

5 September 2024

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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 (Issues Paper 53)

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Law Commission (**Commission**) Issues Paper: *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 (Issues Paper)*.
- 1.2 This submission has been prepared with input from the Law Society’s Human Rights and Privacy and Employment Law Committees.¹ We hope the comments it contains will assist the Commission in developing appropriate recommendations for reform.

2 General comments

- 2.1 We have found it difficult to address each of the questions in the Issues Paper. The Law Society cannot provide views about (for example) the demand for land, housing and accommodation for the transgender or non-binary community or whether transgender and non-binary students in fact face difficulties at school.
- 2.2 We also note some questions raised by the Issues Paper have not been the subject of recent (or any) jurisprudence in New Zealand, and so it is unclear how some proposals might be applied in practice.
- 2.3 In its responses, the Law Society instead focuses on issues of workability.

Section 97

- 2.4 The Law Society notes the existing power in section 97 of the Human Rights Act 1993 (**HRA**) receives only a passing reference in chapter 8 of the Issues Paper, with further references in chapter 17. In our view, section 97 is an underutilised provision. It

¹ For more information on the Law Society’s sections and committees, please visit our website: <https://www.lawsociety.org.nz/branches-sections-and-groups/>.

provides for broad defences to claims under Part 2 of the HRA, and should give comfort to any business, employer or provider of goods and services who cannot avail themselves of a specific Part 2 defence. That being so, there is a case to draw any new exceptions narrowly.

3 Chapter 3: Experiences of discrimination

Q1: Is there any other information about discrimination experienced by people who are transgender or non-binary or who have an innate variation of sex characteristics that you think it is important for us to consider?

- 3.1 The Law Society is grateful for the comprehensive survey of issues in chapters 1–3. We mention only one further issue.

Issues in the Corrections Act and Regulations

- 3.2 The Corrections Act 2004 and Corrections Regulations 2005 create difficulties for people in prison and Corrections staff who are transgender or non-binary, or who have innate variations of sex characteristics. At least two issues arise:

- (a) First, the Regulations require “male” and “female” prisoners to be detained separately. Where a person’s sex is indeterminate, it is for the chief executive to determine in which part of the estate the person is to be housed.² There is a process for people to seek review of their recorded sex,³ but the regulations may inadequately address the situation of prisoners who are non-binary or who have innate variations of sex characteristics. Further, some transgender people may feel unsafe in the part of the estate that accords with their nominated sex.
- (b) Second, certain physical searches may be carried out only by a staff member “of the same sex” as the person to be searched.⁴ It is unclear how that might apply to any of the groups discussed in the Issues Paper. To take an example, a transgender prisoner may need to be searched by both a male and female staff member, depending on the stage of their transition.

- 3.3 The Department of Corrections acknowledges that its transgender population is particularly vulnerable with complex needs.⁵ We recommend the Corrections Act and Regulations be reviewed.

4 Chapter 4: Key reform considerations

Q2: Do you agree with the key reform considerations that the Law Commission has identified for this review?

- 4.1 We agree with the key considerations identified in the chapter.

² Corrections Regulations 2005, reg 65.

³ Corrections Regulations 2005, regs 65A–65E.

⁴ Corrections Act 2004, s 94.

⁵ Letter from Rachel Leota (National Commissioner, Department of Corrections) to unknown recipient (23 September 2020).

5 Chapter 5: The perspectives and concerns of Māori

5.1 Questions 3–5 of the Issues Paper relate to tikanga and Māori perspectives. The Law Society considers that these questions will be better addressed by submitters with firsthand tikanga knowledge.

6 Chapter 6: Should section 21 be amended?

Q6: Do you have any feedback on the Commission’s preliminary conclusion that an amendment to section 21 of the HRA is necessary and desirable to ensure adequate protection from discrimination for people who are transgender or non-binary or who have an innate variation of sex characteristics?

6.1 We agree with the preliminary conclusion. We note in particular:

- (a) Absent clear endorsement by the judiciary, the 2006 opinion of the Acting Solicitor-General is insufficient to guarantee protection in the law for the transgender and non-binary community or those with innate variations of sex characteristics.
- (b) As the Issues Paper notes, the current approach relies on individual litigants bringing cases to a court or tribunal to clarify the law. That is an unfair burden on a community which is vulnerable in several respects.
- (c) A clear statement of protection in section 21 of the HRA would not only confirm legal rights and obligations, but also promote those rights and obligations to those who may benefit from that protection.
- (d) There is precedent for clarifying the scope of section 21, even if sufficient protections may exist. In 2022, section 21 was amended to explicitly provide that “disability” includes reliance on a “disability assist dog”. It is likely such a ground would have been read into the previous section 21(1)(h) in any event, as “other remedial means”.

