

WHAT THEY DO IN THE SHADOWS

The rapid implementation of gender ideology in the New Zealand public sector

Part 2. Case studies

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Table of Contents

Human Rights Commission.....	3
The Human Rights Act 1993 – Sex and Gender.....	3
The Crown Law Opinion, 2006.....	4
The Yogyakarta Principles, 2006/7.....	6
<i>To Be Who I Am</i> , 2008.....	8
HRC Submission to the BDMRR Bill, 2018.....	10
The Commission’s Advocating for Secrecy, 2019.....	11
<i>PRISM</i> Report, 2020.....	12
Balancing Rights and Promoting Harmonious Relations.....	16
References (Human Rights Commission).....	18
Ministry for Women.....	24
Background.....	24
A Lack of Website Search Capability.....	25
Policy-making in the Dark, 2018.....	25
<i>Bringing in Gender</i> , 2019.....	27
The Equal Pay Amendment Act, 2020.....	28
The Briefing to the Incoming Minister 2020.....	28
Discussion.....	29
References (Ministry for Women).....	29
Stats NZ.....	32
Introduction.....	32
Statistical Standard for Gender Identity V1.0.0, 2015.....	33
Consultation on a New Standard for Sexual Orientation, 2018.....	34
Gender Pay Gap Measurement and Analysis, 2018.....	34
Household Economic Survey, 2019/20.....	35
Review of the Sex and Gender Identity Standards, 2019/2020.....	35
Discussion.....	38
References (Stats NZ).....	40
Ministry of Social Development.....	43
Stirrings of Discontent, 2018.....	43
Announcing Self-identification, 2019.....	43
OIA Request about the Change, 2019.....	45
Questions Arising from the Decision.....	46
References (Ministry of Social Development).....	48

Human Rights Commission

The Human Rights Commission (HRC) was created in 1997 to provide better protection of human rights in Aotearoa, working under the Human Rights Act 1993.¹ It is funded from the budget allocation for Justice but operates at arms length from the New Zealand government as an independent Crown Entity.

Its job is to:

- *advocate and promote respect for human rights in New Zealand*
- *encourage harmonious relations between individuals and among the diverse groups in New Zealand*
- *promote racial equality and cultural diversity*
- *lead, evaluate, monitor and advise on equal employment opportunities*
- *provide information to the public about discrimination and help resolve complaints about discrimination.*²

The Human Rights Act 1993 – Sex and Gender

The sex-based rights of women in human rights laws are typically based on recognition of the disadvantage women as a class have suffered historically under a patriarchal system that has valued men over women, and under which women have been and continue to be the recipients of male violence.

So the New Zealand Human Rights Act (1993) prevents discrimination of women as a sex, including in relation to pregnancy and childbirth as well as protections from other disadvantages arising from the power imbalance between men and women. The provisions are drafted in a sex-neutral way, but their effect is to support single-sex access to sex-differentiated places as well as the staffing of and access to specific services where women and girls have particular needs or vulnerabilities. The provisions thus ensure inclusion, safety and fairness, as well as accounting for vulnerability. They do this, for example, in relation to competitive sport, where the “*strength, stamina, or physique of competitors is relevant*”. Other protections include:

Courses and counselling services for highly personal matters, such as sexual matters or the prevention of violence

Allowing for women to be appointed where the position is that of a counsellor on highly personal matters such as sexual matters or the prevention of violence or where privacy, authenticity and integrity are issues, and [w]here sex is a genuine occupational qualification for the position or employment

Protection of women-only public spaces, single-sex accommodation (such as refuges and prisons) and separate facilities, as well as places and vehicles for each sex on the grounds of public decency or public safety

Allowing for discrimination in favour of women and girls in education

Skills (such as hair-dressing) where the nature of a skill varies according to whether it is exercised in relation to men or women.¹

The Act also protects against discrimination on the basis of sexual orientation, whether that is homosexual, heterosexual or bisexual.

