1993. 'Gender' is an imprecise concept that refers to sex-based stereotypes and social expectations, e.g. what is considered feminine and masculine.

'Gender identity and expression' refer to the identification with, and expression of these stereotypes. We say the rights of women and children to reject such stereotypes without discrimination, labelling, or medical intervention to 'fix' them is paramount.

Our position is that the addition of 'gender identity' to the grounds for unlawful discrimination could undermine the exceptions based on sex. Part 2 of the HRA sets out circumstances where discrimination may be lawful. The question of whose rights would take precedence (i.e. women's sex-based rights, or new rights protecting men claiming identity as women) would inevitably have to be decided in a Court of Law as in the Australian case of 'Tickle v Giggle'.

We also say that the freedom of speech to question the concept of 'gender' and 'gender identity' to assert the sex-based rights of females, is a fundamental human right. It is protected in the Bill of Rights Act 1990, and must not be removed by any legislation, policy or government practice.

The Law Commission Issues Paper seeks feedback as to whether there should be a provision in Part 2 of the HRA about 'misgendering' and 'deadnaming' (see Q75). The Women's Rights Party is concerned that this could lead to discrimination against women and men expressing 'gender critical' views (e.g. if they are challenging workplace policies) and could lead to arrests for 'hate speech'.

Definition of Sex

We support the argument that the HRA should be amended to clarify the definition of 'sex'. Currently the Act includes 'sex (including pregnancy and childbirth)' in the list of 13 prohibited grounds of discrimination (see s21 of the HRA). This suggests that the original Act intended 'sex' to refer to a person's biological sex (either male or female) and only females, no matter how they identify, can experience pregnancy and birth. We would add breastfeeding to this.

The HRA mentions 'women' and 'men' in only one section (s47 in relation to skill) and the fact that this exception specifies that it applies to 'one sex only' clearly refers to females and males.

The Women's Rights Party definition is contained in both our Constitution and Policy Platform: "Human female denotes the sex with a reproductive system typically organised to bear offspring or produce eggs, distinguished biologically by the production of gametes (ova) that can be fertilised by male gametes, and includes females whose reproductive system may be disordered in some way and those females who choose not to reproduce." Note that our definition includes those females with DSDs.

Protection of Sex-based Rights

The Women's Rights Party policy is that women's and girls' sex-based rights, as biological females, need to be protected in policy and law, and this should be given precedence over any proposed provisions based on concepts of 'gender' or 'gender identity'.

We don't agree that anyone is 'born in the wrong body' and can change or opt out of their sex. 'Gender' refers to socially constructed behaviours that society expects from one or other biological sex, which often perpetuate inequalities between the sexes, noting that these expectations are not enduring (they change over time) and they vary across cultures.

We note that people with DSDs do not share the same issues as those claiming a 'gender identity' and the Issues Paper has limited evidence of discrimination on this basis.

We note also that the Issues Paper does not consider the discrimination experienced by "de-transitioners" often at the hands of the trans community.

Recommendations from our submission

You might want to make some of these points in your own language, using examples that you have experienced or know of.

1. That the Law Commission contracts a reputable polling company to survey New Zealand women (and men) to identify the importance they attach to the sex-based rights in the Part 2 Exceptions.
2. That the Law Commission invites those women's organisations that have submitted on the Issues Paper to serve as an Expert Group to examine the evidence contained in the submission process, with the lens of sex-based rights that would be at risk should 'gender identity' be introduced into the HRA. These would include representatives from the Women's Rights Party, Mana Wāhine Kōrero, Speak Up for Women, FOWL, LAVA, Resist Gender Education and Save Women's Sports.
3. That the Law Commission recommends to Parliament the provision of separate services for "de-transitioners", who may be reluctant to engage in those services that facilitated their pathway to transition. This is in line with recommendations of the Cass Review.

4. That the Law Commission recommends to Parliament review or repeal of the changes to the Births, Deaths, Marriages and Relationships Registration Act. If birth certificates include provisions for a “nominated sex”, it needs to be clear that this is the individual’s preferred sex and not biological sex. Clear and accessible records must be kept of any changes to the birth certificate, and this information must also be recorded on the certificate itself. Further, no child under 18 should have a “nominated sex” on their birth certificate, unless the original sex on the birth certificate was incorrect, for example, in the rare instance of a child born with a difference of sexual development (DSD or ‘intersex’).
5. That the Law Commission considers the experience of ‘innate variations of sex characteristics’ or ‘intersex’ separately from issues associated with being transgender or non-binary. The Commission should give more weight to those health professionals with expertise in this area to more clearly define the scope and treatment of DSDs in Aotearoa NZ today, given the contradictory evidence in the Issues Paper.
6. That the Law Commission recommends to Parliament that the s21 Prohibited grounds of discrimination remain as they are. ‘Gender’ refers to socially constructed behaviours that society expects from one or other biological sex, which often perpetuate inequalities between the sexes, while ‘gender identity’ is an inner feeling experienced by an individual that has no place in law and policy.
7. That the Law Commission pays serious attention to CEDAW, as international law that New Zealand is obliged to abide by. The sex provisions of the Human Rights Act were written in order to comply with CEDAW and any changes to the law which reduced or removed the protections on the grounds of sex, both the anti-discrimination provisions and the exceptions where discrimination is permitted on the grounds of safety, dignity and privacy, would be in breach of CEDAW.
8. That the Law Commission consults with women’s organisations such as the Women’s Rights Party to come up with a clear science-based definition of ‘sex’. We have provided the following suggestion:

A person’s ‘sex’ refers to a person’s biological sex (either male or female).

‘Women’ and ‘girls’ refer to human females, and the words ‘men’ and ‘boys’ refer to human males.

