

28 June 2026

Committee Secretariat  
Social Services and Community Committee  
Parliament Buildings  
Wellington

Adhikaar Aotearoa  
Wellington

Dear Committee,

Please find attached our submission on the Legislation (Definitions of Woman and Man) Amendment Bill.

We have read the Committee's advice of 9 June 2026 that, if oral hearings are held, priority will be given to submitters whose submissions focus on the legal mechanics of the Bill. Our submission is directed primarily to the Bill's legal operation, drafting, and practical effects. Therefore, we request the opportunity to appear before the Committee to speak to our submission.

Kindest regards,

Board of Adhikaar Aotearoa: Vinod Bal (author of the submission), Dr Cayathri Divakalala, Shawn Wimalaratne, Kiran Patel and Shaneel Lal



Adhikaar Aotearoa

# **Submission on the Legislation (Definitions of Woman and Man) Amendment Bill**



Adhikaar Aotearoa

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# Part 1: Introduction

We oppose the Legislation (Definitions of Woman and Man) Amendment Bill and recommend that it not proceed. In our view, the Bill represents an exercise in bad lawmaking and is a significant departure from New Zealand's commitment to human dignity, equality, and evidence-based lawmaking.

We begin from the proposition that one of the law's most important functions is to uphold human dignity. The law does not merely regulate conduct. It also expresses who is recognised, respected, and afforded equality. The laws that Parliament create shape whether people are able to participate in society with security, autonomy, and self-respect. As the Irish High Court observed in *Foy v An t-Ard Chláraitheoir*.<sup>1</sup>

Everyone as a member of society has the right to human dignity, and with individual personalities, has the right to develop [their] being as [they] [see] fit; subject only to the most minimal of State interference being essential for the convergence of the common good. Together with human freedom, a person, subject to the acquired rights of others, should be free to shape [their] personality in the way best suited to [their] person and to [their] life. All persons by virtue of their being are so entitled.

We consider that observation to be equally applicable in New Zealand. Human dignity is not an abstract aspiration. It is a foundational constitutional value.

The Bill would insert the following provisions into the Legislation Act 2019:<sup>2</sup>

13A Meaning of woman or female

In any legislation, regardless of gender identity,—

- (a) woman means an adult human biological female;
- and
- (b) female means a human biological female.

13B Meaning of man or male

In any legislation, regardless of gender identity,—

- (a) man means an adult human biological male; and
- (b) male means a human biological male.

The Bill seeks to impose a single and biologically based definition of “woman”, “man”, “female”, and “male” across New Zealand legislation, irrespective of gender

<sup>1</sup> *Foy v An t-Ard Chláraitheoir* [2007] IEHC 470 at [118].

<sup>2</sup> Legislation (Definitions of Woman and Man) Amendment Bill 2026 (296—1), cl 4.

identity and unless expressly displaced by another enactment. In doing so, it would affect the interpretation and operation of legislation across the statute book.

This submission concludes that the Bill should be rejected. We consider that it is based on an inadequate evidential foundation, creates substantial legal uncertainty, is inconsistent with constitutional and human rights principles, and fails to adequately account for human diversity. Rather than promoting clarity, the Bill risks creating confusion, undermining existing legal protections, and causing harm to some of the most vulnerable members of our community. In our view, a proper discharge of Parliament's legislative function requires the select committee to recommend that the Bill not proceed.

This submission is structured as follows.

Part 2 provides our legal analysis of the Bill. We examine the Bill's objectives, legal operation, and practical consequences. We consider the uncertainty created by concepts such as “biological” sex, the Bill's interaction with existing legislation, its consistency with the New Zealand Bill of Rights Act 1990, New Zealand's international human rights obligations and constitution more generally, and its compatibility with the Legislation Design and Advisory Committee (LDAC) Guidelines. We conclude that the Bill is constitutionally unsound and inconsistent with principles of good legislative design.

Part 3 considers the reality of sex and gender diversity within ethnic communities. We demonstrate that many cultures have long recognised identities that do not fit neatly within the binary categories assumed by the Bill. By attempting to impose a universal understanding of sex, the Bill overlooks this diversity.

Part 4 contains our conclusions and recommendations.

The legal analysis contained in this submission is our own.

# Part 2: Legal analysis

# Introduction

This Part examines the Legislation (Definitions of Woman and Man) Amendment Bill from a legal and constitutional perspective. We conclude that the Bill represents bad lawmaking: it is legally incoherent, constitutionally unsound, and inconsistent with New Zealand's domestic and international obligations.

The analysis proceeds in three sections.

First, we examine the legal basis of the Bill. We assess a number of propositions advanced in support of the Bill during the First Reading debate and in the explanatory materials. In particular, we consider whether the United Kingdom Supreme Court's decision in *For Women Scotland* provides meaningful support for the Bill, whether the Bill can properly be characterised as an exercise in human rights balancing, and whether the account of freedom of expression relied upon by the sponsoring Member adequately engages with competing rights and interests.

Secondly, we assess the legal mechanics of the Bill. We consider whether the Bill is capable of achieving its stated objectives, whether it promotes legal certainty, whether it creates inconsistencies within New Zealand's legislative framework, whether it coherently interacts with existing legislation, the implications of retrospective operation, and whether the Bill adequately addresses the position of intersex people.

Thirdly, we examine the Bill's constitutional implications. This section considers the Bill's consistency with the New Zealand Bill of Rights Act 1990, including the right to freedom from discrimination and the requirements of section 5 justification. It also examines the Bill's consistency with New Zealand's international human rights obligations and with the Legislation Design and Advisory Committee (LDAC) Guidelines, which articulate the principles of good legislative design expected in New Zealand.

Taken together, these sections demonstrate that the Bill rests on a weak legal foundation, is beset by significant technical and interpretive difficulties, and raises substantial constitutional concerns. For those reasons, we conclude that the Bill should not proceed.

# The legal basis of the Bill

We first think it is useful to assess the legal basis of the Bill. We have derived the legal basis of the Bill from the First Reading speeches of the Member of Parliament sponsoring the Bill, Jenny Marcroft, along with its text. We limit our assessment to three points. Each is considered in turn.

## ***For Women Scotland* does not provide legal precedent for the Bill**

In the First Reading debate, the sponsoring Member asserted that: “[t]here is legal precedence [sic] for this [the Bill] if we look to the UK. A landmark ruling by the UK Supreme Court in April last year found that the term “woman” refers to “biological sex”. This ruling was a victory for the rights of women and girls. Most people already know this: biological sex matters. The UK’s unanimous ruling is confirmation.”<sup>3</sup> This is a substantial misreading of the case, significantly overstating the scope of the judgment.