This case study traces the steps by which women's, lesbians' and gay men's protections under the Human Rights Act have come under threat from an ideology that claims that men who identify as women are to be accepted as women and allowed to access the same rights as them. Following the timeline information there is discussion about the extent to which the Human Rights Commission is meeting the key legislative requirements of its role – specifically those related to:

- advocating and promoting respect for human rights in New Zealand
- encouraging harmonious relations between individuals and among the diverse groups in New Zealand.²

The Crown Law Opinion, 2006

As described in Part 1, a Private Member's Bill, introduced in 2006 and sponsored by transsexual MP Georgina Beyer, aimed to provide for 'gender identity' to be included as one of the prohibited grounds of discrimination in Section 21 of the Human Rights Act. It was introduced into Parliament and then withdrawn.³

Due to the Labour Government wishing to distance itself from controversial and "politically correct" legislation — especially in the wake of the Prostitution Reform Act 2003 and the Civil Union Act 2004 — the Bill was withdrawn before it was even debated.⁴

(An attempt to introduce a similar bill in 2014 was also rebuffed.⁵)

Coinciding with the withdrawal of the 2006 Bill was the publication of a legal opinion that Attorney General Michael Cullen had requested from Crown Law. Their opinion was that transgender people should be protected under the sex basis provisions of the Act.⁶

That legal opinion provided the broadest and most wide-ranging interpretation of transgender rights. It did not consider case law that was available at the time and which pointed the way to how accommodations between women's rights and

transgender rights might have been met.⁷ This included cases such as *Bellinger v Bellinger*, which had drawn cautious conclusions and suggested that:

the aim of...surgery is to make the individual feel more comfortable with his or her body, not to 'turn a man into a woman'.⁷

Other judgements suggested that there were objective tests about who was included within the category of 'transgender', and that:

In effect the law has, in limited and defined circumstances, created a "fiction" in the interests of a small number of transgender people.⁷

The same judgement said there was a need for the careful setting of eligibility criteria so as not to risk "*overthrowing the whole system*".⁷

However, the conclusion of the Crown Law opinion appears to have been assumed to mean that males who claim a gender identity different from their sex (transwomen) must be treated as women. It could equally have been framed as transgender people being protected under the category of their birth sex as gender non-conforming individuals, as the case *Price-Waterhouse vs Hopkins* found.⁶

In fairness, Crown Law was not asked to be restrained, nor to examine the legislation rather than the case law in other jurisdictions in order to address the issues raised by failing to legislate. Nor were they asked to identify specifically who was in the category of 'transgender'. They defined this in the broadest of terms, including transvestites and cross-dressers as well as transsexuals, taking a lead from the Beyer Bill on gender identity and which was followed by the Human Rights Commission's *To Be Who I am* report, discussed below. The opinion was silent as to whether there should be any qualifying criteria for inclusion in the class 'transgender', even though there were such criteria as surgery and legal confirmation required in most countries whose case law was examined.⁶ The question posed was the open-ended "*whether prohibition of discrimination on the grounds of gender identity is already provided for in the Human Rights Act*". But the wide scope and the need to show there were no hindrances to transgender people's protections has meant the effects of the opinion have gone beyond the usual human rights issues – that is to say, equity in access to health, employment and education, and clarification of individual humanitarian issues such as the right to marry or to receive a partner's superannuation entitlement. (The case law cited was mostly concerned with such issues.) Opinions provided publicly by the HRC have indicated it believes that when a male person claiming a 'female gender identity' seeks to use the services, places, sports, awards, employment roles and rights otherwise available only to women, this is granted by the legislation.⁸ The Commission does this:

- even though the claim infringes significantly on the very provisions that the Human Rights Act was and is intended to protect;

- irrespective of a clear intent that the case law cited provided for this meaning;
- despite the absence of evidence that this was the intent of the legal opinion and
- despite the Beyer Bill as drafted differentiating between sex and gender identity, not collapsing them.

It is unclear whether this goes further than the intent that politicians of the time intended in requesting the opinion.

The Commission's interpretation has occurred even when there is obvious unfairness – as in competitive sport – and in places where women are vulnerable – such as changing rooms. Because of the lack of specific criteria in the Crown Law opinion, this intrusion on women's sex-based rights can take place regardless of whether or not the transgender person has gone through a gender reassignment or even a legal process. The Commission, however, appears uninterested in the impacts on women in the cases where there is a conflict. It says as much in its submissions, stating that "*Sex discrimination is interpreted by the Commission to include discrimination on the grounds of gender identity*".⁸

The Crown Law opinion has been interpreted and extended by the Commission in its public statements to include the right for transwomen to:

- use women's gymnasiums, including changing rooms⁹
- take part in the female categories in sports¹⁰
- be housed in women's prisons.¹¹

It must be assumed that the HRC has also supported transwomen being employed in circumstances where, as men, they could otherwise be excluded, such as in intimate counselling sessions with abused women and in women's refuges, since there is evidence of transwomen filling these roles.

