

Submission: Ia Tangata – the Law Commission’s review of Human Rights Act protections for people who are transgender or non-binary or who have innate variations of sex characteristics

**By the Mental Health Foundation of
New Zealand**



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Te Aka Matua o te Ture | Law Commission

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Tuia te rangi e tū nei
Tuia te papa e takoto nei
Tuia i te here tangata
Tihei mauri ora.

He hōnore, he korōria ki te atua ki te runga rawa
He whakaaro maha ki a rātou kua haere ki te wāhi ngaro
Rau rangatira mā, ānei ngā whakaaro me ngā kōrero nā Te Hauora Hinengaro.

Introduction

Thank you for the opportunity to comment on the Law Commission’s review of Human Rights Act 1993 (HRA) protections for people who are transgender, non-binary, or who have innate variations of sex characteristics. For simplicity, throughout this paper we will refer to these communities as those with diverse GIESC (gender identity, expression and sex characteristics).

The Mental Health Foundation of New Zealand (MHF) acknowledges and commends the compassionate and balanced presentation of the Issues Paper, and we honour the voice of the community who has informed it. We support the overall intention of the review and consider that further human rights protections for those with diverse GIESC, and more broadly, those who are part of the Rainbow or LGBTTQIA+¹ community, is an important legal tool given they face higher levels of discrimination compared to the general population, and in turn, experience disproportionately poorer mental health and wellbeing outcomes.

¹ Lesbian, Gay, Bisexual, Transgender, Takatāpui, Queer, Intersex, Asexual and others.

The MHF agrees with 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) they are transgender or non-binary or they have an innate variation of sex characteristics.

The MHF supports the Law Commission recommendation for changes to the list of prohibited grounds of discrimination in section 21 of the HRA, to clarify that being transgender, non-binary, or having an innate variation of sex characteristics are covered. We do not believe the existing grounds of sex or disability provide a sufficient level of legal protection for those with diverse GIESC.

The MHF supports adding new symmetrical grounds to the HRA that will enhance protections for those with diverse GIESC, while still allowing flexibility for the language these communities use to adapt over time.

Given our remit and expertise, our submission will predominantly focus on responding to the consultation questions set out in *Chapter 3: Experiences of discrimination*, *Chapter 4: Key reform considerations* and *Chapter 6: Should Section 21 be amended?*

Those with diverse GIESC have disproportionately poorer mental health and wellbeing outcomes and deserve better legal protections

As highlighted by the research cited in *Chapter 3: Experiences of discrimination* in the Issues Paper, transgender, non-binary, and intersex peoples experience poorer social and wellbeing outcomes than cisgender and endosex people both within and outside the Rainbow community.

While there is a lack of comprehensive and timely data, especially data tailored to the unique cultural landscape of Aotearoa New Zealand, the existing evidence paints a stark picture of the inequities faced by transgender and non-binary people compared to the general population, especially increased levels of mental distress, suicidality, and discrimination.² We note international evidence supports similar findings regarding the experience of intersex peoples.

² p.31 of the Issues Paper.

It is widely accepted these inequitable mental health outcomes are driven by broader social determinants, such as lack of access to: safe and secure accommodation and employment; quality education and institutions that affirm gender identity and expression; adequate healthcare, goods and services, and appropriate public facilities; participation in recreation, and an overall sense of belonging and community.

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

Evidence shows experiences of mental distress for those with diverse GIESC begin as early as eight years old and continue into adolescent years – a formative time, which has the potential to set people up for a successful future in which they can flourish.

The *Growing Up in New Zealand* study (2023) found transgender or non-binary young people in Aotearoa reported the highest levels of depression and anxiety symptoms at twelve years old, as well as the largest increase in depression symptoms from eight to twelve years of age, regardless of ethnicity, deprivation, or other demographic factors. This group also displayed an increase in anxiety symptoms from eight to twelve years old, whereas a decrease was observed for cisgender girls and boys.ⁱ In 2021, one in five transgender and gender diverse students reported they had attempted suicide in the past year.ⁱⁱ

A range of research demonstrates trans and non-binary youth are more likely to experience bullying and less supportive relationships in adolescence.ⁱⁱⁱ The *Identify* survey (2022) found the proportion of trans and non-binary students who had been bullied in the past twelve months was significantly larger than cisgender students (46 percent vs. 27 percent respectively). Forty percent of intersex participants who had been bullied report the reason for the bullying was based on their variation in sex characteristics. Other reported reasons for bullying included disability or chronic illness (19 percent) and ethnicity (9 percent),^{iv} which shows that young people who experience multiple layers of discrimination are further at risk. We understand misgendering and deadnaming is also reportedly a recurrent issue being faced by students, which can have a significant effect on mental health and wellbeing and carries on into adulthood – particularly in the workplace.