*For Women Scotland Ltd v Scottish Ministers* is a judgment handed down by the Supreme Court of the United Kingdom in April 2025. In that case, the Court unanimously held that the terms “woman”, “man”, and “sex” in the Equality Act 2010 (UK) refer to “biological sex”, not “acquired gender”, even where a transgender person holds a Gender Recognition Certificate under the Gender Recognition Act 2004 (UK).<sup>4</sup>

To consider whether *For Women Scotland* provides the legal precedent that the Member asserted, we first need to consider what the Bill proposes to do. The Bill proposes to amend the Legislation Act 2019 to provide for definitions of “woman” and “man”. The definitions will be retroactive in operation and displace the legislative meanings of “woman” and “man” across the statute book, unless explicitly stated otherwise. The Bill would also displace the ordinary approach to interpreting the legislative meanings of “woman” and “man”, under which meaning is determined by text, purpose, and context.<sup>5</sup> The Bill is therefore a broad legislative intervention with implications extending throughout New Zealand law.

*For Women Scotland*, on the other hand, is a narrow ruling. It was a limited exercise of statutory interpretation of one law only: the Equality Act 2010 (UK). The Court repeatedly emphasised the confined nature of its task. As it explained:<sup>6</sup>

<sup>3</sup> “Wednesday, 20 May 2026” (20 May 2026) New Zealand Parliament <[hansard.parliament.nz](https://hansard.parliament.nz)>.

<sup>4</sup> *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879.

<sup>5</sup> Legislation Act 2019, s 10.

<sup>6</sup> *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [2] and [4].

It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word “woman” other than when it is used in the provisions of the EA 2010. It has a more limited role which does not involve making policy.

[...]

The question for this court is a matter of statutory interpretation.

These passages are fatal to the proposition advanced by the sponsoring Member. The Court was not purporting to establish a universal legal definition of “woman” or “man”, still less endorsing the wholesale application of such definitions across an entire legal system. Rather, it was engaged in the interpretation of a single statute and expressly disclaimed any broader policy-making role. Accordingly, it is simply incorrect to suggest that *For Women Scotland* provides legal precedent for amending the meanings of “woman” and “man” across New Zealand’s statute book. The decision does not support, contemplate, or even endorse the legislative project undertaken by the Bill. If the sponsoring Member seeks authority demonstrating that there is legal precedent for the Bill’s approach, *For Women Scotland* is not that authority.

### **The Bill does not even attempt to engage in human rights balancing nor does it demonstrate an actualised conflict of rights**

In the First Reading debate, the sponsoring Member asserted that: “[t]he balancing of competing rights is, essentially, the task of this House. That is why it is necessary for Parliament to balance the rights of women, because, unless we do so, there is no fair outcome for women.”<sup>7</sup> We discuss below, more specifically, the legal framework governing human rights balancing under the New Zealand Bill of Rights Act 1990 developed by the courts. The point is also raised here because the sponsoring Member has presented the Bill as an exercise in balancing competing rights, and it is our view that that characterisation is difficult to sustain.

Before we assess this point further, we do feel that this starting premise is itself insufficiently examined. The Bill assumes the existence of a conflict of rights requiring legislative intervention but does not demonstrate it. Competing interests are not necessarily competing rights, and a perceived threat to a right is not the same as its breach. Assertions of rights conflict therefore require careful analysis not just mere assertion. However, for the sake of our subsequent analysis, we proceed, noting that this should not be read as a concession on this premise.

<sup>7</sup> “Wednesday, 20 May 2026” (20 May 2026) New Zealand Parliament <[hansard.parliament.nz](https://hansard.parliament.nz)>.

Proper human rights balancing is not achieved merely by identifying one set of interests and giving them legislative effect. Rather, human rights law requires an assessment of whether a rights-limiting measure can be justified. In broad terms, this involves asking whether the objective pursued by the measure is sufficiently important; whether the measure is rationally connected to that objective; whether the impairment of rights is no more than reasonably necessary to achieve the objective; and whether, viewed holistically, the benefits of the measure outweigh the harm caused by the limitation of rights.<sup>8</sup>

The Bill and the policy material underpinning it show little evidence of engagement with that framework. The Bill proceeds from the premise that ‘sex-based rights’ require protection through a statute-wide definition of “woman” and “man” but it does not identify the specific problem that necessitates such a sweeping intervention, assess the impact of the proposed measures on affected groups, consider less rights-intrusive alternatives, or explain why any resulting limitations on rights are justified. The analysis begins and ends with the assertion that one set of interests should prevail. That is not a balancing exercise.

The contrast with the Law Commission’s report, *la 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*, is illuminating. Whatever view one takes of the report’s conclusions, it is demonstrably an exercise in human rights balancing. To contextualise, we give an example.

An issue raised by the sponsoring Member as a rationale for the Bill is fairness in women’s sports. This is an issue that the Law Commission considered as well. Contrary to some characterisations of the report, the Commission acknowledged in some situations sports organisations may be able to make a case for restricting transgender women’s inclusion in women’s sporting categories. It recommended that sports organisations should have the ability to treat participants differently on the basis of gender identity, where they could show this was reasonably required to secure fair competition, ensure the physical safety of participants, or comply with international sporting rules. Specifically, the report recommended that:<sup>9</sup>

The Human Rights Act 1993 should be amended to specify that sports organisations cannot rely on section 49(1) of the Human Rights Act 1993 to treat a person differently by reason of gender identity or having an innate variation of sex characteristics in relation to a single-sex competitive sporting activity that aligns with

<sup>8</sup> See *R v Oakes* [1986] 1 SCR 103 at [69]–[70]; and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J.

<sup>9</sup> Law Commission *la Tangata: 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* (NZLC R150, August 2025) at 367.

their gender identity except to the extent that is reasonably required to:

- (a) secure fair competition between participants having regard to the level of the competition and the public interest in broad community participation in sporting activities; or
- (b) ensure the physical safety of all participants; or
- (c) comply with an international rule that imposes a requirement in relation to the particular competitive sporting activity.

This recommendation emerged from a process of weighing competing rights and interests, including fairness, safety, participation, and non-discrimination. It is therefore an example of the kind of structured balancing exercise that human rights law requires. Before dismissing *Ia Tangata*, the sponsoring Member and the select committee should read it thoroughly. The report is often characterised as though it simply advocates for additional protections without engaging with competing rights and interests. That characterisation is difficult to reconcile with the report itself.