Q7: Do you have any feedback on the application of te Tiriti o Waitangi | Treaty of Waitangi in this context?

6.2 The Law Society shares the indicative view of the Commission that articles 2 and 3 of te Tiriti o Waitangi are relevant considerations to its review, and those articles may impose an obligation on the Crown to ensure adequate protection in the law for Māori who identify as transgender or non-binary or who have innate variations of sex characteristics.

7 Chapter 7: Options for new grounds

Q8: Which of the options discussed in Chapter 7 of the Issues Paper do you think is best for protecting people who are transgender or non-binary?

7.1 The Law Society has a slight preference for a new standalone ground or grounds. The primary new standalone ground could be gender, which could be defined as including gender identity and expression. Alternatively, those grounds could be separately listed.

- 7.2 The ground of sex characteristics could be defined as a further non-exhaustive subgroup of sex, or as a standalone ground.
- 7.3 The proposal for standalone grounds appears to be a relatively straightforward amendment to section 21 and one which affords wide prima facie protection.
- 7.4 We caution against using descriptions such as “gender reassignment” or “gender history”,⁶ because they run the risk of being underinclusive and quickly outdated.
- 7.5 We note the Commission’s concern that “gender identity” would need to be defined as including both a person’s gender identity and having a gender identity that is different from sex assigned at birth.⁷ We are not sure that would be the case. In likelihood, a court or tribunal taking a human rights approach to a ground of “gender identity” would interpret it to include, where necessary, the fact that a person’s gender identity differs from their sex assigned at birth.
- 7.6 For completeness, we do not share the Commission’s concern that a ground of “sex and gender” would inappropriately conflate disparate grounds.⁸ We note that other disparate grounds are grouped together in section 21, such as psychiatric illness and reliance on a wheelchair — each being very different forms of the broader ground of disability.

Q9: Which of the options that we discussed do you think is best for protecting people who have an innate variation of sex characteristics?

- 7.7 As above: “sex characteristics” could be listed as a non-exhaustive subgroup of sex, or as a standalone ground.

Q10: If there were a combined “sex and gender” ground, do you have any feedback on how the HRA could make it clear when an exception relating to this ground applies?

- 7.8 If a combined sex and gender ground is adopted, we agree that each of the exceptions should be amended to specify when it applies, if at all.⁹ That appears to provide the greatest clarity to individuals seeking protection under the Act, and those who have obligations under it.
- 7.9 Part 2 exceptions should not be amended to apply only when advancing the underlying policy rationale.¹⁰ That would not provide sufficiently clear guidance to Part 2 actors, who are often individuals or small business owners.
- 7.10 We also agree that, depending on the scope of the ground, referring only to sex and gender in each exception may result in overreach, for the reasons in the Issues Paper.¹¹

⁶ Issues Paper at 7.15–7.17.

⁷ Issues Paper at 7.37.

⁸ Issues Paper at 7.57.

⁹ Issues Paper at 7.60.

¹⁰ Issues Paper at 7.59.

¹¹ Issues Paper at 7.62.

Q11: If new stand-alone grounds of discrimination are added to the HRA, should the ground of sex be amended to clarify the circumstances in which it would continue to apply?

- 7.11 We do not consider that defining sex as biological sex or as the sex recorded on a birth certificate helpfully advances the issue of protection for people who are transgender or non-binary, nor would it necessarily assist other Part 2 actors. As the Commission notes, such amendments would raise difficult issues of proof which may be insurmountable or unpalatable for some people, whether transgender or cisgender.

8 Chapter 8: Introduction to Part 2

Q12: An issue we raise in Chapter 8 is the potential for uncertainty as to the scope of any sex exception that is not amended to reflect new grounds. Do you have any feedback on this issue?

- 8.1 In the Law Society's view, leaving the ground of sex without amendment risks an impermissibly broad application of the Part 2 exceptions to include gender. For that reason, any new grounds should be made explicit in section 21.

Q13: An issue we raise in Chapter 8 is how people would prove their sex assigned at birth if any sex exceptions are amended to clarify that they allow different treatment on that basis. Do you have any feedback on this issue?

