

Submission to Te Aka Matua o te Ture Law Commission

He Puka Kaupapa | Issues Paper 53

Ia Tangata

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

"I'm widening the bandwidth on how to be a woman", Alex Drummond, a male who self-identified as a woman with no hormonal or surgical interventions.

"Why aren't you widening the bandwidth of being male?", Magdalene Berns (d.), 2016

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Introduction

Speak up for Women (SUFW) welcome the opportunity to make a submission on the ***‘review of the protections in the Human Rights Act 1993 (HRA) for people who are transgender, people who are non-binary and people with innate variations of sex characteristics’*** (The review). While the title of the review does not mention ‘women’, it is clear to us that they are the group with the most to lose.

Nothing illustrates this more than the recent [Tickle vs Giggle](#) verdict in the Federal Court of Australia. Legislative changes that result in women not being able to have anything designated ‘women-only’ are dangerous, misogynistic and backward. New Zealand has an opportunity to do better, to address the conflict between ‘trans’ rights and women’s rights and SUFW are pleased to be a part in this resolution.

We are aware that this submission may have a wider audience than the Law Commission and therefore have included some material in this Introduction for those who may not have read the Issues Paper.

[Speak Up for Women](#) is a feminist organisation focusing on the preservation of sex-based rights for women and girls. There are lots of times when sex doesn't matter; we encourage freedom of gender expression and want our children to grow up without narrow definitions of what it means to be a woman or a man, but sometimes ***sex really does matter*** and this is where we are focussed.

We do not consider it discriminatory to exclude males who may identify as some other sex or gender, from female-specific activities or spaces, or the reverse. As we will discuss, we consider the protection of female-only spaces, sports and opportunities essential to protecting women's rights and safety.

The HRA is anti-discrimination legislation that provides protection for all New Zealanders. It is the overriding legislation that means a shop owner can't refuse to serve gay people, that a hotel receptionist can't refuse a room to an unmarried couple and that an employer can't ask a prospective employee if they have children.

The HRA broadly covers public accommodation, employment, education and goods and services, however, it generally leaves us alone in our private lives and homes.

Currently there are ***13 prohibited grounds for discrimination*** included in section 21 of the HRA. They are; sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment status, family status and sexual orientation. These are sometimes referred to as protected characteristics, and if you make a claim of discrimination against a person or entity, it needs to be on one of these grounds.

As well as outlining areas where it is unlawful to discriminate, the HRA goes into great detail about the **exceptional circumstances** where it is **lawful** to discriminate. Unsurprisingly, these sections are referred to as exceptions.

Exceptions deal with the potential conflicts that can arise when the inclusion of one or more groups of people can create a barrier to participation for another group of people. They can deal with situations where positive discrimination is required to enable a group to participate fully. In some cases they simply deal with fairness.

An example of an exception to the employment provisions of the HRA (section 22) is;

Nothing in section 22 shall prevent different treatment based on sex or age where, for reasons of authenticity, being of a particular sex or age is a genuine occupational qualification for the position or employment.

In practice this could apply to a worker in a licensed premises—where they are legally required to be 18 years of age or older.

The SUFW submission to the review largely deals with the exceptions that have been put in place to provide a group—in this case women—with equal opportunities to participate in society.

We look at the reasons for the exceptions, the impact and importance of definitions, and how a new prohibited ‘ground for discrimination’ could impact the way the exceptions are used.

The 2006 Crown Law opinion on the position of transgender people in the Human Rights Act may have provided useful guidance in 2006. With the introduction of ‘gender identity’ into policy across our government and public services, however, and the introduction of ‘sex self-ID’ into law, we are now in a position where women and girls can no longer be guaranteed safety, dignity and privacy in many areas where we have previously had these protections in law (if not always in practice).

As a way of providing background information on SUFW and our position in these matters, it would be useful to reference the following from our May 2023 article [Responses to Media Questions](#).

- In the same way we have no particular view or opinion on other demographic groups as a whole, we have no particular view on people who identify as transgender. Additionally we note that ‘transgender’ has become a very wide umbrella term that rests on self-identification.
- We support equal human rights for all people, including the right to live free from violence and harassment; the right to freedom of speech and association; the right to access employment, education, housing, and healthcare without discrimination based on demographic or identity group.

- We note that many, if not most, people are arguably, in some respects, gender non-conforming regardless of whether they assert a transgender identity or not. We support the rights of all people to adopt whatever personal or social presentation is comfortable for them and to either adhere to or reject sex stereotypes in accordance with their personal preferences. Many of our supporters are lesbians or gender non-conforming.
- Where we draw the line is the demand that a person's subjective "gender" self-identification should be affirmed in all situations in society, law and policy with no exceptions. With regard to males who say they are, or would like to be women (i.e. trans-identifying males or "transwomen"), we draw the line at services and facilities and opportunities that are single sex, that is, for females.
- In most day-to-day situations, a person's sex is not relevant. However, in situations where sex is relevant we believe that sex should be the primary consideration, not a person's asserted "gender" identity. This means retaining services and facilities and opportunities for females and excluding all males—including men who want to be or claim to be women or non-binary.

Nothing in our submission will stray from this position, but we will elaborate and provide constructive feedback and recommendations in order to resolve what we believe has unnecessarily become a dangerous conflict of rights.

We have not strictly followed the question / answer format required by individual submitters. We are utilising our position as an organisation and are submitting more broadly. We will reference the questions where we can. We will also, where appropriate, reference the submissions of some of our sisters in arms.