### **The Bill relies on an incomplete account of freedom of expression and competing rights**

Robert Wintemute, a Professor of Human Rights Law at King's College London and author of *Transgender Rights vs. Women's Rights: From Conflicts to Co-existence*, was cited by the sponsoring Member during the First Reading debate.<sup>10</sup> The sponsoring Member stated that “Wintemute [...] said that, in fact, there is a conflict of rights and he argues that freedom of expression must protect women's right to question certain demands made by trans activists, even if those questions cause offence. Perhaps members of this House could reflect on that.”<sup>11</sup>

It is true that rights can come into conflict, and that freedom of expression protects the right to advance views that others may regard as offensive. In New Zealand, that protection is found in section 14 of the New Zealand Bill of Rights Act 1990. However, framing the issue solely in terms of “women's right to question” risks presenting only one side of the rights equation. First, a conflict of rights framing needs to be actualised: as mentioned above, interests should not be conflated with rights, and a risk of a threat to a right is not the same as the breach of a right. But even if we accede to this point for the purposes of analysis, transgender, non-binary and

<sup>10</sup> Robert Wintemute *Transgender Rights vs. Women's Rights: From Conflicts to Co-existence* (Polity Press, Cambridge, 2025).

<sup>11</sup> “Wednesday, 20 May 2026” (20 May 2026) New Zealand Parliament <[hansard.parliament.nz](https://hansard.parliament.nz)>.

intersex people also possess rights and interests protected by domestic and international human rights law, which we discuss further below.

Wintemute himself recognises that conflicts between transgender rights and women's rights are often overstated. As he observes:<sup>12</sup>

What has struck me about conflicts between transgender rights and women's rights is that they concern a relatively small number of situations. In the vast majority of cases in which a transgender individual asserts a right, there is no conflict with the rights of women or any other group.

Wintemute goes on to identify a range of rights that, in his view, transgender people should enjoy without controversy. These include freedom from physical violence and harassment; criminal procedure and democratic rights, including freedom of expression, peaceful assembly, and association; freedom from discrimination in employment and other areas where sex assigned at birth is not relevant; family law rights, including marriage and adoption; and freedom of gender expression, including choices relating to clothing, hairstyle, jewellery, and make-up.<sup>13</sup> His analysis therefore proceeds from the premise that transgender people are entitled to substantial legal recognition and protection, and that genuine conflicts of rights arise only in a relatively limited set of circumstances.

As to not be disingenuous, Wintemute does outline concerns with what he sees as unreasonable demands. However, it would be a misreading of his work to treat that position as support for a legal framework, as advanced by the Bill, that largely denies recognition to transgender people or disregards their rights. Indeed, while the sponsoring Member is correct to note that Wintemute acknowledges the existence of rights conflicts, his work cannot be cited as support for the absolute proposition that only one side of those conflicts warrants legal recognition.

More broadly, on freedom of expression, we agree that the existence of offence does not generally, without more, justify restricting expression. However, we also hold firm on the fact that just because expression is protected does not render it immune from criticism, nor does it extinguish the rights and interests of those affected by it. The question is therefore not whether women may ask questions or participate in public debate. That is the law. The more difficult question, and the one that human rights law seeks to answer, is how legal systems should reconcile competing rights and interests when they come into tension. As outlined above, the Bill does not do this.

<sup>12</sup> Robert Wintemute *Transgender Rights vs. Women's Rights: From Conflicts to Co-existence* (Polity Press, Cambridge, 2025) at 54.

<sup>13</sup> At 55–67.

# Legal technicalities

We now assess the legal technicalities of the Bill. We have derived these from our own analysis. We limit our assessment to five points. Each is considered in turn.

## **The drafting of the Bill does not advance its intended policy purpose**

The Bill's explanatory note identifies three principal objectives: to uphold legal certainty, protect the integrity of sex-based rights, and ensure that language in law reflects biological reality. Similar themes were naturally advanced during the First Reading debate. The sponsoring Member stated that the Bill will “ensure legal certainty across the entire statute book, preventing conflicting or ideologically driven interpretations from creeping into different areas of the law.”<sup>14</sup> She further asserted that the Bill responds to “a growing realisation that ignoring biological reality has negative consequences for women’s safety and fair competition in sports.”<sup>15</sup>

The difficulty is that the drafting of the Bill does not achieve these objectives.

It is not apparent that the Bill advances legal certainty or biological reality. The Bill defines a “woman” as “an adult human biological female” and a “man” as “an adult human biological male”. However, the Bill does not define what is meant by “biological female” or “biological male”, nor does it identify the criteria by which biological sex is to be determined. It does not specify whether biological sex is determined by chromosomes, reproductive anatomy, hormones, gamete production, a combination of those factors, or some other criterion altogether. Nor does it explain how the definitions are intended to apply in respect of people with innate variations of sex characteristics. As a result, the Bill risks relocating interpretive uncertainty rather than resolving it.

The Bill does not appear to advance its stated objective of protecting sex-based rights. Proponents of the Bill frequently invoke concerns relating to women's safety, single-sex spaces, and fairness in women's sport. However, New Zealand law already contains mechanisms that address these issues. The Human Rights Act 1993 permits differential treatment in a range of circumstances, including in relation to certain sex-segregated facilities and competitive sporting activities. Importantly, those provisions do not depend upon the insertion of statute-wide definitions of “woman” and “man” into the Legislation Act 2019. The legal rules governing these issues already exist and operate independently of the amendments proposed by the Bill. Further, as outlined above, these issues have already been analysed by the Law

<sup>14</sup> “Wednesday, 20 May 2026” (20 May 2026) New Zealand Parliament <[hansard.parliament.nz](https://hansard.parliament.nz)>.

<sup>15</sup> “Wednesday, 20 May 2026” (20 May 2026) New Zealand Parliament <[hansard.parliament.nz](https://hansard.parliament.nz)>.

Commission, and their recommendations on them, despite some characterisations, are very balanced.

The result is a disconnect between the Bill's stated objectives and its legal effect. This is an exercise of bad lawmaking and renders the Bill inconsistent with the LDAC Guidelines.

### **The Bill creates an internal legislative inconsistency**

The Bill also creates tension within the very statute it seeks to amend. Section 16(1) of the Legislation Act 2019 provides that: “[w]ords denoting a gender include every other gender.” This provision reflects an interpretive principle that gendered language should, unless the context indicates otherwise, be read inclusively. The Bill, by contrast, seeks to introduce restrictive and exhaustive definitions of “woman” and “man” that are intended to apply across the statute book.

Questions therefore arise as to how these provisions are intended to operate together. If words denoting a gender include every other gender, it is unclear how that principle is reconciled with definitions that seek to confine “woman” and “man” to particular biological categories. The Bill provides no explanation. This is an exercise in bad lawmaking and renders the Bill inconsistent with the LDAC Guidelines.

### **The Bill conflicts with other legislative frameworks**

The Bill sits uneasily alongside other recently enacted legislative frameworks, particularly the Births, Deaths, Marriages, and Relationships Registration Act 2021. The Bill does not explain how its proposed definitions are intended to interact with that Act. This omission creates uncertainty about the legal significance of documents and processes established under the 2021 Act.