- 8.2 We agree with concerns that the Commission has identified.¹² It is unrealistic to expect a person to carry their passport or birth certificate (or other sex marker); it is inconsistent with current practice to require people to prove their sex on a regular basis; and it is irrational given birth certificates and other identification documents can be issued in a person's nominated sex. For those reasons, the "sex" ground should not be amended in those terms.

Q14: An issue we raise in Chapter 8 is the potential for intrusions on people's privacy if exceptions are tied to a person's sex assigned at birth, the fact they are transgender or non-binary, or their sex characteristics. Do you have any feedback on this issue?

- 8.3 Asking questions about a person's gender identity, sex assigned at birth or sex characteristics raises privacy concerns. It may also be traumatic for that person. We hope, in practice, such questions would not arise often in day-to-day interactions (such as usage of public bathrooms).
- 8.4 To the extent that those questions may need to arise in other settings, such as employment, the privacy expectations are somewhat lower. A person entering employment where sex or gender is relevant does so willingly: they would likely have a reasonable expectation that their details of their sex or gender identity would need to be disclosed to their employer and, on occasion, a customer or client.

¹² Issues Paper at 8.55.

9 Chapter 9: Employment

Q15: Are the existing protections in the HRA relating to employment (and closely related contexts) sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?

- 9.1 Although there is a strong legal argument that the HRA already provides protection to those groups via sex as a prohibited ground of discrimination, there remain disputes about this point in workplaces. It would benefit all for clarity to be provided via law reform to ensure certainty and clarity around the protections that exist.
- 9.2 Considering section 22 specifically, the existing protections are appropriately broad and should cover most issues arising. Many of the difficulties we see faced by these groups would fall within one or more of the four types of treatment that are already unlawful pursuant to section 22 or would be regulated by other relevant laws. For example, employees experiencing workplace bullying are also likely to have recourse under the Employment Relations Act 2000. We note here that the Law Society's response is based on our experience of matters that reach the point of engagement with the legal system. We recognise that this limits the scope of our understanding of the issues at play and we defer to the experience of affected groups.
- 9.3 One possible issue that could arise relates to deadnaming¹³ and other subtle forms of bullying by fellow employees. On a very conservative reading of section 22, deadnaming by colleagues might not come under "conditions of work" or "terms of employment",¹⁴ or an employer-imposed "detriment".¹⁵ It might arise only if it causes an employee to resign.¹⁶ We consider this further below (see Question 75).

Q16: Do you have any practical concerns about what the employment protections in the HRA would cover if new prohibited grounds of discrimination are added to the Act?

- 9.4 We have no comment in respect of this question.

Q17: Are new employment exceptions desirable to accommodate any new grounds we propose?

- 9.5 We are not aware of any new exceptions that may be needed.

Q18: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 26 for work performed outside New Zealand be amended to reflect those new grounds?

- 9.6 Yes. There seems no logical reason for this exception not to apply if new grounds were added.

¹³ See Issues Paper at 17.40.

¹⁴ HRA, s 22(1)(b).

¹⁵ HRA, s 22(1)(c).

¹⁶ HRA, s 22(1)(d).

Q19: Do you have any additional feedback on the practical implications of amending section 26?

- 9.7 As with all exceptions, the intention is not to fetter the prohibited ground more than necessary. This will entail careful wording: see further our comments provided above at paragraph 2.4, considering section 97 and recommending that any exceptions should be narrowly drawn.

Q20: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(1) that applies where sex is a genuine occupational qualification for reasons of authenticity be amended to reflect those new grounds?

- 9.8 Yes. It is consistent with the scheme of section 27(1) to amend it to include the new grounds.

Q21: Do you have any additional feedback on the practical implications of amending section 27(1)?

- 9.9 The complexity is that “authenticity” is undefined. The application of the definitions will be important where, for example, it is claimed that a female is required for reasons of authenticity.

- 9.10 To improve clarity and align with the original rationale for the exception, thought could be given to amending section 27(1) to clarify it applies in respect of “authenticity (such as in acting or modelling roles)”. In the example referred to in the Issues Paper of casting someone who “visibly appears” to be, for example, cisgender or transgender, it remains unclear who might assess the “visible appearance” — would that be at the discretion of the director or require some kind of objective measure?

Q22: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(2) for domestic employment in a private household be amended to reflect those new grounds?

- 9.11 We agree it is consistent to extend section 27(2) to include any new grounds, to preserve the autonomy of decision-making in the home. However, the section should be the subject of wider review in the future for the reasons the Issues Paper identifies.¹⁷

Q23: Do you have any additional feedback on the practical implications of amending section 27(2)?