We would like to mention that this is a large piece of work and the Law Commission utilised a panel of experts in preparing this Issues paper. Advocates for women's rights were not included on this panel and the Issues paper presents a one sided view while making only token reference to other perspectives. We're concerned that it has been left to grassroots advocacy groups (and in our case, laywomen) to navigate legal documentation, consider legal ramifications and provide feedback that will have far reaching consequences for New Zealand women. We are fortunate to have had a range of legal expertise available to clarify and advise on legal issues.

A note on language

The SUFW foundation is that we are sex realists. Our position on sex-based rights is centred on the reality that human beings cannot change sex.

- When we refer to transwomen or trans-identifying males, we are referring to adult human males.
- We use the term 'woman' frequently in this document. In every case it means an adult human female.

- We do not believe that sex is assigned at birth, it is observed at birth.

This is the basis of our worldview and is not negotiable.

Approach

We considered the Review in three parts, summarised below and expanded on later in our submission:

1. Does the HRA provide adequate protection for ‘people who are transgender, people who are non-binary and people with innate variations of sex characteristics’ (the Group)? **Yes, but clarification is needed**
2. Should there be exceptions in the HRA to allow for exclusive access and participation for this Group in some instances, in the same way that other (already) protected groups (sex, age, religion, sexual orientation) are able to? **Yes, we believe this is fair if the Group can be defined sufficiently**
3. Can exceptions be added to the HRA **without infringing** on the exceptions on the basis of sex? **Yes, if managed correctly**

Our findings were that the HRA **does in fact provide adequate** protection for the Group under the current ground of sex, however, including the Group in the current ground of sex **does not** enable the Group to be subject to any relevant exceptions, positive discrimination or measures to ensure equality in the HRA, and **does** infringe on the current exceptions and positive discrimination measures to ensure equality on the basis of sex.

Speak Up for Women recommend two amendments to the HRA. We believe that these amendments will provide suitable protection from discrimination for **“people who are transgender, people who are non-binary and people with innate variations of sex characteristics”**, while maintaining good protection for single sex spaces, services and sports used by women and girls. These amendments form an integral part of our submission and we discuss them fully in the chapters below.

SUFW Proposed Amendment 1

Add a clear biological definition to the ground of **sex**:

the trait that determines whether a sexually reproducing organism produces male or female gametes.

SUFW Proposed Amendment 2

Add a new ground to section 21, **variation of sex characteristics**:

the variation in the external presentation of primary and / or secondary sex characteristics

Why we support this Review in concept

The current protected ground of sex in the HRA has been interpreted using the 2006 Crown Law [opinion](#) in response to Georgina Beyer's Human Rights (Gender Identity) Amendment Bill 2004. Crown Law stated that gender identity and sex were the same for the purposes of assessing discrimination grounds, "there is currently no reason to suppose that "sex discrimination" would be construed narrowly to deprive transgender people of protection under the Human Rights Act."

The Crown Law opinion took the view that gender or gender identity were likely included under the ground of sex since, when a person was treated unfairly because they were transgender, they were actually being discriminated against because they didn't match society's view of what a man or woman should be—i.e. their presentation and behaviour was not "acceptable" for someone of their sex.

The Crown Law opinion did not suggest that gender or gender identity could be substituted for sex when interpreting the HRA exceptions on the basis of sex. This position hasn't been tested in the courts, but it has been utilised, often inaccurately, by government funded bodies in messaging, policy and organisational decision making. These policies can be found on many Government websites, with one exception, the Department of Internal Affairs. These agencies all follow the same line—that trans-identifying people should be treated as their "chosen gender" for all purposes. They have erased sex and sex-based rights and they have erased the sex class of women.

This lack of clarity has created a situation where we cannot use the legislation designed to help us because the policies supposedly based on this legislation are not properly aligned.

We need the HRA to be clear, we need suitable definitions and we need clear boundaries.

Examples:

1. The [Transitioning and Gender Affirmation in the New Zealand Public Service](#) guide is an example of policy makers representing the law as they would like it to be. This guide leaves no room for those who believe that sex is immutable and that gender identity is an entirely subjective belief. Highlighted here by MSD Manager Kelvin, aka the thought police.

"From my perspective the transition is more about everyone else transitioning their thinking."

Kelvin - MSD Manager

2. The Human Rights Commission(HRC) [FAQs](#) state the following, giving no regard whatsoever to the feelings and comfort of women and girls, or the HRA:

Can I use public toilets and changing rooms that align with my gender?

If you are transgender, intersex, or non-binary, you should be able to use the toilets and changing rooms you feel most comfortable in.

Many public facilities provide unisex or accessible toilets and private cubicles within changing rooms to ensure everyone can feel safe and comfortable. If gender neutral bathrooms are available, trans people are not required to use them and have the right to use a bathroom that matches their gender.

I'm a transgender woman. Can I go to 'women-only' sessions at my local pool?

Yes, you should be treated the same as other women. Transgender women should be able to go to women-only sessions and access other women's spaces.

The Human Rights Act makes it unlawful for places providing a service to the public to discriminate against people because they are transgender.

If you have been excluded from a place that provides a service to the public because you are transgender, you can contact the Human Rights Commission for information, support, or to make a complaint.

The HRC should quite rightly be relied upon to provide accurate and current recommendations and guidance on matters relating to Human Rights and discrimination, yet they have used their position to peddle untruths to an audience who, in most cases, have no other option than to follow their advice.

In July 2023, after pressure from SUFW, the HRC added this disclaimer to the beginning of their FAQs:

This page addresses some frequently asked questions about discrimination and human rights. This guidance is intended to provide general information. It is not legal advice and should not be relied on as such. Human rights are a complex and evolving area of law, and some of the questions may be considered by the Human Rights Review Tribunal and courts in the future. Please contact us if you have questions or want more information.

