SAVE WOMEN'S SPORT
keeping it fair for women and girls

September 2nd 2024

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

Submission from Save Women's Sport Australasia to the New Zealand Law Commission

Contents

Introduction

1. Thank you for the opportunity to make a submission in respect of Ia Tangata | a review of the protections in the Human Rights Act for people who are transgender or non-binary or who have an innate variation of sex characteristics ("the Review").

2. Save Women's Sport Australasia is part of an international coalition of women's organisations, athletes, and supporters of women in sport who advocate for the protection of sport for women, and a founding member of the International Consortium on Female Sport. We believe that fairness, competition and safety all necessitate the separation of sport according to biology rather than gender identity.

3. We welcome the opportunity to provide our views on the proposed changes to the Human Rights Act 1993 ("HRA"). Naturally, we will address the Review's discussion in respect to sports. However, given that our passion for the protection of women's sports arises from our belief in the importance of women's rights across the board, we will take this opportunity to comment on other aspects of the Review as well.

Summary of our Recommendations

1. This amendment should not proceed without a wider and more in-depth review of the New Zealand Bill of Rights Act 1990 ("NZBORA") and its interplay with the HRA, as well as review of the HRA as a whole.

2. If an isolated review of the HRA is to proceed, we seek the following:

    a. "Sex" to be defined as "the trait which determines whether a person produces male or female gametes;"

    b. All current exceptions pertaining to biological "sex" to remain;

    c. The HRA's current sex-specific sports exception to be retained with two amendments – removal of the limitation to "competitive" sports, and extension to include any age where issues of fair competition and safety are relevant; and

    d. Part 2 requires insertion either of exemption clauses to uphold the relevant NZBORA rights, or, in the alternative, section 97 to be amended to extend the defence of "genuine justification" to all matters of otherwise unlawful discrimination, and to also apply at the initial stage when a matter is brought before the Human Rights Commission.

Terminology

4. As the Review acknowledges, terminology is rife with conflict in any discussion of this nature. For clarity, we use the terms "woman" and "girl" to refer to a person who is biologically female. Any reference to a male is a reference to a biological male, as such a "trans-identified male" refers to a male person who identifies as a woman or non-binary. When we use the

term "sex" we are referring to biological sex. For ease, we will otherwise use the other terms as defined in the Review.

Broader review required

5. We note that the Review emphasises restraints in scope.

6. It is our submission that this amendment should not proceed without a wider and more in-depth review of the NZBORA and its interplay with the HRA, as well as consideration of the HRA as a whole. Piecemeal legislation is rife with pitfalls and legislation of this importance requires precision and the utmost care.

7. We raise a number of issues to support this submission.

Upholding the NZBORA's fundamental rights

8. Your report provides no meaningful consideration of the relevant rights being impacted by an amendment of this nature. A person's fundamental liberty rights to freedom of association, freedom of expression, freedom to manifest their religion or belief may all be infringed upon and yet the report mentions these rights only in passing.

9. We consider that there is a significant pitfall in the construction of the HRA in that it does not allow for the appropriate consideration of these rights in part 2. This is particularly problematic in regards to gender identity-type issues where there are fundamentally different and opposing beliefs at play. The HRA requires acknowledgement of this and a mechanism for these rights to be brought into consideration.

10. The recent Australian Judgement of ***Tickle v Giggle***[1] illustrates this point. Briefly, the facts of the case involve a woman ("Ms Grover") who set up an online women-only networking app. As a victim of abuse and sexual harassment herself, Ms Grover sought to make a safe space for women to interact with one another. Given her unwillingness to include a person who was born male into the app ("Tickle"), she has been found to have discriminated against Tickle. The consequence of this decision is that an app that was previously a refuge for approximately 20,000 women, some of which had suffered abuse at the hands of biological males, and all of which are part of a protected group that has suffered historical disadvantage by value of their sex, has now been closed down and Ms Grover has been ordered to pay damages and costs.

11. Of course, the Australian legal landscape is different to New Zealand, yet the Court's lack of reference to the imposition of anti-discrimination law on Ms Grover's liberty is worryingly absent. Nothing is said of her right to freedom of expression, freedom of association, or her freedom to have and manifest her fundamental belief that the category of "woman" is defined by biology. Likewise, there is no discussion of the rights to freedom of association of the women who joined this app and may well have also had fundamental beliefs in respect to the nature of sex (a number of these women provided affidavits in support of Ms Grover). Regardless of the outcome, the law should ensure that these rights are given their due consideration.