- 9.12 As identified in the Issues Paper, consideration should be given to whether section 27(2) should be extended to all grounds of discrimination.

¹⁷ Issues Paper at 9.43.

Q24: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the privacy exception in section 27(3)(a) be amended to reflect those new grounds?

- 9.13 We suggest it is consistent with the bodily privacy and autonomy of customers and clients to extend section 27(3)(a) to include the new grounds. Section 35 may also assist to ameliorate any adverse consequences to the employee.

Q25: Do you have any additional feedback on the practical implications of amending section 27(3)(a)?

- 9.14 As discussed in the Issues Paper, any exception needs to be carefully worded so that it does not enable employers to decline candidates based on personal sex or gender preferences.

Q26: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exceptions in sections 27(3)(b) and 27(5) for employer-provided accommodation be amended to reflect those new grounds?

- 9.15 Yes, subject to the caveat that we are unsure of the scale of the problem that sections 27(3)(b) and 27(5) seek to address. We agree with the observation that larger employers (many of whom will be government entities such as the New Zealand Defence Force) should be able to accommodate people who are transgender or non-binary or who have innate variations of sex characteristics.¹⁸ However, there may still be some employers who cannot reasonably provide alternative accommodation arrangements, such as on-site school boarding houses with limited space or land.

Q27: Do you have any additional feedback on the practical implications of amending sections 27(3)(b) and 27(5)?

- 9.16 See Question 25.

Q28: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(4) for counsellors on highly personal matters be amended to reflect those new grounds?

- 9.17 It is consistent with the respect for the highly personal nature of counselling discussions to extend section 27(4) to include the new grounds. We also suggest section 35 assists to ameliorate any adverse consequences to the employee.

- 9.18 There do not appear to be any cases on the interpretation or application of the existing exception, but it is very limited in the scope of the exception it provides. There is some logic to the suggestion in the Issues Paper that this is an exception which may equally benefit people who are transgender or non-binary or who have an innate variation of sex

¹⁸ Issues Paper at 9.58.

characteristics, who wish to seek counselling from a person with whom they feel they have a shared experience.

Q29: Do you have any additional feedback on the practical implications of amending section 27(4)?

9.19 We have no further comment in respect of this question.

Q30: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exceptions in sections 28(1) and 39(1) for organised religions be amended to reflect those new grounds?

9.20 We suggest religious organisations will be better placed to address sections 28(1) and 39(1). The Human Rights Review Tribunal has observed that the statutory purpose of those provisions is to “to preserve the institutional autonomy of organised religions in relation to their decisions concerning the appointment of clergy and ministers”.¹⁹ We suspect that it is unlikely that religious groups which restrict ministry to a particular sex would not have similar restrictions when it comes to gender, and note that comparable jurisdictions provide for similar exceptions in the case of gender discrimination.²⁰

Q31: Do you have any additional feedback on the practical implications of amending sections 28(1) and 39(1)?

9.21 We have no further comment in respect of this question.

Q32: Do you have any feedback about the implications of this review for the Employment Relations Act 2000?

9.22 If the proposed amendments were to be made to the HRA, a corresponding amendment would need to be made to section 105 of the Employment Relations Act 2000 to include gender (or other new grounds) in that Act as a prohibited ground. Minor amendments may be required to section 106 depending on the nature and extent of the amendments made to the HRA.

10 Chapter 10: Goods, services and public places

Q33: Are the existing protections in the HRA relating to goods, services, facilities and places sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?

10.1 In general, the existing protections relating to goods, services, facilities and places seem sufficient to cover issues of concern. We note only that the application of the clubs exception in section 44 seems unclear and has not been the subject of recent clarification by the judiciary. We acknowledge the Issues Paper does not address this exception.²¹ We recommend that the exception be reviewed in any future reform work.

¹⁹ *GLCADS v Bishop of Auckland* [2013] NZHRRT 36.

²⁰ See for example: Sex Discrimination Act 1984 (Aus), ss 37(1) and 38(1).

²¹ Issues Paper at 10.12.

Q34: Do you have any practical concerns about what the protections for goods, services, facilities and places in the HRA would cover if new prohibited grounds of discrimination are added to the Act?

10.2 We have no further comment in respect of this question.

Q35: Are new exceptions relating to access to goods, services, facilities or places desirable to accommodate any new grounds we propose?

10.3 We are not aware of the need for any new exceptions.

Q36: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the courses and counselling exception in section 45 be amended to reflect those new grounds?