For example, a person may lawfully hold a birth certificate issued under the 2021 Act recording them as female. At the same time, the Bill would require references to “woman” and “female” across the statute book to be interpreted in relation to “biological” sex. This raises an obvious question: what legal significance does an amended birth certificate have if a person's legal status is ultimately determined by an undefined concept of biology rather than the information recorded on that certificate? The Bill provides no answer. Instead, it creates tension and undermines people's ability to rely on legislation that confirms a fundamental civil and political right: the right to recognition before the law.

The result is a risk of incoherence across the statute book. Rather than working within existing legislative frameworks, the Bill potentially subverts recently enacted

legislation addressing the same subject matter. This is another example of the bad lawmaking and renders the Bill inconsistent with the LDAC Guidelines.

### **The Bill retrospectively imposes rigid definitions onto functional terms**

As the Law Commission has noted, there is no single and settled definition of “sex” in New Zealand law. The Commission identified more than 100 Acts and regulations containing references to sex, none of which define the term. In some enactments, the terms “sex” and “gender” are used alongside one another and appear to carry different meanings. In others, the terms appear to be used interchangeably.<sup>16</sup> The Commission therefore concluded that “sex is a functional term that is used in different ways depending on the context”.<sup>17</sup>

To be clear, the Bill does not propose to define “sex” itself. Rather, it proposes to define the terms “woman” and “man” by reference to “biological female” and “biological male”. However, that distinction does not avoid the underlying difficulty. The Bill proceeds on the premise that there exists a singular and stable conception of biological sex that can be applied uniformly across the statute book through the definitions of “woman” and “man”. Yet, the Commission notes that concepts relating to sex and gender frequently perform different functions in different statutory contexts. This is significant because the Bill would apply its definitions retroactively to existing legislation enacted over many decades and for many different purposes. Parliament enacted those statutes against a background in which terms such as “woman” and “man” were interpreted in light of their text, purpose, and context. The Bill would replace that contextual approach with a single universal definition unless a particular enactment expressly provided otherwise.

Retrofitting universal definitions onto longstanding legislation is not an exercise in legal clarification; it is a significant alteration to the interpretive framework of the statute book. In circumstances where Parliament has historically allowed meaning to be informed by legislative context, purpose, and subject matter, replacing that approach with a rigid and retrospective definition represents bad lawmaking.

### **The Bill does not address unintended consequences for intersex people**

The Bill proceeds on the assumption that all people can be readily categorised as either a “biological female” or a “biological male”. However, intersex people do not always fit neatly within such binary classifications. The Bill proposes to apply its

<sup>16</sup> Law Commission *Ia Tangata: 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* (NZLC R150, August 2025) at [3.112]–[3.113].

<sup>17</sup> At [3.126].

definitions of “woman” and “man” across the statute book, yet neither the Bill nor its explanatory note explains how those definitions are intended to apply to people whose chromosomal, gonadal, hormonal, or anatomical characteristics do not align with conventional understandings of male and female. It is clear that some intersex people do identify their sex as intersex, particularly those who conceptualise intersex legal personhood as a political and personal identity.<sup>18</sup> The Bill neither acknowledges this reality nor explains how such people are intended to be accommodated within its binary framework.

This omission is difficult to reconcile with the Bill's stated objective of promoting legal certainty. A measure that purports to establish universal definitions should, at a minimum, address how those definitions apply to people who may not fit neatly within the categories being prescribed. Instead, the Bill appears to assume the issue away. This is an exercise of bad lawmaking and renders the Bill inconsistent with the LDAC Guidelines.

<sup>18</sup> See *Registrar-General of Births, Deaths, Marriages and Relationships v Nelson* [2022] NZFC 3065.

# The Bill is constitutionally unsound

We consider that the Bill is constitutionally unsound. We limit our assessment to four points. Each is considered in turn.

## **The Bill is inconsistent with the New Zealand Bill of Rights Act 1990**

To enact legislation that is inconsistent with the New Zealand Bill of Rights Act 1990 is bad legislative practice and renders the Bill contrary to the expectations set out in the LDAC Guidelines. Rights inconsistencies should not be treated as a mere procedural hurdle.

Below, we undertake an analysis of the Bill's consistency with the New Zealand Bill of Rights Act 1990. We limit our analysis to four subpoints. Each is considered in turn.

### ***Age discrimination***

We agree with the analysis in the Attorney-General's section seven report as it relates to age discrimination.

The Attorney-General concluded that the Bill is inconsistent with the right to freedom from discrimination on the ground of age. Because the Bill defines a "woman" and a "man" as an adult human biological female or male, and "adult" is generally defined in the Age of Majority Act 1970 as a person aged 20 or over, the Bill could exclude people under 20, but 16 and over,<sup>19</sup> from statutory provisions referring to women or men. The Attorney-General considered that this creates a risk of material disadvantage amounting to prima facie age discrimination and that the discrimination is not rationally connected to the Bill's stated objectives. As a result, the discrimination is not justified under section 5 of the New Zealand Bill of Rights Act 1990.<sup>20</sup>

<sup>19</sup> Anti-discrimination protections on the basis of age are effective once a person is of 16 years of age: see Human Rights Act 1993, s 21(i).

<sup>20</sup> Chris Bishop *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Legislation (Definition of Woman and Man) Amendment Bill* (2026) at [16]–[31].

## *Sex discrimination*

### *The Attorney-General's advice and our view*

Our view on the analysis of the Attorney-General's section seven report as it relates to sex discrimination is more nuanced. Before expounding on this proposition, we discuss the advice below.

The Attorney-General concluded that there is an insufficient basis to find that the Bill gives rise to *prima facie* discrimination on the ground of sex. While successive governments have taken the position that discrimination on the basis of gender identity is covered by the existing prohibition on sex discrimination, that interpretation has not been expressly enacted by Parliament or authoritatively confirmed by the courts. The advice also emphasised that the Bill's legal effects are uncertain, noting that it does not define "biological" sex, may have unclear implications for transgender and intersex people, and would affect only a relatively small number of statutes using the terms "man", "woman", "male", or "female", rather than the Human Rights Act's definition of "sex" itself.<sup>21</sup> It is implicit that this uncertainty makes it difficult to predict the Bill's practical legal consequences and therefore, its impact on affected groups. That uncertainty is significant for legal analysis because, under the anti-discrimination framework developed by the courts, a claimant must establish both differential treatment on a prohibited ground and a resulting material disadvantage.<sup>22</sup> If the Bill's effects cannot be predicted with sufficient confidence, it may become correspondingly more difficult to establish either element.