[1] *Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960.*

12. We encourage you to consider how best to remedy this issue. It may be that the HRA is amended to include relevant exemptions including one based on a person's fundamental religion or belief.

13. Alternatively, the defence clauses require amendment, noting that:
    a. The exceptions make no reference to the rights protected by the NZBORA, which should be protected in this space given that discrimination law is by its nature infringing on liberty in the private sphere;
    b. The exceptions do not cover unforeseen scenarios;
    c. Section 65's reference to "good reason" is unhelpfully vague and only applies to indirect discrimination, whereas there may well be good reason for direct discrimination in cases of gender identity; and
    d. Section 97 only applies at the Tribunal stage, its terms are again unhelpfully vague, and there is no application of a "genuine justification" to sections 22 – 41.

14. We consider that, in lieu of a legislative overhaul, section 97 should be extended to include the stage that a complaint is brought before the Human Rights Commission and to include all otherwise unlawful discrimination.

Inapplicability of the exceptions to Part 1A

15. The structure of the HRA requires an overhaul. Importantly, it should be made explicit that the exceptions outlined under Part 2 relate to both public and private actors. A council swimming pool and state school should be able to rely on s46 to provide sex-segregated toilets (in fact, this exception should apply across the board including employers to employees). A NZ Olympic team should be able to rely on s49 to divide its teams according to sex. And so on.

Poor evidence base

16. At para 4.46 the Review states that "*good law reform is evidence based. In this review, the need to act on evidence is also underscored by the proportionality principle discussed earlier. To be proportionate, limits on rights must be* ***demonstrably*** *justified*." We agree. Yet, the Review fails in this regard.

17. The Review relies heavily on the results of one online survey undertaken in July – September 2018 – Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand ("Counting Ourselves")[2]. This is a wholly unsuitable evidence base for a legislative overhaul of this magnitude (or indeed any legislative change). There are a number of problems with the survey, including, but not limited to:

    a. As an anonymous and online survey – participants may well have done the survey multiple times from different devices;

    b. The survey is self-reported without terms being defined or explained in order to ensure that the answers provided were comparable. By way of example, the survey does not appear to have defined "discrimination" at any point, rather asking subjective questions like "have you ever been discriminated against for any of the following reasons?" Given that there is a public lack of awareness about the legal

[2] 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).

test of discrimination, it is misleading to rely on the results of that survey as evidence that there is a widespread issue with discrimination in the transgender and non-binary population, as claimed at paragraphs 3.11 and 3.22 of the Review; and

c. 30% of the participants did not complete all the questions and yet the results are reported in percentages without reference to the number of participants that answered each question.

18. We question the Review's repeated reliance on this survey as the evidential foundation for this law change. Indeed, a law change of this significance requires robust and credible research to support the significant limitation on the rights of others.

19. Further, throughout the Review the foundation for each proposed amendment are the views and experiences of transgender and non-binary individuals (predominantly as reported by Counting Ourselves). These views are obviously necessary and relevant. Yet, introduction of the grounds of gender identity, gender expression, and/or similar into the HRA does not just affect transgender and non-binary individuals. Most significantly, this law change would have a disproportionate impact on women and girls. Prior to proceeding with this amendment, robust research is required to consider the experiences and views of women across New Zealand. You need to understand their perspective on a law that could open up women's bathrooms, sports teams and safe spaces to trans-identified males. For the Review to be balanced, stories about the struggle that transgender individuals have had accessing sports teams should sit alongside stories of women who have had their safety and fair competition compromised by trans-identified males playing in their sports teams. Stories about the embarrassment that a transgender individual has experienced in not feeling that they can access a woman's changing room should sit alongside stories from women and their daughters who have been in a woman's changing room with a trans-identified male and the ways that this has impacted on their privacy, sense of safety and dignity. (Q1)

20. This law change undeniably involves the rights and interests of two groups of individuals, and both groups deserve to have their rights and interests held in the balance.

Sex as biological

21. Should the Review continue to recommend an isolated amendment to the HRA as proposed, despite the above issues, it is essential that the protected ground of "sex" is unambiguously defined according to a person's biology, being "the trait which determines whether a person produces male or female gametes" (Q11).

22. "Sex" should not include within its definition a person's subjective notion of their gender (para 7.52 is rejected). Nor should sex be defined by reference to a person's birth certificate given that the Births, Deaths, and Marriages Registration Act 2021 ("BDMRA") had the effect of undermining the reliability of a person's birth certificate (para 7.68 is rejected).