10.4 Group courses and counselling may discuss particularly sensitive matters relating to the individual participants. On that basis, it seems sensible to amend section 45 to reflect any new grounds.

10.5 As raised in the Issues Paper,²² the focus on “group” courses and counselling could be made clear in section 45. In practice the exception is likely not required for individual counselling: either the client would not seek the counsellor’s services, or the counsellor could decline on the basis that the client’s needs were not within their expertise (which would not likely amount to unlawful treatment).

Q37: Do you have any additional feedback on the practical implications of amending section 45?

10.6 We have no further comment in respect of this question.

Q38: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the skill exception in section 47 be replaced with a narrower exception?

10.7 While some of the assumptions underlying section 47 may have aged particularly poorly,²³ we suggest some of the rationales remain appropriate. In particular, the exception may be welcomed by members of the beauty industry who offer waxing or other intimate services in order to preserve their comfort and privacy rights.²⁴

10.8 That being so, either option 2 or 3 seem appropriate. Option 3 (an exception that applies to services where the customer would be fully or partially unclothed) may best meet the underlying objectives of the exception.

²² Issues Paper at 10.22.

²³ Issues Paper at 10.36.

²⁴ Issues Paper at 10.28 and 10.30.

Q39: Do you have any additional feedback on the practical implications of amending section 47?

10.9 We have no further comment in respect of this question.

Q40: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the insurance exception in section 48 that allows different terms and conditions on the basis of sex be amended to clarify that it entitles insurers to differentiate based on a customer's sex assigned at birth or sex characteristics?

10.10 We acknowledge that it would be consistent with the current insurance exception, which allows different terms and conditions on the basis of sex, to entitle insurers to differentiate based on a customer's sex assigned at birth or their sex characteristics.

10.11 However, as the Commission also notes, the rationale which underlies section 48 is not applied consistently with respect to all HRA grounds of discrimination.²⁵ In some situations, Parliament has considered that policy reasons not to allow different insurance terms and conditions outweigh the actuarial reasons that might otherwise indicate doing so.

10.12 In the present context, this is a policy question on which the Law Society has no concluded view. We do note that, as earlier discussed at paragraph 2.4, if section 48 remains unamended, section 97 establishes a broad defence which insurance companies could seek to rely on where appropriate.

Q41: If new grounds of discrimination are added to the HRA, should there be a new exception to allow insurers to offer different terms and conditions based on whether someone is transgender or non-binary or has an innate variation of sex characteristics?

10.13 We have no further comment in respect of this question.

Q42: Do you have any additional feedback on the practical implications of amending the insurance exception in section 48 or creating a new insurance exception?

10.14 We have no further comment in respect of this question.

11 Chapter 11: Land, housing and accommodation

Q43: Are the existing protections in the HRA relating to land, housing and accommodation sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?

11.1 As a general comment, the language of section 43 is outdated and could be amended to make clear that it applies to (for example) tenancies and boarding houses. A layperson reading section 43 may not realise that a tenancy is an "interest in land or any residential

²⁵ Issues Paper at 10.47.

accommodation” to be “dispose[d]” by the landlord. This may be outside the scope of the Issues Paper and we have no other concerns about the scope of section 43.

Q44: Do you have any practical concerns about what the land, housing and accommodation protections in the HRA would cover if new prohibited grounds of discrimination are added to the Act?

11.2 We have no further comment in respect of this question.

Q45: Are new exceptions relating to land, housing or accommodation desirable to accommodate any new grounds we propose?

11.3 We are not aware of the need for any new exceptions.

Q46: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 55 for shared accommodation such as hostels be amended to reflect those new grounds?

11.4 It would be consistent with the existing scope of section 55 to amend it to include any new grounds.

Q47: Do you have any additional feedback on the practical implications of amending section 55?

11.5 We have no further comment in respect of this question.

Q48: Do you have any feedback about the implications of this review for the Residential Tenancies Act 1986?

11.6 We have no concerns about the implications of the review for the Residential Tenancies Act 1986. As the Issues Paper notes, that Act prohibits discrimination where it would contravene the HRA.²⁶ By default, the 1986 Act will reflect any new grounds introduced to section 21.

12 Education

Q49: Are the existing protections in the HRA relating to education sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?

12.1 The Law Society has no concerns with the scope of existing protections, save to note that they would not cover student to student bullying or harassment such as misgendering and deadnaming. However, other legal protections exist to promote a safe student environment. Misgendering and deadnaming are considered further below.