While we accept the factual premises identified by the Attorney-General, we are less certain that those considerations necessarily point away from a finding of *prima facie* sex discrimination. The absence of judicial authority means only that the issue remains unresolved, not that a discrimination claim is weak. Similarly, legislative silence is a weak indicator of Parliament's intent, particularly where successive governments, public agencies, and the Human Rights Commission have administered the law on the basis that transgender people are protected from sex discrimination. Nor is the relatively small number of statutes affected determinative: a single statutory exclusion may amount to discrimination if it imposes a material disadvantage. Further, material disadvantage does not require every legal consequence to be identified in advance. The loss of legal recognition, exclusion from statutory protections, or uncertainty as to one's legal status may itself constitute a material disadvantage for the purposes of the discrimination inquiry. Therefore, we are somewhat more persuaded than the Attorney-General

<sup>21</sup> At [32]–[41].

<sup>22</sup> See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [109]; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [43].

that discrimination on the ground of sex encompasses discrimination on the basis of gender identity.

*Sex discrimination covers discrimination on the basis of gender identity*

“Sex” is a prohibited ground of discrimination in New Zealand’s anti-discrimination framework, while “gender identity” is not an express ground.<sup>23</sup> The argument that discrimination on the basis of gender identity is a form of sex discrimination is straightforward. Discrimination against a person whose gender identity or expression differs from societal expectations associated with their sex assigned at birth occurs because they do not conform to norms associated with their sex assigned at birth: in other words, sex discrimination. The principle is no different from the proposition that a cisgender person cannot be treated less favourably because they fail to conform to stereotypes associated with their sex. This is not novel or controversial reasoning.

Courts and tribunals across a range of jurisdictions have concluded that discrimination on the basis of gender identity is inherently sex-based. For example:

- *P v S and Cornwall County Council* (Court of Justice of the European Union).<sup>24</sup>
- *Bostock v Clayton County* (Supreme Court of the United States of America).<sup>25</sup>
- *Kavanagh v Canada (Attorney General)* (Canadian Human Rights Tribunal).<sup>26</sup>
- *National Legal Services Authority v Union of India* (Supreme Court of India).<sup>27</sup>

This reasoning is being advanced in New Zealand litigation, and we agree with it.<sup>28</sup>

Applying this logic, the Bill gives rise to a prima facie case of sex discrimination because it defines “woman” and “man” in a manner that excludes transgender women and men from those categories. The Bill therefore creates a distinction between cisgender and transgender people who otherwise identify and live as women or men, potentially denying transgender people access to the legal recognition, rights, or protections attached to those categories. On this view, the differential treatment arises because a person's gender identity does not align with their sex assigned at birth and therefore constitutes differential treatment on the ground of sex. The resulting exclusion from legal recognition and statutory

<sup>23</sup> Section 19 of the New Zealand Bill of Rights Act 1990 imports prohibited grounds of discrimination from section 21 of the Human Rights Act 1993. Section 21 of the Human Rights Act 1993 includes the ground of “sex”: s 21(a).

<sup>24</sup> Case C-13/94 *P v S* [1996] ECR I-2143 at [21].

<sup>25</sup> *Bostock v Clayton County* 590 US 644 (2020) at 666–673 per Gorsuch J.

<sup>26</sup> *Kavanagh v Canada (Attorney General)* [2001] 41 CHRR D/119 (Canadian Human Rights Tribunal) at [135].

<sup>27</sup> *National Legal Services Authority v Union of India* 2014 INSC 275 at [59] per Radhakrishnan J.

<sup>28</sup> See Lyric Waiwiri-Smith “Inside the clash between a Wellington pride festival and anti-trans lesbian activists” (8 September 2025) <[thespinoff.co.nz](https://thespinoff.co.nz)>; and Alex Casey “Deadnaming, insults and harassment: trans Corrections officer brings landmark human rights case against employer” (16 May 2024) <[thespinoff.co.nz](https://thespinoff.co.nz)>.

protections is capable of amounting to a material disadvantage, giving rise to prima facie discrimination.

*For Women Scotland does not determine the scope of sex discrimination under New Zealand law*

We have heard some assertions that the reasoning in *For Women Scotland* displaces the logic that sex discrimination covers discrimination on the basis of gender identity in New Zealand. We do not necessarily agree. *For Women Scotland* does not apply directly in New Zealand, and there are important differences between the Equality Act 2010 (UK) and the Human Rights Act 1993 that may materially affect how a similar matter would be resolved here.

First, part of the Supreme Court's reasoning was tied to specific features of the Equality Act 2010 (UK) that have no meaningful comparator in New Zealand. The Court regarded references to pregnancy, childbirth and breastfeeding in the Equality Act 2010 (UK) as a strong indication that “woman” and “sex” were being used in a biological sense.<sup>29</sup> It pointed to provisions protecting women from discrimination because of pregnancy and noted that interpreting sex by reference to acquired gender would produce the odd result that transgender men with Gender Recognition Certificates could be excluded from those protections.<sup>30</sup> By contrast, the Human Rights Act 1993 contains only three references to pregnancy: one in the definition of “sex” in section 21 and another in the pregnancy and childbirth positive discrimination provision in section 74. It does not contain the network of pregnancy-specific sex protections that played a significant role in the Court's analysis.

Secondly, New Zealand courts have historically adopted a more flexible approach to questions of sex and legal recognition than the British courts. Prior to the introduction of self-identification for birth certificate amendments, New Zealand courts declined to treat biological factors as determinative and rejected the proposition that full gender affirming surgery was necessary before a person could be legally recognised in their affirmed sex.<sup>31</sup> In contrast, even before *For Women Scotland* was handed down, English courts have adopted similar rationale to that articulated in that case. For example, in *Bellinger*, the House of Lords held that it was required as a matter of statutory interpretation to give the terms “male” and “female” in the Matrimonial Causes Act 1973 (UK), a narrow biological meaning.<sup>32</sup>

Thirdly, *For Women Scotland* appears to proceed on the premise that the rationale for many, if not all, sex-based exceptions in the Equality Act 2010 (UK), provisions

<sup>29</sup> *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [177]–[178].

<sup>30</sup> At [185]–[188] and [196].

<sup>31</sup> See *M v M* (1991) 8 FRNZ 208 (FC) at 219; *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 (HC) at 607; and *Michael v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 (FC) at [72].