After the addition of this statement, SUFW contacted the HRC to ask that they take proactive steps to update their audience:

SUFW *“While this is an improvement, it does not address the fact that the advice from your website prior to the disclaimer was undoubtedly used by organisations as legal advice.”*

Human Rights Commission *“While the Commission will continue to generally promote our FAQ page as a place for people and groups to find information about discrimination and other human rights, we do not intend to take any further steps to reach out to specific organisations regarding this.”*

The results of the HRC position have been seen across councils and service providers—they have explicitly mentioned the HRC advice when explaining why “they can’t exclude trans women from women’s spaces”.

We believe by routinely classifying trans-identifying males as women, the HRC have failed in their obligations to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

3. Employment New Zealand incorrectly state on their [website](#) that:

“In some specific employment situations, an employer can lawfully treat job applicants or employees differently based on sex. An example may be where a woman is employed to model women’s clothing. **Where treating people differently on the basis of sex is lawful, transgender people should be considered alongside other applicants of the gender that is specified for the role.** *[Our emphasis]*

Prohibition of discrimination on the grounds of sex under the Human Rights Act 1993 includes the grounds of gender identity.

Transgender people are protected under the Human Rights Act 1993 from unlawful discrimination on the grounds of gender identity in the workplace. The Employment Relations Act 2000 gives employees and employers a duty to treat each other in good faith, which includes an obligation to communicate openly and try to deal with any issues that affect their employment relationship.”

4. The Births, Deaths, Marriages and Relationships Registration Act 2021 (BDMRR) includes section 79(2) certificates as evidence. This section explains that a birth certificate is not necessarily indicative of a person's sex and was added in the second iteration of the BDMRR amendments after concerns were raised by SUFW and others regarding the use of the certificate as a legal identity document.

The legislation is administered by the Department of Internal Affairs (DIA). The information on the DIA website is much more in line with the actual law.

‘What does self-identification mean for single sex spaces and activities such as changing rooms and sports teams?’

The self-identification process should not affect how access to single sex spaces or sports is determined. Birth certificates are not usually used to determine a person's right to access single sex services or spaces.'

The priority of SUFW in this Review is to clarify and separate the ground of sex from any current or future grounds in section 21 of the Human Rights Act.

SUFW is adamant that sex as a prohibited ground / protected characteristic should be defined precisely and from a biological perspective as part of any proposed amendments to the Human Rights Act. We see this review as an opportunity to improve the legislation and clarify the laws relating to single sex spaces, facilities and sports.

The Material Reality of Sex

SUFW Proposed Amendment 1

Add a clear biological definition to the ground of **sex**:

the trait that determines whether a sexually reproducing organism produces male or female gametes.

Sex has explicit exceptions in the HRA which have provided protection for women and girls to meet the intended obligations of ensuring safety and dignity, and recognising the historical lower social status of women compared to men. The informal conflation of sex and gender as discussed above has weakened the effect of those exceptions and we believe this needs to be rectified. The easiest way to do that is to specifically define sex in the legislation. The definition needs to be in scientific, accurate terms.

There is still misunderstanding around intersex matters. Sex in human beings is bimodal. People are either male or female. Disorders of sexual development (DSD aka intersex aka people with innate variations of sex characteristics) still occur on either a male or a female chromosome structure. These disorders do not mean that there are more than two sexes.

The inability by an individual to produce male or female gametes through age, medical intervention, or biological disorders does not negate the reality of only male and female, nor that it takes two human body types to reproduce. Clownfish we are not.

Issues Paper Q11

Yes. We support an amendment for a clear, symmetrical, biological definition of the ground of sex in the Human Rights Act 1993. All circumstances in which it applies should be clarified.

There is little dispute that sex exists. Even if one decides they are not the “sex assigned at birth”, they are still using sex as a benchmark. Based on the consensus that sex exists, we propose that a new protected ground can be added to reflect that the basis of 'gender ideology' is still biological sex; gender identity refers to those who choose to **believe** they are living either as the opposite sex, or living outside the binary concept of sex. ***The idea is gender, the reality is sex.***

Lesbian Rights are Women's Rights

The most recently added prohibited ground for discrimination is sexual orientation. 'Same sex attracted' has no meaning if 'sex' is not defined as scientific and immutable.

The class of people who are most (and were initially) impacted by the advent of gender identity ideology would have to be lesbians. Lesbians bear the brunt of an ideology that promotes ideas which go against the fundamental nature of homosexuality. The discourse has centred around pressuring lesbians to have sex with men who claim womanhood and lesbianism as their own. Pressure justified on the basis that by statement alone a male body can become a female body. Unsurprisingly, this egregious breach of boundaries and decency built a strong resistance from lesbians.

One of the concerns that gender critical people have with gender identity being added as a protected characteristic, is how this will impact the protection of, and exceptions for, other protected characteristics. This concern hasn't arisen out of a vacuum—we have experienced a stepping out of line from the TQ++ groups for some years. If sexual orientation is based on sex, we face a dilution of the meaning of sexual orientation. If gender identity works in conflict with sex, it necessarily will work in conflict with sexual orientation.

The Problem with Gender

From consulting the Issues paper and from our feminist perspective, considering gender as a legal concept is concerning. There is nothing to anchor gender in legislation purely because of its questionable definitions; plural because there is little agreement. Gender identity is unable to be defined consistently or reasonably and the TQI++ community itself is unable to come to a consensus on what gender is and its relationship to sex. From a gender critical perspective it is detached from the reality of sex, often oppositional to sex, and is socially constructed.