²⁶ Residential Tenancies Act 1986, s 12.

Q50: Do you have any practical concerns about what the education protections in the HRA would cover if new prohibited grounds of discrimination are added to the Act?

12.2 We have no further comment in respect of this question.

Q51: Are new education exceptions desirable to accommodate any new grounds we propose?

12.3 We are not aware of the need for any new exceptions.

Q52: If new prohibited grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 58(1) for single-sex schools be amended to reflect any new grounds we propose?

12.4 Of the options proposed, option 2 (the exception should clarify that it does not entitle single-sex schools to refuse to admit transgender students whose gender identity aligns with the school's designated sex) seems the most workable and consistent with the aims of the review. As the Issues Paper notes, it would maximise educational opportunities for transgender students.²⁷ If option 2 is adopted, we suggest the practical effect would likely remain the same: transgender students (and parents of transgender students) would likely attend a school in which they feel most comfortable, which will depend heavily on the culture of the school. In many cases, and depending on the stage of the student's transition, that might be a school that is not single-sex.

Q53: Are additional amendments to section 58(1) required to accommodate students who have a gender identity that is not exclusively male or female?

12.5 If option 2 were preferred (see Question 52), there should not be a need for further amendment to section 58(1) to accommodate this group. We assume that students who identify as nonbinary are unlikely to seek admission to a single-sex school.

Q54: Do you have any additional feedback on the practical implications of amending section 58(1)?

12.6 We have no further comment in respect of this question.

Q55: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 59 for courses and counselling be amended to reflect those new grounds?

12.7 We agree the exception in section 59 is likely to have the same rationale as that in section 45 and should be amended to reflect any new grounds.

²⁷ See further Issues Paper discussion at 3.27–3.29.

Q56: Do you have any additional feedback on the practical implications of amending section 59?

12.8 We have no further comment in respect of this question.

Q57: Do you have any feedback about practical implications of this review for the Education and Training Act 2020?

12.9 We have no further comment in respect of this question.

13 Chapter 13: Exceptions for sex-separated facilities

Q58: Is an amendment to the HRA desirable to encourage the provision of unisex facilities and, if so, what should it require?

13.1 The Law Society is cautious about requiring the provision of unisex facilities through amendment to the HRA. The Act is not typically used as a vehicle to mandate changes or impose costs across a sector. In most cases, the exceptions in the Act are simply that: exceptions to be invoked only where it has been proven that unlawful treatment has already occurred.

13.2 It could be said that some parts of the Act do operate as de facto mandates: as the Issues Paper notes, reasonable accommodation provisions exist but in practice usually take effect only when a Part 2 actor is put on notice of a person's disability or other needs. Further, all employers are strongly incentivised to adopt policies and other measures to prevent potential vicarious liability for discrimination by individual employees (most commonly, sexual harassment).²⁸

13.3 Even so, those de facto mandates are limited. Any proactive requirement to provide unisex facilities for all Part 1A and 2 actors may be better placed in the Building Act 2004, for example, where the requirements for physical premises can be read as a whole. However, if the HRA is utilised for this purpose, we agree it should be subject to a reasonableness requirement and perhaps phased in over time,²⁹ given the potential significant cost that would otherwise be imposed on small and medium businesses.

Q59: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the single-sex facilities exceptions in sections 43(1) and 46 be amended to reflect those new grounds?

13.4 We suggest option 2 (the Act should clarify that it is lawful to use a single-sex facility aligned with your gender identity) be adopted, combined with a reasonableness requirement. We agree that it is likely to reflect current practice.³⁰

13.5 We consider options 3 and 4 are unsuitable for the reasons given in response to Question 13 above.

²⁸ HRA, s 68(3).

²⁹ Issues Paper at 13.37–13.38.

³⁰ Issues Paper at 13.44.

Q60: If options 3 or 4 were adopted, do you think other reforms would be desirable alongside these?

- 13.6 If either of these options are adopted, we agree the “public decency or public safety” threshold be amended to impose a reasonableness requirement.³¹ Reasonableness requirements exist in many of the most invoked provisions in Part 2 (see, for example, sections 29, 35 and 52).

Q61: Do you have any additional feedback on the practical implications of amending the exceptions in sections 43(1) and 46?

- 13.7 We have no further comment in respect of this question.

Q62: Do you have any feedback on the implications of this review for single-sex facilities in education?

- 13.8 We consider students and schools are likely to be better placed to address this question and have no further comment.