The Yogyakarta Principles, 2006/7

The Yogyakarta Principles¹² were the brainchild of ARC International, a Canadian NGO.¹³ Their purpose was to rectify the lack of an over-arching United Nations treaty or framework for sexual orientation and gender identity, or for people with intersex conditions. In 2005, ARC set up an office in Geneva to lobby for change. It coordinated a meeting in Yogyakarta, Indonesia, of sympathetic academics and human rights specialists who developed and promoted the Yogyakarta Principles. (The present NZ Chief Human Rights Commissioner, Paul Hunt, was involved in that exercise when he was a United Kingdom-based academic.¹¹) The 2006 version of the Principles contains the definition of 'gender identity' used by the HRC:

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or

*may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.*¹²

The Principles were updated in 2017 with further principles in a way that responds to the progress of gender ideology and serves to reinforce it.¹⁴ The Principles have been influential within the European Union, with committees of the United Nations, in New Zealand and beyond, in implementing gender ideology. The acronyms SOGIESC (Sexual Orientation, Gender Identity and Expression and Sex Characteristics) and SOGI, adopted in the Principles, helped to tie the gender identity issue to the larger and at that time more well-established LGB wagon, as well as creating a false equivalence between transgender and intersex (medical) conditions.^{14 15}

ARC's work was also influenced by a small group of wealthy and influential transgender activists. The work of these activists also led to transgender treatment guidelines and critiqued the medical diagnosis of transgender identity, seeking to remove its association with mental illness.^{16 17} The term 'gender identity' was first defined in the American Psychiatric Association's Diagnostic and Statistical Manual, version 3, in 1980.¹⁸ However, it had barely been used in jurisprudence before 2007¹⁴ except, interestingly, in New Zealand, where it was the defining term in the Beyer Bill described above, which was first drafted in 2004.³

The foreword to the Principles says they are "*a universal guide to human rights which affirm binding international legal standards **with which all States must comply***" (emphasis added). Human rights lawyer Anna Zobnina outlines how the Principles have frequently been presented as if they have international standing and as if they have been agreed by international forums.¹⁴ This is not the case, but in its documents the Human Rights Commission frequently presents them as if it is.^{8 11} The Principles have never been discussed and hammered out through the United Nations formal processes. They are best described as a "project in progress".¹⁴

A 2016 resolution of the United Nations Human Rights Council did refer to discrimination based on 'gender identity',¹⁹ but did not define the term. The UN has created a special rapporteur on the issue and created a campaigning centre within the UN to promote LGBTI rights.²⁰ Special rapporteur roles are advisory and exploratory and do not define national legislative requirements.²¹ Transgender and self-identification rights are referenced in other documents, but this is not the same as creating a legal treaty obligation. Neither those terms nor 'gender identity' are defined by the UN in conventions or treaties.

For feminists, the concern is that the extra-legal adoption of the Principles into national legislation is endangering both women's rights in general and in particular lesbian rights.^{14 22} The convergence between homosexuality and transgender status

implied by the Principles has the effect of making it next to impossible to campaign for lesbian rights (or against harms) without also campaigning for the rights of men to call themselves lesbian.¹⁵

The Principles, although not legally binding in international law, are being implemented by states to different extents and their provisions are being used to disadvantage women by being used to enact local laws that can:

- abolish women-only spaces by allowing 'gender' self identification
- shift the meaning of 'gender' from its usual meanings of a synonym for sex or stereotypes of behaviour to a meaning of self-identified gender
- replace 'sex' with 'gender identity' in the description of sexual orientation, thus making 'lesbian' mean attraction to a person of the same gender identity, not the same sex
- make feminist analysis of women's oppression branded a form of prejudice
- prioritise the rights to create families, including by artificial means, over the potential problems of commercial surrogacy arrangements.²²

As noted above, the HRC uses the Yogyakarta Principles in its submissions and publications in a way that implies they have the legal status of a United Nations treaty. This usage, coupled with the Crown Law legal opinion, is having impacts that are not covered by legislation. This is reflected in the Commission's *To Be Who I Am* report,²³ its 2018 submission to the Births, Deaths, Marriages and Relationships Registration Bill⁸ and its 2020 *PRISM* report.¹¹