To incorporate an entirely subjective term into legislation has serious implications for legal decisions and policy making. It would mean that from the moment any amendments passed into law they would require legal tests and precedents and this is not acceptable for new legislation.

The Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill introduced to Parliament in 2023 by Elizabeth Kerekere, seemed to be seeking a clear boundary between sex and some form of gender / gender identity. While this Bill did not seek to remove protections based on sex, it was clear even then that defining “gender identity” in a way that is appropriate for legislation would be a struggle. That is because it is impossible to define it in a way that isn’t entirely subjective.

A person’s declaration that they are ‘transgender’ or ‘non-binary’ can no more be proven than it can be disproven. It is a feeling, an idea.

A noted example of the problem with gender and what it means to different people, is the inclusion of the term in the NZ Census 2023. Responses to the gender question were mandatory yet the question on ‘gender’ was really asking for our supposed gender identity. The consultation on this part of the census revealed a significant amount of stealth in order to give gender the priority that policy makers decided it warranted. Stats NZ define gender as follows:

Gender refers to a person’s social and personal identity as male, female, or another gender or genders that may be non-binary. Gender may include gender identity and/or gender expression. A person’s current gender may differ from the sex recorded at their birth and may differ from what is indicated on their current legal documents. A person’s gender may change over time. Some people may not identify with any gender.

If the gender question was left unanswered, Stats NZ advised that the Census team would allocate a gender based on answers to other questions. For those of us who deny the existence of gender identity, or even those who have trouble understanding the ideology, this is offensive. For a government department to allocate an identity to individuals is astonishing, particularly when there is such a strong importance placed on

accepting trans identities in whichever form the owner desires. So how can we legislate on this basis? The answer is that we can't.

So why did Stats NZ use the term *gender* to describe *gender identity*?

There is some insight in the 2020 consultation [here](#) and it can be seen in this extract:

It appears there was recognition by Stats NZ that if left to their own devices, the majority of people would not answer a question on gender or gender identity as it would not apply to them.

Stakeholder feedback and recent work by other national statistics offices indicates that the general population may not easily understand this distinction between gender and gender identity. In addition, cisgender people may consider they have a gender, but that the term 'gender identity' applies specifically to transgender people. This may be partly because human rights language often describes discrimination against transgender people as being based on their gender identity. Transgender people may also prefer the generic term 'gender'. If the word 'identity' is typically only added when referring to transgender people, it makes transgender people the outlier exception, or 'other'.

A particular group which is often overlooked in social discourse around gender identity ideology, as well as in this Issues paper, is that of detransitioners. One could argue that detransitioners are more well versed in discrimination than most people because they have entered into the gender ideology, undertaken a range of potential medical options and social stances, then ultimately renounced their position. The public condemnation toward some detransitioners on social media can be breathtaking in its vitriol.

Detransitioners may well still present with opposite sex characteristics as some medical interventions are permanent, thus placing them in a no-man's land of physically not quite 'fitting in' anywhere. Discrimination would still be a possibility but not based on gender identity as they do not see themselves as part of that group anymore. So, how best to protect this minority? It's not a transgender / non-binary / intersex issue as per the Issues paper; rather, it's a presentation issue in that they do not fit the stereotypes of their sex characteristics.

SUFW Proposed Prohibited Ground of Discrimination

SUFW Proposed Amendment 2

Add a new ground to section 21, **variation of sex characteristics**:

the variation in the external presentation of primary and / or secondary sex characteristics

The previous sections have demonstrated our concerns with the proposed amendments discussed in the Issues paper. We believe that proposed wording of an additional protected ground (gender identity / gender) is based on a shaky foundation, does not sufficiently cover all groups that would be affected and does not adhere to biological reality, or any other form of reality. Adding this ground in this formulation will lead to further conflict between women's rights and those of trans-identifying people.

We oppose the introduction of a prohibited ground of gender identity or gender.

We see the groups that the issues paper is trying to protect as being in two categories;

Category One

People with innate 'variation of sex characteristics' and people who have medically or surgically altered secondary sex characteristics.

We consider that the first category can be defined in such a way that it meets the threshold for a separate prohibited ground for discrimination. This new ground would enable people in this category to make a complaint of discrimination and would provide access to positive discrimination channels via section 73 'measures to ensure equality' and other exception sections. It would also create a helpful legal division between this ground and the ground of sex.

We propose a new and separate prohibited ground of discrimination '**variation of sex characteristics**'.

'Variation of sex characteristics' refers to the variation in the external presentation of primary and / or secondary sex characteristics, based on an individual's sex.

Issues Paper Q8

(c) Symmetrical option 1 - preferred language is "variation of sex characteristics": variation in the external presentation of primary and/or secondary sex characteristics.' This would be a separate prohibited ground and would stand on its own in Section 21.

This allows for protection from discrimination whether a person is a detransitioner, an individual with innate variations of sex characteristics (DSD), or a trans-identifying individual who has taken material steps to alter their sex characteristics.

An example of this proposed prohibited ground would be a young woman taking testosterone and undergoing a double mastectomy as she believes she is a transman. Her voice deepens and she has secondary sex characteristics of a male, such as increased facial hair. At some point the woman decides to detransition but the testosterone has left her with a permanently deepened voice, and, of course, no breasts. Any unlawful discrimination she encountered, for example in employment, could be addressed under the protected ground of 'variation of sex characteristics'.

Our view is that 'variation of sex characteristics' would be entirely separate from sex as a prohibited ground for discrimination as it refers to external indicators which are malleable and discernable and can alter over time, whereas sex is immutable, unchanging and determined at conception. We propose that it is a separate ground in section 21. This would be classed as a symmetrical definition as all humans have sex characteristics which are observable by others.