Q63: Do you have any feedback on the implications of this review for single-sex facilities in employment?

- 13.9 We have no further comment in respect of this question.

14 Chapter 14: Competitive sports

Q64: Do you think the exception in section 49(1) of the HRA should be amended to reflect any new grounds we propose?

- 14.1 We acknowledge the careful and detailed research that underlies the Issues Paper on this topic and consider the Commission is well placed to make recommendations that balance all interests. We also query how much of an issue this is in practice, given section 49 has not been the subject of litigation.
- 14.2 We agree that safety and fair competition underlie (or should underlie) the application of section 49. For those reasons, we consider that a focus on strength, stamina, physique and age will be appropriate when weighing the merits of different options.³²
- 14.3 As with the current application of section 49(1), whichever option is chosen would still require the defendant sporting body to prove the exception applies, which is appropriate.

15 Chapter 15: Other issues in Part 2

Q65: Do you have any feedback on the implications of this review for section 62 of the HRA, which prohibits sexual harassment?

- 15.1 We do not consider the review has any significant implications for section 62. As the Issues Paper notes,³³ it is likely that intrusive or inappropriate questions about a

³¹ Issues Paper at 13.58.

³² HRA, ss 49(1) and 49(2)(d).

³³ Issues Paper at 15.9.

person's genitalia would be considered sexual harassment per section 62(2). For completeness, we note it may also amount to discrimination in some contexts: see *Sahay v Proceedings Commissioner*,³⁴ where conduct in the nature of sexual harassment was found to be less favourable treatment for the purposes of the Human Rights Commission Act 1977.

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

- 15.2 The Law Society acknowledges that so-called 'hate speech' reforms are outside the scope of the Issues Paper and that, accordingly, the Commission has ruled certain matters out of scope.³⁵ However, it is prudent to acknowledge that the transgender and non-binary community appears to suffer significant levels of verbal harassment and other abusive speech.³⁶ Moreover, harassment is not simply "speech": it differs qualitatively. We do not consider the HRA contains legal remedies sufficient to address harassment directed at a person on these grounds. If the Commission was to recommend new Part 2 provisions, we suggest that there are two options.
- 15.3 The prohibition of racial harassment (section 63 of the HRA) is concerned with four innate characteristics: colour, race, ethnic origins and national origins. For all practical purposes, each is immutable (unlike, for example, political opinion and age). It could be consistent to introduce an anti-harassment provision concerned with a person's gender identity or sex characteristics to reflect that those grounds may also be immutable and are often innate. We discuss section 63 further below, considering Question 75.
- 15.4 Consideration could also be given to a provision similar to section 61 (racial disharmony). That would protect people who are transgender or non-binary or who have an innate variation of sex characteristics from harassing comments made in a public forum.
- 15.5 We note a forthcoming decision of the Court of Appeal on related matters: *Hoban v Attorney-General*, concerning the lack of an equivalent to section 61 for speech directed at sexual orientation.
- 15.6 Although some protection may be sought through the Harmful Digital Communications Act 2015, the HRA confers certain advantages including potential mediation or other dispute resolution, and the ability to seek performative orders, training orders and damages. Those are practical and helpful measures which are largely unavailable in other fora.

³⁴ HC Wellington AP277/96, 23 December 1998.

³⁵ Issues Paper at 1.47.

³⁶ Transgender Health Research Lab *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Te Whare Wānanga o Waikato | University of Waikato, 2019) at 67–78.

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

15.7 See Question 66, above.

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

15.8 We agree the issue is probably not suitable for the HRA and should instead be considered in standalone legislation. It concerns significant questions of bodily integrity, the rights of minors and their parents or guardians, and the ethical responsibilities of medical practitioners.

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

15.9 We have no further comment in respect of this question.

Q70: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the superannuation exception in section 70(2) be amended to reflect those new grounds?

15.10 Like the Commission, we are unaware whether section 70(2) gives rise to significant issues. We suspect it is seldom invoked. Unless there is a compelling reason to the contrary, it could be left unamended.

Q71: Should section 74 be amended to clarify that it applies to anybody who is pregnant or who is giving birth regardless of their gender identity?

15.11 We agree section 74 should be amended as suggested.

16 Chapter 16: Discrimination by public actors

Q72: Do you agree with our assessment of the implications of this review for Part 1A of the Human Right Act 1993 and section 19 of the New Zealand Bill of Rights Act 1990?