To Be Who I Am, 2008

In 2008, the Commission carried out a survey of the wants and needs of transgender people, resulting in the report *To Be Who I Am*.²³ The HRC's consultation process was open for five months and, like the legal opinion mentioned above, spread the net as widely as the Crown Law Opinion had, including responses from not only transsexual people who had transitioned chemically and surgically but also transvestites, as well as a few young children who identified as transgender. But the report suffers two major problems. Firstly, although a few children were part of the consultation it is mainly adult voices that speak to the needs and situation of children. Secondly, and unlike the usual good practice with consultations, the desire to provide a level of compassion and acceptance that fully endorsed transgender people's lives and perspectives meant there was a lack of balance and critical thinking in framing the proposals that arose from the consultation. Both factors have led to uncritical acceptance across government and have been the principal causes of the major unintended policy changes described elsewhere in these case studies and in Part 1 of this paper.

The report's approach barely mentions issues around diagnosis, but assumes simply that people identifying as being transgender or reporting gender dysphoria, including children and young people, should be accepted at their word. Rather than looking at

underlying causes of wishing to transition, such as abuse and trauma, it advocates for transgender treatment in a way that has normalised access to puberty blockers, cross-sex hormones and surgery for children and young people.^{24 25}

Regarding discrimination, the Commission states that:

[I]n arriving at recommendations to address discrimination the enquiry has drawn heavily on suggested solutions from trans people.

In other words, the recommendations about children are based mainly on adult transpeople's views of their childhoods. Yet research shows that the great majority of children with gender dysphoria or gender confusion change their minds or grow out of their discomfort with their bodies.^{26 27} In retrospect, this report appears to have set the scene for the increasing readiness to provide medical and surgical transition for young people,²⁴ while ignoring other evidence.^{27 28} By taking a solely 'lived experience' perspective of transgender people's lives, the report fails to mention that *many* children are interested in things more stereotypically associated with the opposite sex, as well as wanting to be that. Indeed, in the years since the report was written there have been numerous testimonies from people whose behaviour as children was different from the usual stereotyped roles, but who did not become transgender.^{26 29} There are well documented cases indicating that there are similar reasons for young women seeking to transition as for their becoming anorexic.^{30 31} There is also strong evidence of social contagion in the decision to transition.²⁸ Finally, since the exceedingly small numbers of mostly adult people who identified as transgender at the time of the 2008 report, the demographic of people wishing to transition has shifted to a much younger and far larger cohort of mostly young women. The thinking about gender identity has captured our institutions to the point where an Auckland University survey of eight-year-olds in 2020 considered it appropriate to ask whether the children "*identified their gender as somewhere between a boy and a girl*".³²

To Be Who I Am also reports children as being transgender and tells of the medical problems for 'transmen' who bind their breasts while they await mastectomies. (Subsequently, there are waiting lists for breast-binders prior to the removal of healthy breasts in young women transitioning to becoming transmen.³³)

In contrast to other work by the Commission, where a balance is sought between different interests, only the perspective of transgender people is given serious consideration in the report. This was evidently driven by good motives, and appeared to have been necessary to encourage the community to participate. As a result, the report largely avoids insights from counsellors, ethicists, lawyers and feminists, as well as pre-transition partners and children of trans-identified people. The report makes little effort to consider the views of medical specialists other than those who are wholly supportive of transition. However, the reticence by clinicians to

endorse and treat is visible in the comments made by transgender people in their evidence. As an example one transman was quoted as saying that they had:

... received an appointment... to see a gynaecologist.... but he was absolutely horrified when I told him why I wanted a hysterectomy ... He point blank refused to perform a hysterectomy ... saying that no surgeon is permitted to remove healthy tissue, even if the patient doesn't want it. (Transman)²³

But in general sceptical medical personnel were not able to bring their voices and concerns to the table. Nor does the report consider whether the co-morbid mental health issues are significant, despite serious mental health issues being very common in the lives of transgender people.³⁴ Mental health issues are addressed either in the context of an oppressive 'anti-trans' society, or are portrayed as pre-existing conditions that are separate from a transgender identity, creating an impression that transitioning is a panacea for a person's well-being. Subsequent research has demonstrated poor quality evidence that this is true and a growing body of evidence that is contradictory.³⁴