Category Two

People who have a self-professed identity that cannot be defined, is subjective and purely ideological

We do not consider that this second category can be **explicitly** protected under the HRA. We believe it offers too many scenarios and options including no real way of determining whether or not an individual is even in the group, but is covered sufficiently under the Bill of Rights ACT 1990 (BORA), and under other prohibited grounds in the HRA—political opinion, religious belief.

We cannot support the addition of any sections or amendments that seek to include this group **specifically** in a new or existing prohibited ground of discrimination. This does not mean that we wish for this group to be subject to discrimination, it means that we believe people belonging to this category have satisfactory coverage under existing legislation.

In the case of 'non-binary or trans-identifying' people, where confirmation of sex stereotypes is maintained (i.e. no body alteration), and gender identity is based on self-identification only, this group is unlikely to suffer discrimination in the public arena over which the HRA has jurisdiction.

For gender non-conforming individuals, we don't believe it is practical or possible to legislate the area of hairstyles, clothes and mannerisms. It is noted that often discrimination against people with gender non-conforming presentation would more likely fall under other grounds. For example, butch lesbians are gender non-conforming, however any discrimination is likely to be centred on sexual orientation rather than a suit and tie, or based on sex, because they are not following the prescribed presentation of a woman.

Issues Paper Q6

We support an amendment to section 21 that clearly defines sex from an immutable, biological perspective. Additionally we support a new ground 'variation of sex characteristics'

Preserving Sex, Proving Sex 13, 14

It is to be noted that the Law Commission (8.55 in the Issues paper) brought up the matter of how to determine an individual's sex in everyday life. It is because of the advent of policies and legislation such as the BDMRR that this needs to be considered; even ten years ago this was not a question that needed to be asked.

This question is nothing short of gaslighting women into being responsible for solutions to a problem that we have not created. Rather than get into the details of how we can **force** people to prove their sex and have endless arguments about genital inspections and birth certificates, let's be realistic:

- 1. All transgender and non-binary people know exactly what their sex is.*
- 2. The current inclusion of trans-identifying males in women's spaces is not because they have lied and said they are women; they don't have to, all they have to do is say they are 'transgender', because the mantra "trans women are women" has taken hold across public facilities.*
- 3. We need clear laws and policies stating that single sex facilities are legal and may choose to exclude people based on sex, regardless of their identity.*
- 4. We need a government funded and managed publicity campaign across the full spectrum of service providers, facility managers and sports organisations, that explains legal obligations and scenarios.*

If this approach is not possible, and because our lawmakers have allowed legal mistruths in the form of changing the sex marker on the birth certificate, we need to squarely confront the implications.

The vast majority of people can easily determine the sex of another person and the vast majority of people are honest about their sex. However, if we can no longer trust a social contract, and we no longer have a meaningful birth certificate, and we are not prepared to create laws and policies to manage gender identity, we need to undertake chromosome tests at all births to provide legal documentation of sex for an individual's lifetime.

This would be required if / when lawful requests are made such as in the execution of providing single sex spaces and a perceived breach is identified.

This may well be deemed impractical and intrusive. But a solution is needed for a problem that we didn't create.

Issues Paper Q13

We suggest two options for consideration: the requirement for biological sex identification papers **or** suitable legislative and policy changes followed by a publicity campaign.

Issues Paper Q14

We believe the safety of the majority will need to override the privacy concerns

Exceptions and why we need them

Part 2 of the Act includes exceptions where discrimination is lawful. These exceptions are a form of positive discrimination and recognise that in some cases, the inclusion of one group can be a significant barrier to participation for another group. Exceptions do not say that we **must** exclude a group—they just give us the option, though in many cases, failing to exclude a group could be discriminatory.

We recognise that the exceptions provide an opportunity for all people to participate in society on an equal basis. We also recognise that these opportunities are vital for women and girls. The exceptions were included in the HRA (and in some cases the preceding Human Rights Commission Act 1977) because it was recognised that women would self-exclude if there were not facilities, services and sports where they could be free from males. We are not averse to other definable groups having the same right to exclude afforded to them, but we are adamant that none of the exceptions on the basis of sex should be altered so as to include any members of the opposite sex.

Our responses to the questions relating to the exception questions and any changes are based on the following assumptions:

- 1. Sex is biological and clearly defined in the Act**
- 2. A new prohibited ground, 'variation of sex characteristics' is added to section 21 of the Act**

In general, if a section in the Act includes sex alone, this section should remain unchanged. If a section includes sex along with other prohibited grounds (age, race, religion, sexual orientation etc) then the new ground, 'variation of sex characteristics' should be added. We will indicate exactly which amendments (if any) should be made for each section.

Exceptions in relation to employment

Our proposed amendment to add 'variation of sex characteristics' to section 21 would provide employees and candidates for employment with protection against discrimination.

An employment example: an employer would breach the Act by terminating employment of a male employee taking hormones to increase breast size on the ground of 'variation of sex characteristics'. In terms of managing the employee's presentation (e.g. clothing that exhibits those breasts inappropriately) would be subject to the organisation's code of conduct and other relevant policies.

Employers would continue to be able to lawfully discriminate when selecting candidates for particular roles.

We support amending the exception 22(b) in order for employers to follow the local laws and customs when employees are working overseas.

Section 26 - Exception in relation to work performed outside New Zealand

Issues Paper Q18

We support amending 26(b) by adding in the new ground of "variation of sex characteristics"

Section 27(1) - characteristics required for authenticity

We support the right of an employer to utilise the employee that authentically meets the criteria for the role, e.g. hiring a clothing model who meets the physical requirements of the merchandise.