23. To define sex other than by reference to biology would strip women of the protections that were hard fought for, and hard won, through a history of oppression and disadvantage. Without reference to biology, sex-based exceptions in the HRA are rendered meaningless.

24. Again, the case of *Tickle v Giggle*[3] provides sober reading. Because the Court was unprepared to accept a biological definition of sex, Ms Grover was stripped of her right to define the boundaries of a women's-only support group to only include other women with comparable lived experiences.

25. In the Canadian decision of *Vancouver Rape Relief v Nixon,*[4] the Supreme Court of British Columbia held that Vancouver Rape Relief was entitled to exclude a transgender male ("Nixon") from being accepted as a peer counsellor for female victims who had experienced male violence. Rape Relief's fundamental belief that "only persons who have been raised and lived their lives exclusively as girls and women are suitable as peer counsellors for female victims of male sexual violence"[5] was upheld and protected.[6] The rights of female victims of male violence to receive counselling and support from other women were upheld.

26. The Court discussed that one important aspect of defining the boundaries of a protected "identifiable group," in this case women, is "community acceptance" from the group itself. Women should not be forced to redraw the boundaries of their own group. Rape Relief rightly argued that "*unless it can decide who is a woman for these purposes, its integrity as an organization devoted to promoting the interests and welfare of women will be so compromised that its right to be such an organization under [the legislative exception] is rendered meaningless*." We agree.

27. At para 7.66 the Review raises the difficulty of maintaining a sex-based exception on the basis of biology due to the difficulties of proving biological sex (Q13). We make a number of comments in this regard:

    a. In the vast majority of situations, proof of sex would not be required given that the law has the role of setting and upholding community expectations. Proof of sex has not generally been required in the past, it has only now become an issue due to advocacy that has sought to redefine what it means to be a woman. If the HRA sets a community standard, we expect that the majority of people will respect and uphold this standard without difficulty;

    b. In the unlikely event that there is an irreconcilable disagreement about a person's sex, there are a few options:
        i. In an area like elite sports, where questions may arise in respect to a person's sex, genetic testing is available;
        ii. Parliament may well wish to reconsider its approach in the BDMRA which has undermined the credibility and use of Birth Certificates, or to consider an alternative identifying document should this be necessary.

28. The Review raises concerns about the implications of a biological definition of sex on the privacy of a transgender or non-binary individual. Again this is unlikely to be an issue in the large majority of situations given that the individual who does not wish to disclose their sex would not attempt to gain access to the very few environments that allow for sex-based exceptions to discrimination.

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[3] *Tickle v Giggle*, above n 1.
[4] *Vancouver Rape Relief Society v Nixon et al.* 2003 BCSC 1936.
[5] At [29].
[6] This decision was upheld by the Court of Appeal of British Columbia in *Vancouver Rape Relief Society v Nixon* 2005 BCCA 601

Protection of women's sport

29. On the basis that sex is defined according to biology, let us turn to the very important discussion of women's sports.

30. We applaud para 14.15 of the Review for its recognition of the historical prejudices against women in sport:

> "*We think these rationales of fair competition and safety ultimately link back to a broad underlying goal of supporting participation in sport for a marginalised group — specifically, women. The historical exclusion of women from sport provides important context. Modern sport, which emerged around the middle of the nineteenth century, has been described as "primarily designed … to be for and about (white) boys and men". Several rationales have historically been used to exclude women's participation in sport. It was thought sport would be harmful to women's health (particularly reproductive), that it was unattractive and that sport would "masculinise" female athletes. Further, since most sports were developed "in the relative absence of women", they were mainly designed to "test the abilities and capacities of the male body". The creation of women's sub-categories was a common strategy to overcome this historical disadvantage and secure female participation in competitive sports*."

31. As discussed at para's 6.9-6.11, one of the founding rationales for anti-discrimination laws is to protect a group who has been subject to a history of disadvantage. The HRA's sport exception has enabled women to carve out a space in which they have been able to pursue their own personal sporting goals – ranging from connection, fitness and socialisation for some girls and women, to elite competition, status and financial rewards for others. We celebrate the growing support for women in sport. One needs only picture the crowds who attended the 2022 Women's Rugby World Cup to see how far women's sport has come.