<sup>32</sup> *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 at [36]–[37] and [78].

that make discrimination lawful, is inherently biological.<sup>33</sup> This assessment reaffirms the Court’s holding that “sex” in the Equality Act 2010 (UK) refers to “biological sex”.<sup>34</sup> This position is distinct from the position in New Zealand. The Law Commission observed that the rationales underpinning sex-based exceptions in the Human Rights Act 1993 vary considerably and may include privacy, safety or participation, depending on the context, suggesting that an adoption of the *For Women Scotland* rationale for exceptions will not fit neatly with our statutory framework.<sup>35</sup>

### ***A weakly articulated section 5 justification***

A finding that the Bill limits the right to be free from discrimination protected by the New Zealand Bill of Rights Act 1990 is not the end of the analysis. Section 5 of that Act provides that the rights and freedoms contained within it “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The courts have developed a structured proportionality analysis for assessing whether a limitation is justified. The inquiry asks whether the objective of the measure is sufficiently important; the measure is rationally connected to that objective; the measure impairs the right no more than is reasonably necessary; and the benefits of the measure outweigh its deleterious effects (overall proportionality).<sup>36</sup> The Bill’s justification case is weak at every stage of this analysis.

The Bill does not identify a sufficiently important objective. The explanatory note advances three broad objectives: to promote legal certainty and consistency, to protect the integrity of sex-based rights, and to ensure that legal language reflects “biological reality”. Each objective encounters difficulties.

First, the Bill seeks to define “woman” and “man” by reference to “biological” sex, yet nowhere defines what “biological” means. The central concept upon which the Bill rests is therefore left unresolved.

Secondly, the claim that existing law is uncertain is asserted rather than demonstrated. The explanatory note identifies no evidence that current statutory

<sup>33</sup> *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 at [175]–[197] and [211]–[246].

<sup>34</sup> While some exceptions in that Act may reflect biological differences, this proposition is troubling because the Court is quick to draw assumptions and take judicial notice of matters that ought to be a question of evidence.

<sup>35</sup> Law Commission *Ia Tangata: 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* (NZLC R150, August 2025) at [8.84]–[8.100].

<sup>36</sup> See *R v Oakes* [1986] 1 SCR 103 at [69]–[70]; and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J.

frameworks are not working. There is no indication of conflicting judicial authorities requiring legislative intervention; public agencies being unable to administer legislation because of uncertainty over the meaning of sex; widespread litigation caused by existing terminology; or demonstrated failures of existing statutory mechanisms designed to address the issues raised by the sponsoring Member. The absence of evidence is striking. Parliament is expected to identify the problem that legislation seeks to solve. Here, the explanatory materials assume the existence of a problem rather than establishing it.

Thirdly, the objective of ensuring that legal language reflects “biological reality” may not itself constitute a sufficiently important objective for the purposes of section 5. The courts generally require a pressing and substantial concern capable of evidential demonstration.<sup>37</sup> Without more, we are unsure if this objective is likely to satisfy that threshold.

The failure to establish a sufficiently important objective may itself be fatal to the justification analysis.<sup>38</sup> Nevertheless, even if one assumes the objectives are sufficiently important, the Bill encounters further difficulties at subsequent stages of the inquiry.

The Bill lacks a rational connection to its stated objectives. The rational connection inquiry asks whether the measure is logically capable of advancing its stated objectives. Because we discuss this point above, at pages 14 to 15, we do not discuss it further here.

The Bill is not minimally impairing. The minimal impairment inquiry asks whether the objective could be achieved through a less rights-restrictive means. The Bill adopts an exceptionally broad approach. Rather than addressing any identified statutory problem individually, it inserts universal definitions into the Legislation Act 2019 that apply across the entire statute book unless displaced. No explanation is provided as to why such a sweeping intervention is necessary.

The overall proportionality analysis is absent. The final stage requires the balancing of the benefits of the measure against its negative effects on protected rights. It is a more holistic inquiry that, in this context, would ask:

- What problem exists?
- How significant is that problem?
- Why are existing legal mechanisms inadequate?
- What benefits will the Bill produce in practice?
- Why is a blanket statutory definition necessary to achieve those benefits?

<sup>37</sup> On the evidentiary point, see generally *Make It 16 v Attorney-General* [2022] NZSC 134 at [45]–[57], otherwise, see *Oakes* and *Hansen* above.

<sup>38</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [121] per Tipping J.

- Do those benefits outweigh the impact on those excluded from the legal categories of “woman” and “man”?

The explanatory note provides little assistance in answering these questions. It identifies no measurable harm, presents no evidential foundation for legislative intervention, and offers no assessment of the practical consequences for transgender, non-binary and intersex people. In effect, the proportionality analysis has not been undertaken. The explanatory materials assert benefits but do not demonstrate them.

While this exercise has not been undertaken, our view is clear: the Bill is not proportionate. The benefits asserted in support of the Bill remain largely speculative and unsupported by evidence. Against those uncertain benefits must be weighed potentially significant adverse effects, including the exclusion of transgender, non-binary and intersex people from legal categories that may otherwise reflect their identity, uncertainty regarding the significance of amended birth certificates, and impacts on the dignity and equal recognition: the overall proportionality inquiry is concerned with the real-world human impact of a measure.

### ***Rights of minorities***

Section 20 of the New Zealand Bill of Rights Act 1990 protects the rights of persons belonging to ethnic, religious, and linguistic minorities to enjoy their culture in community with others. While there is relatively little New Zealand jurisprudence on the provision, it reflects the principle, also recognised in article 27 of the International Covenant on Civil and Political Rights (ICCPR), that minority communities are entitled to maintain and express distinctive cultural identities and traditions.

The Bill raises concerns in this regard because a number of ethnic communities have long recognised forms of sex and gender diversity that do not fit neatly within a binary conception of “man” and “woman”. These include identities such as *takatāpui*, *whakawahine*, *tangata ira tāne*, *hijra*, *khawaja sara*, *khunsa mushkil*, *murat*, and other culturally recognised identities. By imposing a universal legal framework, the Bill privileges one conception of sex and gender while failing to engage with culturally specific understandings maintained by minority communities. This raises serious questions as to whether the Bill is consistent with the right of these communities to enjoy and maintain important aspects of their culture as protected by section 20.

## The Bill is inconsistent with international law

The Bill is inconsistent with New Zealand's international human rights obligations. Enacting legislation that is contrary to New Zealand's international obligations is contrary to good legislative practice and inconsistent with the expectations set out in the LDAC Guidelines.

As the Law Commission has recognised, there is now a substantial and growing body of international authority recognising that international human rights treaties to which New Zealand is a party protect people from discrimination on the basis of gender identity.<sup>39</sup>

New Zealand is a party to the ICCPR.<sup>40</sup> Although the ICCPR does not expressly list gender identity as a prohibited ground of discrimination, article 26 (non-discrimination) prohibits discrimination on a range of grounds and includes the open-ended category of “other status”. In *G v Australia*, for example, the Committee considered a complaint by a transgender woman who was denied a birth certificate reflecting her gender identity because she remained legally married. The Committee found violations of both article 17 (privacy) and article 26. In doing so, it stated unequivocally that “the prohibition against discrimination under article 26 encompasses discrimination on the basis of marital status and gender identity, including transgender status”.<sup>41</sup> The decision reflects the Committee’s settled view that transgender people are entitled to protection against discrimination under the Covenant.