Issues Paper Q20

We support amending 27(1) by adding in the new ground of 'variation of sex characteristics'

Section 27(2) - employment in private household

We believe the private household is a place where suitability for a role is more subjective and reliant on personal attributes, thus suitability has stricter criteria.

Issues Paper Q22

We support amending 27(2) by adding in the new ground of 'variation of sex characteristics'

Section 27(4) - counselling services

In relation to section 27(4) where there is an exception to protect a situation where a counsellor is employed to provide a service for highly personal matters, we support the amendment to include “variation of sex characteristics” so that the service can meet the needs of clients.

Issues Paper Q28

We support amending 27(4) by adding in the new ground of ‘variation of sex characteristics’

Goods, services, facilities and places

Section 45 - Exception in relation to courses and counselling

We support the amendment to include 'variation of sex characteristics' in section 45. We consider individuals needing support and counselling have the right to choose who they derive that support from and this may be necessarily exclusionary.

Issues Paper Q36

We support amending section 45 by adding in the new ground of "variation of sex characteristics"

Section 47 - Exception in relation to skill

We believe inclusion of the suggested exception in section 47 would be appropriate: "where a skill differs depending on a person's sex characteristics, a person does not breach the Human Rights Act 1993 by only offering a service in relation to persons with particular sex characteristics (option 2)." For example, this would assist those who were providing a service of a personal nature to exclude themselves from providing that service where they do not have the specific skill base.

Issues Paper Q38

We support amending section 47 by adding in the new exception "where a skill differs depending on a person's sex characteristics, a person does not breach the Human Rights Act 1993 by only offering a service in relation to persons with particular sex characteristics."

Section 48 - Exception in relation to insurance

Insurance companies assess premiums on the basis of risk. We don't believe in discrimination in the form of refusing insurance services because someone looks different. However, given the significant and detrimental ongoing health aspects of cross sex hormones and surgical intervention under the guise of 'gender affirming healthcare', it would be blinkered to not include 'variation of sex characteristics' in section 48 exception.

Issues Paper Q40

We support an amendment to the exception in section 48 to allow insurers to differentiate between sex and sex characteristics.

Issues Paper Q41

We support a new exception in section 48 to enable insurers to offer different terms and conditions on the ground of 'variation of sex characteristics'.

Land, housing and accommodation

Section 55 - Exception in relation to hostels, institutions, etc

Hostels and institutions can include boarding school hostels, safe houses, sheltered accommodation, standard boarding houses and retirement homes. It is extremely common for these services to be provided solely for one particular group based on age, sex, religion or disability.

This exception applies to Women's refuges whose sole purpose is to provide emergency accommodation for women escaping domestic violence.

Any legislation that makes it unlawful for a women's refuge to refuse to admit males will be doing immeasurable harm to the women who need these services. The trauma associated with being in a supposed safe space with a male, regardless of how that male identifies, would defeat the entire purpose of the refuge. Sex matters.

Men (including trans-identifying men) have often argued that they need safe refuge in cases of domestic violence too. We support all groups of people to have the ability to set up a service that excludes other groups in order to meet the needs of their own group (and this should be at the forefront of any situation involving victims of domestic violence).

Issues Paper Q46

We support an amendment to section 55 to include 'variation of sex characteristics'. The ground of sex should remain.

Education

It is not clear whether the the education exceptions include schools or whether these fall under section 1A of the Act, however we support maintaining exceptions and making amendments as follows;

1. Schools can lawfully exclude students of one or other sex.
2. Schools can lawfully require accurate information regarding a student's sex when assessing eligibility of a student to enrol. This could require details of any name changes or birth certificate sex marker changes.
3. Schools can lawfully require students to use the bathroom and change facilities that match their sex.
4. Schools must provide unisex bathrooms and facilities alongside single-sex facilities.
5. Teachers and staff tasked with supervising students in situations where, for example a female teacher is required to supervise female students, must be of that sex.

We consider the protections for minors need to be more stringent than for adults. There is currently significant concern about the wellbeing and safeguarding of children in regards to gender identity ideology, informed consent, parenting rights, the RSE, and the matters of social contagion and Rapid Onset Gender Dysphoria.

Overall, we agree with the stance of Resist Gender Education.

Issues Paper Q49

We believe the definition of sex as we've proposed needs to be the basis of decision making in education, thus making the existing protections sufficient.

Issues Paper Q52

We support Option 3: The exception should clarify that it entitles schools to refuse to admit students whose sex assigned at birth does not align with the school's designated sex.

Issues Paper Q53

No, we do not support additional amendments to section 58(1) to accommodate students who have a gender identity that is not exclusively male or female.

Issues Paper Q55

We believe that in the interests of meeting the needs of vulnerable youth, there should be the exception in section 59 for courses and counselling to be amended to reflect the new ground as we propose.

Single-sex facilities

Section 43(1) - Exceptions in relation to access by the public to places, vehicles, and facilities

Section 46 - Exception in relation to public decency or safety

Self Exclusion

Ultimately 'gender identity' should have no impact on any provision in law for public decency and safety. This is a fundamental right of all people. The right of women and girls to have the security of single-sex public facilities was hard fought. Known as the Urinary Leash, historically, women were unable to leave their own houses for extended periods of time because there was little availability of public toilets. Interestingly, in 1898 Britain "the plans for a [women's toilet](#) were set back by several years as men opposed the women's toilets being situated next to the men's."