32. This law change has the potential to completely erode the gains that have been made to date if women are not legally entitled to exclude male bodies from their sports where fair competition and safety are relevant.

33. The ideas of fairness and safety are at the heart of sports. We have weight categories, disability categories, age categories and sex categories to allow us to compare "like for like." These are categories defined by a person's body – their physiology – not their sense of self.

34. We do not agree with the sentiment conveyed in the Review's statement that "*the evidence [about male advantage in sports] is both emerging and incomplete*." Although more research will of course be undertaken, there is overwhelming scientific evidence that demonstrates male-female performance differences exist from the earliest stages.[7] Study after peer-reviewed study[8] has shown clear performance advantages for males in sport, including pre-puberty. Further studies clearly show that male advantage continues to exist even after attempts to suppress testosterone. The only way sport can be fair and equal for women is with a protected female category that excludes competitors with male advantage.

35. We acknowledge the hardship of transgender and non-binary individuals who have been excluded from women's sports on account of their biology. Unfortunately, the integrity of

[7] A helpful overview of up to date evidence can be found here: https://www.sportpolicycenter.com/news/2023/4/17/should-transwomen-be-allowed-to-compete-in-womens-sports.
[8] A systematic review of evidence from 30 countries can be found here: https://bjsm.bmj.com/content/52/22/1445.

sports demands a hard line to be drawn. We have received countless stories from women, and parents of girls, who have already experienced the erosion of fair competition and/or the undermining of their safety because the lines have been drawn by gender identity rather than biology. We wish to highlight just a few:

a. Recently, a women's football team in Australia[9] won the grand final of their premier division after going through their season undefeated. With 5 trans-identified males in their team, The Flying Bats had an unassailable advantage over all the other women's teams in their competition. We were contacted by a number of players from competing teams who privately expressed their concerns around fairness and safety to us, but had been warned if they spoke publicly they would be sanctioned. They felt the only option was to default their games, and in doing so were fined $500.

b. A mother contacted us after a trans-identified male participated in a cricket tournament against a team her 11-year-old daughter was competing in. Not only did this young male dominate many of the games, he also won player of the tournament. The girl's mother shared that it was of particular concern that the accommodation was single-sex and young girls were required to share a room with this trans-identified male.

c. After swimming training one afternoon, a 12-year-old girl encountered an older male in her changing rooms. She immediately ran out and informed her mother, who asked the pool staff to request that he leave. He refused and the Police were called. The mother and her young daughter were then told that the male identified as a woman and as a result they could not ask him to leave. The young girl no longer felt safe in her changing rooms and has since stopped swimming altogether.

d. We heard from a woman who plays Roller Derby. She explained that a male, who in all other aspects of his life presents to the world as a man, identifies as transgender/non-binary for the purpose of joining a women's Roller Derby team. This woman has experienced excessive force from this male player on repeated occasions. During one training he elbowed her sharply in the stomach, knocking the wind from her. On another occasion she was held and shoved with such excessive force that she had a panic attack. She explains that she has previously been abused by men and this incident triggered her historic trauma. She asked the male player respectfully to please use less force in order for her to feel safe. Her request was denied to her face and when the coach got involved the male player said that she was "attacking their gender." As a result of this situation, this woman felt she had no choice but to leave the sport which she had loved for the previous 8 years.

36. With reference to the Review's options, we support either option 1 or option 5, with the following two amendments:

a. The restriction to children over 12 years (s49(2)(d)) should be removed given that in some sports the strength, stamina, or physique of competitors is relevant prior to 12 years old; and

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9 https://www.dailymail.co.uk/sport/football/article-13777523/Flying-Bats-Australian-womens-soccer-team-trans-players-grand-final-Sydney.html.

b. The word "competitive" should be removed given that this term could be defined more narrowly than the Review suggests. Community sports are a pipeline to elite sports and issues of fairness and safety are relevant at all sporting levels.

37. Option 2 is quite clearly untenable, both morally and practically. Apart from the severe hardship that this would cause for women in sports, sex-based discrimination is necessary if New Zealand is to compete in international sports. The following international sporting bodies have made policies excluding males from women's sports: World Athletics, World Aquatics, World Rugby, Union Cycliste Internationale, World Netball, International Rugby League, and World Boxing.

38. Of importance we note that the HRA does not mandate exclusion of male individuals from women's sport. The HRA does, and should continue to, provide for the exclusion of males from women's sports only where this is necessary for the protection of fair competition and safety for women. Should a sporting body consider that the strength, stamina or physique of a competitor are not relevant, it would not be entitled to exclude a male from participation.