16.1 We repeat our observations in response to Question 1 and otherwise agree with the Commission’s assessment.

16.2 We note with interest that between 2008 and 2023 the Human Rights Commission received 91 complaints about government activity from people who identified as transgender, gender diverse or intersex.³⁷ That amounts to only around six complaints

³⁷ Issues Paper at 16.21.

per year. In addition, not all of those complaints would have concerned discriminatory behaviour on those grounds: the complainants might have raised issues of disability or political opinion discrimination, for example. Accordingly, the numbers in issue seem small. That accords with the paucity of complaints that have progressed to the Human Rights Review Tribunal.

- 16.3 That being so, we do not consider the addition of new grounds would have a significant impact on Part 1A actors.

17 Chapter 17: Cross-cutting issues

Q73: Do you agree with the Commission's assessment that "amendments to section 21 of the HRA along the lines we are exploring in this Issues Paper may make little difference in practice to the potential for state law to interfere with sex-differentiated tikanga activities"?

- 17.1 We agree *Bullock v Department of Corrections* might no longer be good law.³⁸ Otherwise, we refer the Commission to submissions from others more knowledgeable in tikanga on the concerns relating to safeguarding tikanga addressed in Questions 73–74.

Q75: If new grounds are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should there be a provision in Part 2 about misgendering and deadnaming?

- 17.2 We agree with the considerations discussed in this part of the Issues Paper, particularly the attention paid by the Commission to the importance of freedom of expression and safeguards that exist in the law. Bearing this importance in mind, it is appropriate that the HRA does not make unlawful isolated or careless instances of misgendering or deadnaming.
- 17.3 However, as the Commission also notes, there are many laws that do limit speech, including laws about defamation, privacy, censorship of objectionable publications and incitement to commit an offence.³⁹ They do so to protect both individual and public interests.
- 17.4 In the Law Society's view, either one of two options presented in the Issues Paper could be workable and appropriate. For the reasons canvassed by the Commission,⁴⁰ one option is to leave misgendering and deadnaming to be regulated under the existing provisions in Part 2 of the HRA, such as provisions relating to detriment. This would leave misgendering or deadnaming to be assessed in context based on all the relevant facts and in the light of other relevant rights and interests. As earlier noted (see paragraph 9.3), this option does have some risks in the event that the relevant provisions (such as section 22 relating to employment) were interpreted very conservatively. However, it seems likely to enable more nuanced consideration than a blanket rule.

³⁸ [2008] NZHRRT 4.

³⁹ Issues Paper at 17.44.

⁴⁰ Issues Paper at 17.62–17.67.

17.5 Alternatively, we consider that option 1 (providing in the Act that misgendering and deadnaming are unlawful under Part 2) is capable of being crafted in a way that could meet freedom of expression concerns while providing protection for the affected groups. As noted above in relation to harassment: the Act could adopt a provision similar to section 63, which only makes speech unlawful if, at a minimum, it “expresses hostility against” a person, or “brings [them] into contempt or ridicule”. Such speech must also be hurtful or offensive and be repeated or of such a significant nature that it has a detrimental effect on the other person.

17.6 Very few cases are brought under section 63. In a recent case, the Tribunal found insensitive and racially-motivated speech did not contravene section 63 because it was contained only in a one-off phone call: *Goel v Barron*.⁴¹ Accordingly section 63 may be a useful analogue for any reform in this area.

Q76: Should binary language in the HRA be replaced by gender-neutral language?

17.7 If reform is to occur, we agree binary language in the HRA should be replaced by gender-neutral language.

18 Chapter 18: Other matters

Q77: Are the membership, powers and functions of the Human Rights Commission sufficient to promote and protect the rights of people who are transgender or non-binary or who have an innate variation of sex characteristics?

18.1 We are not aware of any concerns in respect of this issue.

Q78: Do you have any feedback on the implications of this review for the dispute resolution process in Part 3 of the HRA?

18.2 We are not aware of any concerns in respect of this issue.

Q79: If new grounds of discrimination are added to the HRA to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, are there implications for other legislation that we need to consider?

18.3 We are not aware of any implications that require consideration.

Q80: Are there any other issues relevant to this review or options for reform that we have not identified or anything else you would like to tell us?

⁴¹ [2022] NZHRRT 28.

18.4 We have no further comment in respect of this question, save that the Law Society wishes to record its appreciation for the careful and detailed study of the issues in the paper.

Nāku noa, nā

A handwritten signature in black ink, appearing to read 'Jesse Savage', written in a cursive style.

Jesse Savage
Vice President