



PSA 

OUT@PSA

*Submission on *Ia Tangata* – A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people who have an innate variation of sex characteristics: Issues Paper*

About the PSA and Out@PSA

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 95,000 members. We are a democratic and bicultural organisation representing people working in the public service; Crown agents and other Crown entities; state owned enterprises; local government; tertiary education institutions; and non-governmental organisations working in the health, social services and community sectors.

Out@PSA is the PSA's network representing over 3,100 LGBTQIA+ members across the PSA's membership. It represents the interests of LGBTQIA+ workers and aims to promote respectful, diverse and inclusive workplaces and public services

About this submission

This submission was developed with input from Out@PSA's democratically elected national committee, drawing on their views and experiences. It is also informed by the PSA's policy on inclusion for transgender people and gender minorities, which (among other things):

- affirms our support for their rights to be treated equally at work; to have equal access to public and community services without discrimination; and to access facilities, spaces and activities that align with the gender they identify with
- acknowledges the union's responsibility to advocate for the rights of transgender people and gender minorities in workplaces and in the delivery of public services.

Our submission does not address every part of the issues paper; due to the breadth of issues being discussed we have chosen to comment on the matters of most relevance to us as LGBTQIA+ members of the trade union for public and community service workers.

We've used the terms transgender, non-binary and intersex throughout this submission for simplicity of communication. We acknowledge that these terms don't necessarily reflect the broad range of ways people describe themselves; the terms should be assumed to be shorthand that apply broadly.

General comments

We support the Law Commission's preliminary conclusion that New Zealand laws should protect people from discrimination that is linked to the fact (or the discriminator's belief) that they are transgender or non-binary or they have an innate variation of sex characteristics, and that legislative amendment to the Human Rights Act 1993 is necessary and desirable.

This change would be a welcome clarification, giving transgender, non-binary and intersex people the confidence that they are protected by law and that if they experience discrimination, they have avenues available to them to seek recourse.

We don't believe that such an amendment will be enough on its own to ensure adequate protection from discrimination for people who are transgender or non-binary or who have an innate variation of sex characteristics, but we see it as a necessary step in the right direction.

We believe the Law Commission's review should be guided by the following principles:

- Transgender, non-binary and intersex people have the same rights as other people, and the law should provide them with clear protection from discrimination.
- Transgender, non-binary and intersex people should be able to participate in society without the exercising of their rights being contingent on them disclosing their status as a transgender, non-binary or intersex person. Just as a person transitioning should have autonomy over what they tell to whom about their transition, a person who has transitioned should have autonomy over when and who they tell that they identify as transgender, non-binary or intersex. They should be able to feel free to disclose as much or as little as they want about their status.
- Where exceptions currently exist within the law allowing for different treatment based on sex, those exceptions should treat transgender, non-binary and intersex people as inhabiting the gender they identify with (e.g., exceptions that allow people to treat women differently from men shouldn't allow people to treat transgender women differently to cisgender women).
- There may be circumstances where it is appropriate for transgender, non-binary and intersex people to positively discriminate (e.g., to request to receive a service from another transgender, non-binary, intersex or LGBTQI+ person in circumstances that are personal and/or sensitive, or to participate in an activity that is specifically for transgender, non-binary or intersex people). In these cases, the law should enable this as much as feasible without unreasonably restricting the rights of other people.
- Situations where it is legitimate to treat people differently based on physical or biological factors such as assigned sex at birth should be limited to those justified by legitimate issues of safety (not just the perception of safety). They shouldn't be able to be used as opportunities to discriminate against transgender, non-binary or intersex people based on personal prejudice.
- When considering any possible exceptions under the Act that would allow for people to discriminate against people on the grounds of gender identity or sex characteristics, the Law Commission should consider how those exceptions may create indirect barriers for transgender, non-binary or intersex people's employment. For example, exceptions that would allow for customers or service users to discriminate against these groups of people make them less likely to be able to fulfil the requirements of the role, which amounts to the same outcome as if the employer had discriminated against them directly and is something that should be avoided.

Feedback on specific sections

The following sections of our submission focus on specific chapters and questions from the issues paper we wish to respond to.

Chapter 5 - The perspectives and concerns of Māori

As a nation founded on Te Tiriti o Waitangi, we support an approach that takes into account the perspectives and concerns of Māori, and an approach that recognises the tino rangatiratanga of Māori. In undertaking this review the Commission should as much as possible elevate takatāpui and ira tangata experience and knowledge in its process of engaging with Māori and understanding their perspectives, as the people most directly affected.

Chapter 6 – Should section 21 be amended?

Question 6: Do you have any feedback on our preliminary conclusion that an amendment to section 21 of the Human Rights Act 1993 is necessary and desirable?