Despite these serious shortcomings, the report's 'findings' are the source of much later activity, including the HRC's affirmative-only approach to gender-transition treatment, which has been part of the cause of the high numbers of children and young people identifying as transgender. . They have also influenced subsequent policy and approaches, in particular with regard to:

- exceptional rights related to privacy, language, and belief outlined in Part 1 of this paper
- creation of the idea of gender not as cultural stereotypes of behaviour but as a distinct internal essence. This has led to the situation where the Commission now asserts that everyone has a gender identity that may be the same or different from their sex or on a spectrum from male to female
- reintroducing the Beyer Bill proposal that gender identity should be added to the Human Rights legislation
- rejection of the idea that mental health issues may signal other kinds of trauma, involving a risky flight from a sexual identity and which should be addressed before transition
- housing transwomen in women's prisons and
- a large part of the thinking that has seen the widespread adoption of gender ideology across government.

HRC Submission to the BDMRR Bill, 2018

In its submission to the Births, Deaths, Marriages and Relationships Registration Bill, the Commission advanced the rights of transgender people to self-identify without preconditions. The submission gave no consideration to whether those rights might disadvantage women.⁸ It cited the Yogyakarta Principles discussed above, in the same problematic way.

The submission proposed the implementation of condition-free self-identification as follows:

Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;

Make available a multiplicity of gender marker options;

Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;

Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

The submission also listed all of the arrangements in other jurisdictions that allow for self-identification. But few if any of those proposed arrangements were subject to an open process of consultation – just as New Zealand's would not have been. Ireland was listed, even though there are guaranteed protections for women's rights there. Canada's situation was lauded even though the downsides of self-ID in that country have become apparent.^{35 36 37}

The original BDMRR Bill did not contain provisions for gender self-identity, but was a technical redrafting of registrations. Nonetheless, civil society transgender organisations, the Human Rights Commission, Green Party MPs and others pushed to ensure that the self-identification provisions were able to make their way into the Bill for the Second Reading. The Bill was deferred in early 2019³⁸ and has not at the time of writing been re-introduced. It is, however, on the government's programme for the 2021 session.

The Commission's Advocating for Secrecy, 2019

In late 2019, the Ministry of Social Development (MSD) announced that gender self-identification and a third gender option would be accepted from all its clients, with no supporting evidence of any kind required.^{39 40} This was despite the self-identification proposals in the BDMRR Bill having been deferred only a few months earlier. (See the Ministry of Social Development case study for details.) An Official Information Act enquiry to the Ministry and the resulting response shows that an HRC staff member suggested that information about MSD's action to include self-ID and a third gender option for its clients should be kept under the radar:

Avoid turning this piece of work political. Suggest we let them, and other organisations [meaning presumably the organisations that had lobbied for the change] know before we have any public announcements on this due to the negative feedback this could have in the media.⁴⁰

This would appear to indicate that Commission staff are aware there are strong concerns in the community about gender self-identification. Instead of suggesting that this be addressed in a balanced way (as the Commission's statutory role advises) or acting in line with the DPMC Policy Quality Framework⁴¹ and finding a way to work through the differences of opinion, its staff proposed ensuring changes slide through the back door. This is scarcely edifying behaviour for an agency charged with guarding the human rights of all New Zealanders and the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society.

PRISM Report, 2020

In the *PRISM* report the Commission sets out its stall for what it would like an incoming government to do, based on analysis that "reflects the voices of the SOGIESC diverse people who attended the Commission's consultation hui in 2018".

The report's executive summary says that gender identity, gender expression, or sex characteristics are "enshrined in international covenants, conventions, and declarations". The report cites the Yogyakarta Principles and the Universal Declaration of Human Rights but the covenants, conventions and declarations that encode these gender identity rights remain unidentified in the report. The text of the report shows that even getting and retaining the special rapporteur (see above) on LGBTQI issues was achieved only with significant effort.

In his foreword to the *PRISM* report, Chief Commissioner Hunt reveals his personal involvement in drafting the Yogyakarta Principles:

[I]n 2007, I had the privilege of working with a panel of international experts to set out international human rights law as it relates to a person's actual or perceived sexual orientation, gender identity or expression, and sex characteristics (SOGIESC). We had no doubt: SOGIESC rights are human rights. This idea animated the Yogyakarta Principles.¹¹

But, as discussed above, in the 14 years since the Yogyakarta Principles were drafted, they have not been adopted and hence have no international legal standing. Yet the Commission cites them to promote the case for changes to New Zealand laws and policy.