Over a century later, men want to use women's toilets and consider it a form of discrimination when opposed. The safety risk to women if men are legitimately able to enter public toilets designated for women, whether they identify as a woman or not, will potentially lead to a return of the restrictions of a Urinary Leash. Women will feel less safe and less inclined to rely on public toilets and become reluctant to be in public for extended periods of time.

We do not believe that transgender people pose a threat by virtue of being transgender. However, we note that men are on average physically stronger than women, and have a far higher propensity to use violence, including sexual violence. We also note that this size and strength disparity, and this pattern of male behaviour, doesn't change when a male identifies as a woman. Hence, with respect to single-sex services, facilities and opportunities, we believe that these should be reserved for females only.

To be clear, under the circumstances where sex matters, our view is that trans-identifying or non-binary males should continue to be treated as males. We do not believe that trans-identifying males pose more of a threat than other males, or that most males pose a threat, just that exclusion from single-sex services for females applies to all males.

We understand that many people have a trans-identifying male friend or relative who is lovely and kind, and they don't want their friend or family member excluded from female-only spaces or services. However this same argument applies to all males—many women have a brother, father, husband or friend who is lovely and kind and who poses no threat to women. But this is not how safeguarding works. The boundaries in place apply to all males, simply because they are male.

We accept that some women may wish to vouch for men (including trans-identifying males) as safe; however, we do not believe anyone should have the right to give away female-only spaces and services on behalf of all women.

In order to prevent women from using the spaces that were set up so they could participate fully in life, a man does not have to be dangerous or have a history of violence. He doesn't have to be trans-identifying; he just has to be a man.

The majority of women who contact SUFW for advice do so because their employer is allowing a man (usually a man with a newly claimed trans-identity) to use the spaces previously reserved for women, with no regard for the women who also need to use that space.

Unisex Facilities

Unisex, single-occupancy facilities are a good solution because they provide everyone with the opportunity of a private space. SUFW appreciates that, for some people, using the facilities that align with their sex is uncomfortable and problematic, however, we are adamant that using the facilities of the opposite sex is not acceptable. Unisex facilities, along with accessible facilities, provide a simple solution for a service provider to meet their obligations for an inclusive and accessible facility.

We oppose the modification of an existing women's single-sex facility into a unisex space. If unisex spaces are to be constructed, they need to be in addition to single-sex facilities.

As they mature, girls need a high level of privacy and security as they come to grips with their own puberty-driven body changes. This [NZ Herald article](#) highlights some of the difficulties girls experience in unisex toilets.

Statistics

Statistically men as a class are a danger to women and children as a class. The [New Zealand Ministry of Justice](#) 2024 statistics reveal that 98% of convicted sex offenders are men, and according to [Sex Specific Stats](#) "99% of *Sentenced Sexual Offenders* (SSO) were MALE for each and every one of the 25 years between 1999-2023" in New Zealand.

In September 2024 SUFW obtained data from Corrections (read the full release [here](#)) regarding the number of trans-identifying males in our prison system.

While there is a huge difference in the sentencing rates of males and females, we are surprised and concerned that trans-identifying males - even more than the whole male population - are over represented in prison statistics - ***these are the men that women are told they should be comfortable sharing spaces with.***

The data clearly shows that individuals who are male, regardless of how they identify, have offending patterns similar to other males. The higher rate of incarceration among trans-identifying males compared to women underscores that these individuals do not shed male patterns of offending simply because they identify differently.

Most, if not all, women can provide a personal story of sexual harassment, abuse or assault at the hands of a man. Overseas statistics indicate the rate of sexual offending in trans-identifying males is aligned to men's rates rather than women's rates (the identity they claim). There is no evidence to suggest that trans-identifying males are any less safe or more safe than any other male.

Social contract

As well as legislation, we have for many years operated under a social contract regarding single-sex spaces. The majority of the time men and women respected the spaces of the opposite sex by knowing it was not their space to enter. With the advent of gender identity ideology, men have increasingly pushed to encroach on women's spaces under the guise of self-identity. Women are no longer confident of their right to complain and service providers are unsure of their obligations.

It is imperative that the exception for single-sex spaces is maintained on the grounds of sex. With the inclusion of 'variation of sex characteristics', individuals would maintain their rights to use single-sex spaces based on their sex.

Issues Paper Q59

We support an amendment to section 43(1) whereby the Act should clarify that service providers can exclude people from single-sex facilities that do not align with their sex "assigned" at birth (option 3).

The ability to have access to privacy and safety when in a vulnerable situation (e.g. changing clothes) should be available to all. For that reason unisex spaces would be of significant benefit. Unisex spaces should **not** be at the expense of women-only facilities.

We recognise the potential financial and practical barriers to implementing unisex facilities for individual businesses, however, we believe that providing these facilities is a necessity.

Issues Paper Q58

We support the Human Rights Act including clauses relating to unisex spaces.

SUFW support the creation of unisex facilities in schools. These should always be in addition to single-sex facilities.

Issues Paper Q62

We support an amendment requiring unisex facilities in schools alongside single-sex facilities.

Issues Paper Q63

We support an amendment requiring employers to provide suitable unisex and single-sex facilities. Employees should not be forced to share with the opposite sex.

Competitive sports

Section 49(1) - Exception in relation to sport

*Subject to subsection (2), nothing in section 44 shall prevent the exclusion of persons of one **sex** from participation in any competitive sporting activity in which the strength, stamina, or physique of competitors is relevant.*

SUFW oppose any additional grounds being added to the exception in relation to sport. The current exception includes only sex, and the reasons, (strength, stamina, and physique) are clear biological factors relating specifically to sex.

In order to be inclusive and fair, sport requires that we have categories. We have competitions by age and sex (and sometimes weight) because without them, all sports would be dominated by 25 year old males.