‘Human female’ denotes the sex with a reproductive system typically organised to bear offspring or produce eggs, distinguished biologically by the production of gametes (ova) that can be fertilised by male gametes, and includes females whose reproductive system may be disordered in some way and those females who choose not to reproduce.
9. That the Law Commission makes it clear in its Report to Parliament that freedom of speech to question the concept of ‘gender’ and to assert the sex-based rights of females is protected in the Bill of Rights Act 1994 and must not be removed by any legislation, policy or government practice.
10. That the Law Commission recommends to Parliament removal of ‘gender’ from the Conversion Practices Prohibition legislation. The Women’s Rights Party supports the aim of the Conversion Practices legislation to protect lesbians, bisexuals and gay people from conversion practices and to promote open and respectful discussions about sexuality. However, we do not support the inclusion of ‘gender, gender identity and gender expression’ in this legislation because it can be seen as a form of gay conversion, and promotion of ‘gender identity’ to children risks causing them permanent harm.

11. That the Law Commission engages with a wider range of Māori and Pasifika who have not been captured by Critical Race Theory and Queer Theory and can contribute a perspective steeped in their traditions.
12. That the Commission examines international examples of jurisdictions that have implemented protections based on a conflation of 'gender identity' with 'sex' with a lens on the impact of such protections on women and women's sex-based rights.
13. That the Law Commission pays serious attention to the Cass Review, and understands that there is no evidence base to support the widespread, forced, social transitioning of children as it is canvassed in the Issues Paper.
14. That the Law Commission recommends to Parliament that the privacy, safety and dignity of school children is best served by the provision of safe, single sex, toilet and changing facilities in schools. The installation of mixed-sex toilets and changing rooms in schools is proving to be a failed social experiment that is harming children and young people.
15. That the Law Commission recommends that single-sex schools consider the rights of parents to decide the educational needs of their children and adolescents and should not be accepting enrolments from students of the opposite sex.
16. That the Law Commission considers the need for women and men to be afforded the dignity and safety of same-sex spaces when we are at our most vulnerable, including but not limited to toilets, changing rooms, prisons, refuges, rape crisis centres, saunas, swimming facilities, hospital wards and other facilities. Sex, not gender, will allow women to be accommodated in an environment that enhances our physical and mental wellbeing.
17. That the Law Commission recommends to Parliament the amendment of s21A(1)(a) to include s46 (Exceptions in relation to public decency or safety). The purpose of this is to allow discrimination on the basis of sex to provide for single-sex spaces such as toilets, changing facilities, hospital rooms, and services such as women-only swim sessions provided by local Councils.
18. That the Law Commission reinforces New Zealanders' overwhelming support for safety and fairness in sport at all levels. We recommend that no additional grounds are added to the exception s49(1). If clarification is required regarding the definition of sex, then it needs to be defined as biological sex to prevent the situation where a document is falsified by sex self-ID and used as proof of sex as occurred in the Paris Olympics.
19. That the Law Commission makes no recommendation to Parliament with respect to 'misgendering' and dead naming'. Restrictions in relation to names and pronouns have no place in the HRA or government policies. The Women's Rights Party is concerned that regulating speech in the HRA could lead to further discrimination against women and men expressing 'gender critical' views (e.g. if they are challenging workplace policies) and could lead to arrests for 'hate speech'.
20. That the Law Commission uses clear and plain language when referring to women in the media, academia, in healthcare, at work and at home. In particular, we object to the term "cisgender woman", to the suggestion that babies are 'assigned a sex at birth', and the use of 'gender neutral' pronouns.

Appendix 1

Definition Used in Law Commission Review of S21 of Human Rights Act

The Law Commission adopts the following definitions for this review (Chapter 2)

- (a) Transgender - someone whose gender identity is different to the sex they were assigned at birth
- (b) Sex - the biological features that relate to sex. These include genitalia, other sexual and reproductive anatomy, chromosomes, hormones and secondary physical features that emerge at puberty, such as body hair. Sex, determined at birth based on the baby's genitalia- is variously referred to as 'sex assigned at birth', or birth sex, or sex observed at birth.

The Commission acknowledges the position that sex is fixed and binary, is determined at conception and observed at birth, and that changing one's sex organs or secondary sex characteristics does not change that. However, the Commission considers that this position is a "perspective" not a biological fact.

- (c) Non-binary - someone whose gender identity does not fit exclusively into the binary of male or female.
- (d) innate variation of sex characteristics - someone born with genetic, hormonal or physical sex characteristics that differ from medical *and social norms* for male or female bodies.

Note the inclusion of 'social norms' in the definition of 'innate variations of sex characteristics' may explain why the Commission claims those with DSDs make up 1.7% of the population, although they acknowledge this figure is a "matter of dispute". DSDs are a medical condition and the accepted incidence is 0.018% of the population. Given that there are around 60,000 births in Aotearoa NZ each year, these conditions affect around 10 or 11 babies a year. Some DSDs may not become apparent until puberty.

- (e) Gender - the Commission acknowledges that 'gender' and 'sex' are often used interchangeably, and 'gender' and 'gender identity' can be used to mean the same thing- it is sometimes not entirely clear which of these definitions the Commission is using -
 - a person's social and personal identity as male, female, or another gender or genders.
 - social and cultural construct- norms, behaviours and roles and stereotypes that a society associates with men, women and other genders
 - a person's internal and individual experience of gender (not necessarily linked to sex or sexual characteristics).

This supports the argument to clearly define 'sex' in the HRA. On the other hand, we do not agree that a person's internal experience of 'gender' or 'gender identity', i.e. their feelings or metaphysical beliefs, should become the basis of law and policy, "thereby erasing the political recognition of sex, and the existence of female persons as a specific class in law". Dr Jane Clare Jones (@janeclarejones on X, 27 May, 2021)