Ensuring that young people can be, feel and know they are legally protected from harassment and discrimination based on their diverse GIESC is a protective factor for their future wellbeing, and the MHF urges the Commission to consider this as an important factor in its decision-making.

As explained in the Issues Paper, reports of hate-motivated offending against people in Aotearoa who are transgender or non-binary are relatively common and seem to be increasing. Additionally, there is the emerging issue of increasing levels of extreme anti-transgender content online. This changing landscape should further bolster the justifications for increasing levels of legal protection under the HRA for those with diverse GIESC.

Q2. Do you agree that we should treat these matters as the key reform considerations for this review?

The MHF agrees with the key reform considerations set out in the Issues Paper. Below we draw particular attention to the elements that we consider are most important when striving to uplift the mental health and wellbeing of those with diverse GIESC.

Appropriate weight should be given to the core values underlying the HRA through the decision-making process

The MHF agrees it is helpful to draw out the policy intent underlying the provisions in the HRA by recognising the core values that underpin it – the four pairs of ideas identified by the Law Commission: equality/fair play; dignity/self-worth; autonomy/privacy; and limits/proportionality.

Through the research explored in the Issues Paper, it is evident those with diverse GIESC in Aotearoa are not currently enjoying equality, their inherent dignity and self-worth, or the experience of autonomy and privacy to the fullest extent possible (insofar as it can be enabled by the law). These limits on their rights are also not proportionate, in that there is no significant benefit to broader society that could justify these intrusions on their rights and freedoms.

It is imperative to uphold the rights of our whānau takatāpui and tangata whenua with diverse GIESC and ensure they have equitable mental health and wellbeing outcomes. We cannot sufficiently evaluate the values that underpin the HRA without

also ensuring we give effect to the relevant Articles of Te Tiriti o Waitangi, in keeping with Aotearoa's fundamental constitutional principles and values. This could look like enabling tino rangatiratanga through ensuring proposed amendments to the legislation do not interfere with tikanga, and that whānau takatāpui and tangata whenua with diverse GIESC are properly consulted and have their views reflected. It is essential that we also continue to reflect on the effects of colonisation on whānau takatāpui and the potential for diminishment of mana due to discrimination, as has been outlined in the Issues Paper.

Evidence-led law reform is a vital instrument in effectively upholding human rights obligations

The MHF believes there is a sufficient evidence base for the two types of evidence that should be considered when undertaking law reforms: 1) evidence of people's needs, perspectives and concerns (especially those most affected by and concerned with any decisions made – people with diverse GIESC) and 2) *"up-to-date data, contextual and other knowledge, people's experiences and research from New Zealand and overseas."*³

Despite definitive data on some issues that could be considered relevant having not yet emerged, as mentioned in your paper, we argue there is sufficient information available from reputable sources, such as robust local and international studies and surveys, and/or quality insight drawn from lived experience voices to provide a sound basis for evidence-led law reform.

The MHF is supportive of the preliminary conclusion that section 21 of the HRA should be amended to protect those with diverse GIESC

Q6. Do you have any feedback on this preliminary conclusion?

We agree the six rationales that have been relied on at various times when considering whether to extend legal protection to particular groups are all satisfied in the current case:

- experiencing a history of disadvantage,

³ p.53 of the Issues Paper.

- possessing characteristics that are immutable or can only be changed at unacceptable cost (the latter being a more conclusive argument in this case),
- discrimination posing harms to human dignity and being intrinsically demeaning,
- achieving consistency with international legal human rights obligations and standards,
- achieving consistency with other liberal democratic societies, and
- keeping pace with changing social norms.

For the sixth rationale, though there has been social progress in working towards accepting these communities, there is a long way to go. As noted above, the uptick in transphobic political and social discourse in recent years, both in real life and online by a small but vocal minority, is an issue that continues to negatively impact on the wellbeing and public safety of these communities. We believe decision-makers should act with urgency to legislate for protections for those with diverse GIESC, considering the current landscape.

The MHF completely agrees that *"it is a guarantee of equity that obliges the Crown to address disparities between Māori and other New Zealanders"* and *"it underpins the Treaty principles of active protection and equity."*⁴ We note the research explored in the Issues Paper at Chapter 5 concerning experiences of whānau takatāpui that highlights how those who belong to the LGBTTQIA+ community and/or have diverse GIESC and hold multiple minority identities (e.g., due to ethnicity) can be at increased risk for adverse mental health, wellbeing and social outcomes. As such, lawmakers have a responsibility to ensure consistency with commitments made under Te Tiriti o Waitangi in considering further law changes such as this.