Our proposed definition of sex will ensure that female sporting categories are preserved where required and are not unnecessarily unfair or unsafe.

In the case of sport, we would also like to have a definition of **competitive sporting activity** that clarifies the boundaries of this exception.

It is important to highlight that this exception does not **prevent** mixed-sex sport, it just allows sporting codes to exclude people of one sex from a competition or grade. We are supportive of codes that provide mixed-sex grades so long as these are not at the expense of women's grades or competitions.

We also believe that the current [Sport NZ Guiding Principles for Inclusion of Transgender People in Community Sport](#) are not fit for purpose and should be repealed immediately. The claim that they are for Community Sport only is deceptive and implies that they are not for competitive sport. The reality is that Community Sport is most sport—it is everything below elite level. Chances are if you play sport, it'll be classified as community sport.

Issues Paper Q64

We support option (g); the status quo but with clarifications.

Sexual harassment

Section 62 - Sexual harassment

Sexual harassment is currently addressed sufficiently in section 62 as it covers all classes of people. No particular class of people should have specific or extra protections under sexual harassment.

Issues Paper Q66

We believe section 62 currently protects all people sufficiently and no amendment is needed

Other matters

Section 74 - Measures relating to pregnancy, childbirth, or family responsibilities

SUFW has no concerns about trans-identifying people or people with DSD conditions having their own spaces, their own facilities, or their own services. Our priority is ensuring women's rights, spaces, facilities and services are unaffected by another group's rights.

We are concerned about the loss of language that reflects women's lived experiences. Pregnancy, childbirth and female reproductive health is in the domain of women, no matter how you identify. It is fundamentally, biologically female and we claim our language for ourselves.

Issues Paper Q71

Pregnancy and childbirth are experienced only by women and any language should reflect this. No amendment is needed.

SUFW Opposition To Amendment #1 - Amendment to the BDMRR

We consider the only redeeming factor in the Births Deaths Marriages Relationships Registration Act 202 is section 79(2) 'certificates as evidence' whereby there is provision for determining sex by other means, instead of or as well as the birth certificate. This allows us to use common sense when legally establishing a person's sex.

The Issues paper makes mention of potentially amending the BDMRR to remove this section. **We strongly oppose the removal of this section.**

SUFW Opposition to Amendment #2 - Misgendering and Deadnaming

The Human Rights Act should remain as a broad overview or umbrella over other legislation rather than pinpointing specific ways that discrimination may potentially occur.

This provides undue weight to matters that can be monitored and addressed in more precise legislation. Misgendering and deadnaming is not directly within the scope of the Human Rights Act and we are concerned that mention of these matters is an attempt to alter the course of other legislative processes.

Hate speech is not currently included in New Zealand legislation and SUFW oppose bringing it in for the reasons that hate speech is subjective, monitoring it will be oppressive, and ultimately it goes against our right to free speech. We support the Free Speech Union perspective on the introduction of hate speech.

Issues Paper Q75

We support Option 4 - There is no need for reform.

Human Rights Commission (HRC)

The HRC has, in recent years, failed in its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The HRC has repeatedly issued advice to the public and other Government agencies stating that trans-identifying males should be treated as women, attempting to eliminate single-sex spaces despite our legislation saying otherwise. We believe that the HRC has the necessary powers and functions but we question the suitability of members who are happy to operate in ways that undermine the law and international conventions. They should be impartial and free of any conflicts of interest and should not be promoting or protecting one group at the expense of another.

SUFW Final Recommendation

We believe a **national education and awareness campaign** is needed to clarify concepts which are currently misunderstood. Given the current messaging, it is not clear to many people in New Zealand where the real restrictions and rights lie. This lack of clarity is contributing to the controversial nature of the debate between women's rights and gender identity in New Zealand, most of which is being ignored by the very entities that could help resolve it.

Summary

The review proposes to amend the Human Rights Act to include other categories of people who would be provided protection from discrimination, as well as potentially be provided the privilege of the exceptions and special measures.

SUFW believes that sex needs to be defined due to a lack of clarity in the HRA. It is SUFW's view that this is mandatory in order to preserve and strengthen women's sex-based rights in law.

SUFW proposed definition of sex: the trait that determines whether a sexually reproducing organism produces male or female gametes.

SUFW cannot in good conscience concede to the amendments in the Human Rights Act as the Law Commission have proposed. However, we believe that discrimination against minority members of society needs to be addressed. Basing it on a personal belief system such as gender identity is not practical or legislatively possible.

We introduce our suggestion of an entirely separate ground ('**variation of sex characteristics**') based on presentation of primary and secondary sex characteristics to ensure that gender non-conforming people, people with DSDs and people who have undergone outwardly physical surgical or hormonal alterations, are protected in New Zealand law from unlawful discrimination. This has its limits in the exceptions.

SUFW proposed definition of 'variation of sex characteristics': variation in the external presentation of primary and/or secondary sex characteristics.

We strongly oppose amendments suggested in the Issues Paper:

1. Any proposed amendment to the BDMRR to remove the clause designed to mitigate the authority of a non-factual document.
2. The introduction of misgendering and deadnaming in law.

We recommend a **national education and awareness campaign** is implemented in order to inform the general public regarding sex-based rights and the exceptions in law, so as to mitigate the confusion and lack of knowledge currently threading through the community.

We appreciate the opportunity to make this submission.

We acknowledge the women who went before us who fought with heart and courage for women's rights based on their sex - it is because of their certainty of the definition of 'woman', that we, Speak Up for Women, are able to ensure our voices are heard today.