As stated in our summary, we support the preliminary conclusion that section 21 should be amended. The current state – where discrimination is generally understood to already be covered by existing grounds, but that understanding is untested and unclear – isn't sufficient to give confidence to transgender, non-binary and intersex people that they have legal protection from discrimination and that they have available sufficient recourse if such discrimination were to occur.

Chapter 7 – Options for new grounds

Questions 8 & 9: Which of the options discussed in this chapter do you think is best for protecting people who are transgender or non-binary; and people who have an innate variation of sex characteristics?

We can see that each of the proposed options for new or amended grounds presents advantages, disadvantages, risks and complexities. On balance, the option of amending the prohibited ground of sex is our preferred option (e.g., amending the ground to 'sex and gender' accompanied by an expanded explanation as in paragraph 7.52) covering biological sex, gender identity, gender expression and variation of sex characteristics.

Chapter 9 – Employment

We strongly support the new prohibited grounds offering protection to transgender, non-binary and intersex people under section 22 of the Act. We note that many types of discrimination would be covered under other laws (as listed in section 9.9 of the issues paper) but believe that making them clear in the Human Rights Act further embeds those protections if they are reduced in other laws.

Question 15: Are the existing protections in the Human Rights Act 1993 relating to employment (and closely related contexts) sufficient to cover issues of particular concern to people who are transgender or non-binary or who have an innate variation of sex characteristics?

The Law Commission could consider whether any changes to the Act would be necessary or desirable to:

- promote equal access to gender affirming care
- promote equal access to certain types of facilities necessary for hygiene or health and safety in workplaces or public places (e.g., requiring that sanitary bins are put in men's single sex workplace toilets)

- provide clarity that forcing people (of any gender) to wear gendered uniforms constitutes discrimination.

Question 16: Do you have any practical concerns about what the employment protections in the Human Rights Act 1993 would cover if new prohibited grounds of discrimination are added to the Act?

We note that at paragraph 9.10 of the discussion paper the Commission asks about the implications for employers and co-workers, and whether any new exceptions would be necessary and desirable to ensure the Act appropriately balances relevant rights and interests. We want to take this opportunity to clearly state our view that human rights for transgender, non-binary and intersex people are not a threat to the rights and safety of others that will need to be balanced.

Question 18: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 26 for work performed outside New Zealand be amended to reflect those new grounds?

Regarding the section 26 exception for work carried out outside of New Zealand, we consider that on balance the exception should enable employers to treat transgender, non-binary and intersex people differently. In this case we believe the potential risks to a worker's safety by being deployed in a country where local laws or customs would put them in danger justify different treatment.

Question 22: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the exception in section 27(2) for domestic employment in a private household be amended to reflect those new grounds?

Noting the lack of cohesive rationale for which grounds are currently covered by this exception and which aren't, we don't see a reason why people should be able to discriminate against transgender, non-binary or intersex people for domestic employment, or to require people to disclose whether they are transgender, non-binary or intersex as a condition of their employment.

Of the PSA's membership, almost 10, 000 people work providing care and support services to people in private homes. This work is low paid and undervalued and often insecure. It involves working with clients with disabilities and at times complex needs. This work is funded by government and if exemptions enabled discrimination against transgender, non-binary or intersex people this would have the practical effect of the state funding discriminatory employment.

Question 24 & 28: If new grounds of discrimination are added to the Human Rights Act 1993 to protect people who are transgender or non-binary or who have an innate variation of sex characteristics, should the privacy exception in section 27(3)(a) and the exception in section 27(4) for counsellors on highly personal matters be amended to reflect those new grounds?

We don't have a firm recommendation in this area, but we believe it is an important area of further focus for the Commission, and we would be happy to help facilitating the Law Commission talking more to workers about it.

We acknowledge that when it comes to highly personal areas where people are vulnerable (such as situations like strip searches, personal care, or counselling on sensitive matters), there are important considerations that may not always be compatible. It is important for people to feel a high level of autonomy and comfort about who sees them at their most vulnerable (e.g., in personal care situations, especially home-based). We see benefits for transgender, non-binary and intersex people having a choice about whether to receive highly personal support services from someone who is also transgender, non-binary or intersex.

However, we believe there needs to be a high bar for anything that would allow for discrimination against transgender, non-binary and intersex people that would be detrimental to their employment. As noted in our response to question 22, there are thousands of state-funded but privately employed care workers, and many of these workers will provide highly personal or care where the privacy exception would be relevant. Exemptions in this area enabling discrimination against transgender, non-binary or intersex people would have the practical effect of the state funding discriminatory employment.

Question 32: Do you have any feedback about the implications of this review for the Employment Relations Act 2000?