All existing exceptions on the basis of (biological) sex to remain

39. On the basis that sex is defined by biology, we seek the preservation of **all** existing protections currently afforded to "sex" in the HRA. Any additional grounds inserted on the basis of a person's gender identity or otherwise should not undermine the current sex-based protections found in the HRA. Importantly:

a. A person should be able to determine the sex of a person who is given access to their naked body, as well as to their home. This is at the core of a person's right to privacy and autonomy. The exception on the basis of biological sex in s27(3) should be retained (Q24).

b. A female who has been sexually assaulted by a male should have the right to receive counselling and support from a female. This should be non-negotiable. The sex-based exceptions in s27(4) and s45 should be retained (Q28). The story of Sarah (pseudonym) illustrates the point.[10] UnHerd reports that Sarah was the victim of sexual abuse and rape by two different men. She attended a weekly rape crisis support group. A trans-identified male then began attending her group. Sarah had a panic attack due to the presence of this male in her safe space. When she raised her struggle with the rape crisis provider, Sarah was vilified, required to leave the group, and was unable to find a women's-only safe place to heal from her trauma. This situation was not the fault of the trans-identified male who attended the group and we would hope that any person who is the victim of abuse is able to access the necessary support. However, the pertinent point is that Sarah, and others like her, deserve a male-free safe haven to meet with other women and to recover from the horrors of violence at the hands of males.

c. Service providers who are not skilled in providing services to males should be legally entitled to sex-based protections. The sex-based exception in s47 should be retained (Q38). Consider the case of Jessica Yaniv, a trans-identified male in Canada, who made 7 claims of discrimination against beauty therapists who refused to wax Yaniv's "male parts."[11] The British Columbia Human Rights Tribunal dismissed Yaniv's

[10] https://unherd.com/2022/07/why-im-suing-survivors-network/.
[11] *Yaniv v. Various Waxing Salons* (No. 2) 2019 BCHRT 222.

complaints given that the skill required to provide a Brazilian wax for a penis and scrotum differs to that of a vulva. The Tribunal also found that, given the intimate nature of this service, the service provider should be able to refuse consent. We consider that the HRA should provide similar protections in New Zealand.

d. Hostels and establishments should retain the ability to differentiate on the basis of sex. The sex-based exception in s55 should be retained. This is essential for the safety and privacy of women who either choose to live in shared-sex accommodation, or are placed in that accommodation, such as in a hospital with shared rooms or in a retirement village.

Consider the chilling story of woman who was raped while in hospital in the U.K.[12] It is reported that the hospital initially denied the rape on the basis that she was in a woman's-only ward with no men present, yet the policy was based on a person's gender-identity not their sex.

Likewise, a women's refuge should have the legal ability to exclude males. This is necessary to uphold the rights of women who have been subjected to male violence to be housed with other women during a time of intense vulnerability. The interests of a transgender individual to be affirmed in their identity should never be allowed to override the needs of vulnerable women who are healing from trauma. Retention of this exception does not undermine the ability of a Refuge to offer this vital service to males who have themselves suffered abuse.

e. Schools should be able to retain single-sex status, reflecting the rights of parents to seek the education of their children that aligns with their preferences as provided for in Article 26 of the Universal Declaration of Human Rights (Q52). Likewise, schools should be able to ensure that the safety of their students is protected by providing for sex-separated facilities, overnight trips, staff-student interactions and so on.

We have addressed the issue of evidence of sex above and we note that the HRA does not require a school to exclude a student on the basis of sex, it simply enables a school to do so. Thus, in the very rare case of a student seeking to attend a single-sex school who has an innate variation of sex development that has resulted in their presentation as a sex that differs to their biology, we expect that an appropriate solution could be reached.

f. We consider that the current exceptions allowing for the provision of single-sex facilities on the basis of "public decency or public safety" should be retained, and indeed expanded to include employers, public facilities such as council pools and schools and so on.

We do not consider that it is the role of the HRA to mandate unisex bathrooms. This would be to take the Act beyond its proper function. In practice, as society continues to evolve, it is likely that organisations will increasingly choose to provide unisex options in their efforts to prioritise inclusivity and diversity.

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12 https://www.lifesitenews.com/news/uk-hospital-admits-bowing-to-gender-ideology-after-denying-a-patient-was-raped-because-accused-man-is-transgender/.