Current protections that exist under the HRA on the basis of sex or disability are not sufficient

We strongly agree that legislative amendment is both necessary and desirable to support, rather than definitively achieve, protection from discrimination. We support the reasoning set out in the conclusions reached under Chapter 6.

⁴ p.69 of the Issues Paper.

The MHF does not agree that the existing grounds in section 21, such as sex and disability, are wide enough to protect people with diverse GIESC. While this might be sufficient to protect binary transgender people in some instances, it is unclear how this would support people who identify outside that gender binary and/or have an innate variation of sex characteristics. We understand the government and the Human Rights Commission have stated that the protection extends to those who are "gender diverse" or "intersex", but reasoning has not been clarified or confirmed by a tribunal or court.

We agree it is unsatisfactory for this issue to remain unresolved and unfair to expect individual litigants to bring cases to a court or tribunal to clarify this aspect of the law given the time and resources required, and the likelihood of exposure to public scrutiny, criticism and revictimisation.

The MHF is also of the view that necessitating those with diverse GIESC to rely on 'disability' as a prohibited ground for discrimination would generally be an incorrect reflection of one's inherent lived experience as being part of these communities. Suggesting, by the legal definition of disability, that those with diverse GIESC have "any... loss or abnormality of psychological, physiological, or anatomical structure or function" is deficits-focused and othering. We note international cases that have succeeded have relied on a formal diagnosis of gender dysphoria, which is also inadequate, as the presence of gender dysphoria should not be required to validate the experience of being transgender, non-binary, and/or intersex.

The MHF supports adding new symmetrical grounds to the HRA

While we acknowledge this is not our organisation's area of expertise, in line with recommendations made by the Rainbow Support Collective, **we support adding new symmetrical grounds by:**

- **either** adding "gender identity", "gender expression", and "innate variation of sex characteristics", **or**
- changing "sex" to "sex or gender", including "gender identity", "gender expression", and "innate variation of sex characteristics".

These options would give those with diverse GIESC broad and strong protection, while allowing room for the language these communities use to change over time.

Conclusion

The MHF supports 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) they are transgender or non-binary or they have an innate variation of sex characteristics. We believe a law change of this nature will go some way towards providing people in the affected communities with more certainty as to their legal rights and will provide an important educational and symbolic function to support attitudinal change. We are grateful for the opportunity to comment on this review, and the MHF is hopeful that these changes, if implemented by government, will support better, more equitable mental health and wellbeing outcomes for those with diverse GIESC in Aotearoa New Zealand.

Mauri tū, mauri ora,



Shaun Robinson
Chief Executive

About the Mental Health Foundation

The MHF's vision is for a society where all people flourish. We take a holistic approach to mental health and wellbeing, promoting what we know makes and keeps people mentally well and flourishing, including the reduction of stigma and discrimination (particularly on the basis of mental health status).

The MHF is committed to ensuring that Te Tiriti o Waitangi and its Articles are honoured, enacted, upheld and incorporated into our work, including through our Māori Development Strategy. We are proud that Sir Mason Durie is a Foundation patron.

The MHF takes a public health approach to our work, which includes working with communities and professionals to support safe and effective suicide prevention activities, create support and social inclusion for people experiencing distress, and develop positive mental health and wellbeing. Our positive mental health programmes include *Farmstrong* (for farmers and growers), *Getting Through Together* (the national wellbeing promotion programme in response to COVID-19, in partnership with Canterbury DHB Public Health Unit) *All Right?* (supporting psychosocial recovery in Canterbury, Kaikōura and Hurunui), *Pink Shirt Day* (challenging bullying by developing positive school, workplace and community environments) and *Open Minds* (encouraging workplaces to start conversations about mental health). Our campaigns reach tens of thousands of New Zealanders each week with information to support their wellbeing and help guide them through distress and recovery.

We value the expertise of tāngata whaiora/people with lived experience of mental distress and incorporate these perspectives into all the work we do.

Established in 1977, the MHF is a charitable trust, and our work is funded through donations, grants and contract income, including from government.

References

- ⁱ Growing Up in New Zealand. (2023). *Young people's experiences of depression and anxiety symptoms*. <https://www.growingup.co.nz/growing-up-report/young-peoples-experiences-of-depression-and-anxiety-symptoms>
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