A change to the Human Rights Act to protect transgender, non-binary and intersex people from discrimination must necessarily be accompanied by comparable amendments to section 105 of the Employment Relations Act. Failure to do so would potentially give rise to numerous issues or potential hurdles concerning both standing and jurisdiction for any member seeking protection from such discrimination; and would further serve to compound any existing access to justice issues as experienced by members following discrimination in employment settings.

Chapter 12 – Education

Question 52: Exception for single sex schools

In regard to question 52 (should the exception in section 58(1) for single-sex schools be amended to reflect any new grounds we propose) we recommend option B. We don't believe single sex schools should be able to discriminate against transgender students.

Chapter 13 – Exceptions for single sex facilities

Our view is that people should be able to use the spaces and facilities that align with their gender.

Committee members shared anecdotal experiences about trans people in their lives feeling anxiety about using gendered toilets while out in public because of the potential stigma, hostility or discomfort of being accused of using the wrong one. They spoke about people avoiding the use of gendered toilets, even if it meant limiting how much liquid they drank while out in public. Such impacts on people's behaviour demonstrate how discrimination – or even the possibility of discrimination seeming much more likely in the current political climate – can affect people's psychological, social, and physical wellbeing.

Question 58: Is an amendment to the Human Rights Act 1993 desirable to encourage the provision of unisex facilities and, if so, what should it require?

We support government intervention to promote the use of gender-neutral bathrooms in workplaces and places accessed by the public (either through the Human Rights Act or the Building Code or both). Gender-neutral bathrooms are places where anyone – regardless of gender or any other factor – can have privacy without needing to be concerned about who they may be sharing the space with.

However, we wholeheartedly oppose the provision of gender-neutral bathrooms being used as a way of excluding people from single sex bathrooms. Forcing transgender, non-binary or intersex people to use gender-neutral bathrooms instead of single-sex ones would simply reinforce the discrimination these groups already face. It would send a message that the gender identity of transgender women and men is less valid than that of cisgender women and men, and it would lend credibility to transphobic arguments about transgender people posing some kind of threat to the safety of others. Practically speaking, it would also make everyday life more difficult for transgender, non-binary and intersex people.

Question 59: Should the single-sex facilities exceptions in sections 43(1) and 46 be amended to reflect those new grounds?

We support the Act being amended to provide clarity about who can use single sex facilities. Of the options presented we support option two: clarify that it is lawful to use a facility aligned with your gender identity. This is the only option that protects the rights and dignity of transgender, non-binary and intersex people, as option one perpetuates current uncertainty, and options three and four would allow for unreasonable discrimination. Question 63: Implications of this review for single-sex facilities in employment

We note the lack of clarity around facilities provided by employers to their employees to which the public does not have access (e.g., employee-only bathrooms). We think this would be a useful area to clarify, and in doing so the law should provide that transgender, non-binary and intersex people are able to use the workplace facilities that align with their gender (i.e., consistent with option two in relation to sections 43(1) and 46).

Chapter 15 – Other issues in Part 2

Question 66 & 67: 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? Should there be a new provision inserted into Part 2 of the Human Rights Act 1993 to protect people from harassment?

We recommend that the Human Rights Act should prohibit harassment of people because they are transgender or non-binary or they have an innate variation of sex characteristics. We note that the Law Commission considers the current inconsistencies (in terms of which protected grounds are included in harassment provisions) out of scope, but we think this is an issue that should be further examined.

Question 68: 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?

We strongly agree there should be better protections for intersex people against unnecessary medical interventions, but feel we are not qualified to comment on whether the Human Rights Act is the appropriate place for this. This is a question that should be addressed primarily based on the views of the intersex community, through engagement with the intersex community.

Chapter 17 – Cross-cutting issues

Question 75: Should there be a provision in Part 2 about misgendering and deadnaming?

The Human Rights Act should provide protection to transgender, non-binary and intersex people from deadnaming and misgendering. Although it would likely already be considered a form of harassment we think there would be value in specifically referencing it in the Act to avoid confusion. We do not necessarily believe it needs to be its own category; it could potentially be listed as part of explanatory text showing that it fits within the definition of harassment.

Question 76: Should the binary language “him or her”, “his or her” and “he or she” in the Human Rights Act 1993 be replaced by gender-neutral language?

We note that the Law Commission considers replacing “him and her” with “them” in legislation to be unnecessary as a matter of law. However, as most people are unaware of the relevant clause in the Legislation Act 2019, we think greater use of gender-neutral language would help make it clearer to non-binary people that the law expressly covers them. We agree with the Commission that it would

be a symbolic change. Based on this we think that overall, taking this opportunity to replace binary language in the Act would be a positive step.

Conclusion

We appreciate the opportunity to participate in the review. We would be happy to discuss our feedback further with the Law Commission as the review progresses.

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