It may be argued that the Committee’s decisions in individual communications (known as “Views”) are not formally binding on New Zealand. However, that observation misses the significance of such decisions. While the Committee’s decisions do not themselves create treaty obligations, they are authoritative interpretations of obligations that New Zealand has voluntarily signed up for. The Human Rights Committee has described its Views as holding many of the characteristics of judicial decisions.<sup>42</sup>

While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the Views issued by the Committee under the Optional Protocol exhibit some of the principal characteristics of a judicial decision. They are

<sup>39</sup> Law Commission *Ia Tangata: 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* (NZLC R150, August 2025) at [4.69].

<sup>40</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976).

<sup>41</sup> *G v Australia* UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) (UNHRC) at [7.12].

<sup>42</sup> Human Rights Committee *General Comment No. 33: Obligations of State parties under the Optional Protocol to the International Covenant on Civil and Political Rights* (25 June 2009) at [11].

arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

The relevance of international law extends beyond the ICCPR. Treaty bodies associated with multiple human rights conventions to which New Zealand is a party, including the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination against Women, the Convention against Torture, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities, have repeatedly recognised the discrimination, violence, exclusion and marginalisation experienced by transgender and intersex people. These bodies have concluded that States must take positive steps to protect people from discrimination on the basis of gender identity and sex characteristics.<sup>43</sup>

Against that backdrop, the Bill would place New Zealand at odds with the direction of international human rights law and the interpretations adopted by the bodies charged with monitoring the treaties to which New Zealand has committed itself. Enacting the Bill in this context represents bad lawmaking, will undermine New Zealand's reputation as a State that complies with its international obligations, and departs from the standards of legislative quality expected by the public.

### **The Bill is inconsistent with the Legislation Design and Advisory Committee (LDAC) Guidelines**

The LDAC Guidelines are the principal statement of good legislative design in New Zealand. They set out the constitutional, legal, and policy principles that should guide the development of legislation and are intended to promote legislation that is effective, coherent, constitutionally sound, and consistent with fundamental rights and freedoms.<sup>44</sup>

<sup>43</sup> For example, United Nations Human Rights Committee *General Comment No 36: Article 6 – right to life* (3 September 2019) at [23]; United Nations Committee on Economic, Social and Cultural Rights *General Comment No 20: Non-discrimination in economic, social and cultural rights* (20 July 2009) at [32]; United Nations Committee on the Rights of the Child *General Comment No 20: on the implementation of the rights of the child during adolescence* (6 December 2016) at [33]; United Nations Committee against Torture *General Comment No 2: Implementation of article 2 by States parties* (24 January 2008) at [21]; United Nations Committee on the Elimination of Discrimination against Women *General Comment No 36: on the right of girls and women to education* (23 November 2017) at [45] and [66]; and United Nations Committee on the Rights of Persons with Disabilities *General Comment No 8: on the right of persons with disabilities to work and employment* (7 October 2022) at [22] and [23].

<sup>44</sup> Legislation Design and Advisory Committee “Ngā aratohu | Guidelines” <[ldac.org.nz](https://ldac.org.nz)>.

We acknowledge that the LDAC Guidelines have greater salience in relation to Government Bills. Government proposals are ordinarily assessed against the Guidelines during policy development and legislative drafting, and Ministers are expected to address relevant LDAC considerations when seeking Cabinet approval.<sup>45</sup> Members' Bills do not pass through these executive scrutiny processes. However, the Guidelines remain highly relevant to Parliament's consideration of Members' Bills. As is explained in *Parliamentary Practice in New Zealand*.<sup>46</sup>

They are equally useful to committees in scrutinising the justifications for legislation provided by the executive branch of Government, and in ensuring that Parliament exercises its lawmaking power in a manner consistent with key constitutional principles. Committees receive legislative scrutiny advice on every bill from the Office of the Clerk, which employs the Legislation Guidelines in drawing matters related to a bill's design to the attention of the committee.

When assessed against the LDAC Guidelines, the Bill fails to hit the mark.

First, the Bill does not appear to advance its stated policy objectives and, in several respects, addresses matters already dealt with elsewhere in New Zealand law. Guideline 2.2 provides that:

The provisions of the proposed legislation should be consistent with its purpose and the policy objective that underlies it.

The Bill does not establish a meaningful connection between the proposed definitions and the harms that the sponsoring Member claims the Bill is intended to address. Moreover, many of the issues cited in support of the Bill are already regulated by existing legislative frameworks. This concern is reinforced by guideline 3.3, which states:

New legislation should not restate matters already addressed in existing legislation. Where a provision in existing legislation satisfactorily addresses an issue, it is preferable not to repeat that provision in new legislation.

Second, the Bill creates inconsistencies within New Zealand's legislative framework without addressing how those inconsistencies are intended to be resolved. Guideline 3.2 provides:

<sup>45</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 6.

<sup>46</sup> "The Legislative Process: Select Committee Consideration" in David Wilson (ed) *Parliamentary Practice in New Zealand* (5<sup>th</sup> ed, Clerk of the House of Representatives, 2023) 462 at 469.

Any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation.

The Bill sits uneasily alongside existing provisions of the Legislation Act 2019 and a range of statutory schemes that recognise or accommodate gender diversity. Yet the Bill contains no mechanism for reconciling those interactions.

Third, the Bill creates tension with other legislative frameworks, including the Births, Deaths, Marriages, and Relationships Registration Act 2021. Once again, the Bill does not explain how those interactions are intended to operate, notwithstanding the requirement in guideline 3.2 that conflicts and interactions be expressly addressed.

Fourth, the Bill does not adequately consider unintended consequences. Most notably, it provides no account of how people born with intersex variations are to be treated within the proposed framework. The LDAC Guidelines emphasise the importance of anticipating and addressing such outcomes:<sup>47</sup>

Poorly designed legislation will often not achieve its goals. Even if the main goals are delivered, legislation that gives rise to significant unintended consequences or fails to adapt to meet society's needs over time may impose unnecessary costs and undermine wider government aims for society.

The complete absence of any consideration of intersex people creates uncertainty and illustrates the risks identified by the Guidelines.

Fifth, the Bill raises serious concerns under the New Zealand Bill of Rights Act 1990. Guideline 6.1 provides:

NZBORA rights should not be limited, or should be subject only to such reasonable limits as can be justified in a free and democratic society.

Guideline 6.2 further provides:

Any unjustified limitation should be restricted to that which is necessary to achieve the policy objective.

In addition, guideline 7.1 states:

Legislation should not discriminate on any of the prohibited grounds.

<sup>47</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 8.

And guideline 7.2 provides:

Any discrimination should be no greater than is necessary to achieve the policy objective.

The Bill differentiates between transgender and cisgender people and limits rights protected by the New Zealand Bill of Rights Act 1990. The Bill does not demonstrate that those limitations are justified, that any differential treatment is necessary to achieve a legitimate policy objective, or that the Bill minimally impairs the rights of transgender people.

Finally, the Bill raises concerns regarding New Zealand's international legal obligations. Guideline 4.9 provides:

Legislation should comply with New Zealand's international obligations.

Guideline 9.1 goes further and states:

New legislation must not be inconsistent with existing international obligations.

The Bill risks placing New Zealand in tension with its obligations under international human rights instruments, including the ICCPR. The Bill therefore raises concerns under both guidelines.

Taken together, these concerns demonstrate that the Bill is inconsistent with several of the LDAC Guidelines. Those inconsistencies reinforce the conclusion that the Bill is poorly designed, inadequately justified, and should not proceed.

### **The Legislation Act 2019 has quasi-constitutional status**

The Legislation Act occupies a quasi-constitutional position within New Zealand's legal framework. It contains the default rules of interpretation that apply across the statute book and provides the machinery through which Parliament's enactments are understood and given effect. Amendments to legislation of this constitutional significance are therefore not ordinary policy choices. They have the potential to shape the meaning and operation of a wide range of enactments. Changes of this kind should ordinarily proceed only where there is a clear evidential foundation, careful constitutional justification, and a substantial degree of parliamentary and societal consensus. In our view, that threshold has not been met.

# **Part 3: Sex and gender diversity in ethnic communities**

As an organisation that works alongside and represents queer, transgender, and intersex people from ethnic communities, particularly those from South Asia, we are acutely aware that rigid understandings of sex and gender do not reflect the lived realities of many of the communities that will be affected by the Bill.

The Bill proceeds on the assumption that all people can be readily categorised into fixed and mutually exclusive biological categories. However, that assumption is not culturally neutral. Nor is it historically universal. Across many cultures, societies have long recognised identities, social roles, and lived experiences that do not fit neatly within binary conceptions of sex and gender.

Our work with ethnic communities demonstrates that gender diversity is neither a modern phenomenon nor a foreign import. Rather, diverse understandings of sex, gender, and identity have existed across many parts of the world for centuries. In South Asia, for example, *Hijra* communities have long occupied recognised social, cultural, and religious roles that do not fit neatly within Western binary understandings of male and female.<sup>48</sup> Similar identities and traditions exist across Indigenous, Asian, Middle Eastern, and Pacific cultures. While these identities are distinct and should not be conflated, they demonstrate a common reality: human societies have long recognised that sex and gender are more complex than a simple binary framework.

The diversity of gendered experiences recognised within South Asian cultures illustrates the limitations of the Bill's binary framework. Terms such as *Hijra* and *Khawaja Sara* have historically been used to describe communities that encompass transgender people, intersex people and others whose identities do not fit neatly within Western categories of “man” and “woman”.<sup>49</sup> Other identities also challenge binary classifications. In Pakistan, for example, *Khunsa Mushkil* refers to a person whose sex or gender is difficult to categorise as male or female.<sup>50</sup> In Afghanistan and Pakistan, *murat* describes a person who embodies both masculine and feminine characteristics.<sup>51</sup> These identities are not identical to contemporary Western concepts of transgender, non-binary, or intersex identity, nor should they be collapsed into those categories. Their significance lies elsewhere: they demonstrate that many cultures have long recognised forms of personhood that cannot be adequately captured by rigid legal definitions based solely on binary biological classifications.

Our research further demonstrates that many contemporary attitudes towards gender diversity within ethnic communities are themselves products of colonial

<sup>48</sup> Vinod Bal *Our Histories Are Queer: A Resource of Queer and Trans South Asian Histories* (Adhikaar Aotearoa, Adhikaar Aotearoa, 2024) at 26.

<sup>49</sup> At 26 and 30.

<sup>50</sup> At 30.

<sup>51</sup> At 27 and 30.

intervention. Prior to colonisation, many South Asian societies accommodated diverse sexualities and gender identities. Historical evidence of this acceptance can be found in religious traditions, cultural narratives, literature, language, and social institutions throughout the region. Colonial administrations, particularly the British Empire, introduced laws and social norms that imposed narrow understandings of sex, gender, and sexuality, criminalised gender-diverse communities, and marginalised identities that had previously been accepted or accommodated.<sup>52</sup>

This history is relevant because the Bill is frequently presented as reflecting objective or universal truths about sex and gender. Yet, the categories that the Bill seeks to entrench are themselves products of particular cultural and historical traditions. The Bill gives no consideration to the fact that many New Zealanders come from communities with different understandings of sex, gender, and identity. Nor does it acknowledge that concepts of sex and gender diversity have existed across human societies for centuries.

We do not suggest that Parliament must adopt any particular cultural understanding of sex or gender. However, legislation that purports to establish universal definitions should at least grapple with the diversity of human experience. The Bill does not do so.

<sup>52</sup> At 22–23.

# **Part 4: Conclusion and recommendations**

This submission has advanced two central arguments. First, the Bill is legally flawed. It is founded upon uncertain concepts, creates significant interpretive difficulties, sits uneasily with existing legislation, and raises serious concerns under New Zealand's constitutional and human rights framework. Secondly, the Bill proceeds on an incomplete understanding of human diversity. Taken together, these concerns lead us to a clear conclusion: the Bill should not proceed.

Throughout this submission, we have emphasised the relationship between law and human dignity. The law does not merely regulate conduct; it also reflects the values of the society it serves. It signals who is recognised, who belongs, and whose experiences are worthy of legal acknowledgement. For many people, particularly those who have experienced marginalisation, the law represents a source of protection against the arbitrary exercise of power. As the whakataukī reminds us: *Ka kuhu au ki te ture, hei matua mō te pani: I seek refuge in the law, for it is a parent to the oppressed.*

That ideal carries responsibilities. Parliament's role is not simply to legislate, but to legislate well. Good lawmaking requires evidence, fidelity to human rights and New Zealand's constitution, careful attention to consequences, and a willingness to engage with the diversity of the communities affected by legislation. In our view, the Bill falls short on each measure.

For that reason, we do not consider that the deficiencies identified throughout this submission can be cured through redrafting or amendment. The problem is not confined to particular clauses or drafting choices. Rather, it lies in the Bill's underlying premise and approach. The appropriate response is therefore not amendment, but rejection.

We recommend that the Committee:

1. Recommend that the Legislation (Definitions of Woman and Man) Amendment Bill not proceed; and
2. Report to the House that the Bill raises significant concerns relating to legal certainty, the constitution, human rights, and the recognition of human diversity in New Zealand.