It takes an ideological stance at the outset with respect to gender identity. Despite there being no biological or other proof that gender identity actually exists outside of theorising, the report says that:

*All people have a sexual orientation, **gender identity and expression and sex characteristics**.¹¹ (emphasis added)*

Similarly on pages 7 and 61 of the report it is stated that gender identity:

*refers to **each person's** deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. (Emphasis added).*

Such claims have never been tested among the population at large. As described above, the concept arose not from research or psychology but solely as a means for the ideological validation of the ideas of transgenderism and as a means of equating transgender ideology with sexual orientation through the SOGI/SOGIESC acronyms and framing. Of those who are aware of the recent arrival of gender ideology in our midst, many, including many feminists, do not believe they have a gender identity, nor do they believe in the concept. But promulgating these ideas now serves increasingly to endorse the feelings of confused young people who feel they 'don't fit'.

The report also cites Article 16 of the *International Covenant on Civil and Political Rights* (1966) as providing a basis for sex self-identification with respect to a greater freedom to amend birth certificates. This seems to interpret Article 16 in a way that could not have been predicted by its drafters. It is instead a wilful misreading of a simple statement. It reads:

"Everyone shall have the right to recognition everywhere as a person before the law."

This statement would not permit a right to self-identify in the manner being proposed by the report, so there is no legal basis for the report's interpretation. It appears to be a wish in search of a UN validation.

PRISM also employs language that is particular to people who believe in gender ideology, such as 'sex assigned at birth', 'cisgender' and 'pansexual' and definitions that differ from common usage. It uses the word 'gender' as meaning self-defined gender, which is in stark contrast to the definition of gender adopted by the United Nations⁴² and the World Health Organisation.⁴³

The report also states in its definition of 'sexual orientation', and in usage of the term elsewhere in the document, that this refers to attraction to the *same, different or both genders*. Given its unusual interpretation of gender as meaning 'gender by self-identification', this must be assumed to mean 'self-identified gender'. This sleight of hand effectively drains sexual orientation of its meaning. It also misrepresents the legislation that the Commission has a statutory duty to uphold. This legislation says that:

sexual orientation...means a heterosexual, homosexual, lesbian, or bisexual orientation.

Same-gender attraction in the terms cast by the Commission's *PRISM* report is most certainly not what was intended by the lesbian women who campaigned to include lesbians in New Zealand's equality and human rights legislation.⁴⁴

The report also uses the inaccurate language ‘sex assigned at birth’. Sex is often known from scans well before a birth and midwives and doctors **observe** the sex at birth. (Until it was co-opted by gender ideologists, the only legitimate use of the term is for the very rare births where a person is found to have a disorder of sexual development where sex is genuinely indeterminable and often, but not always, an interim assessment is made.)

PRISM lacks nuance on the issue of hate speech. It argues strongly in favour of a new law, with no discussion of balancing rights to free speech with other rights. Neither does it address the possible downsides of vexatious complaints or the well-publicised experience overseas, where such legislation has been enacted and the police have been involved in serious overreach.⁴⁵ The report downplays the disadvantage suffered by gay and lesbian people (whom it titles “sexuality diverse communities”).¹¹

Further the Commission reports that:

*[S]exuality diverse communities have had the benefit of rapid gains in social acceptance [whereas] the pace of change for those with diverse gender identities, gender expressions, and sex characteristics has been much slower.*¹¹

The Commission cites no evidence for this assertion and ignores evidence that the opposite is in fact the case. For example, the *Youth12* reports showed that gay and lesbian young people are at least equally if not sometimes more impacted than transgender people by discrimination and its impacts, including on mental health.⁴⁶ Nor does it refer to the United Nations Free and Equal project, whose framing is predicated on lesbian, gay and transgender people having different but equivalent stigma and disadvantage.⁴⁷

Meanwhile, aside from general proposals concerning bullying, discrimination and a proposed new hate speech law, all the other practical changes proposed to support rainbow communities are directed at transgender people. These recommendations include a mix of unquantifiable and vague sentiments such as the right to “an assured sense of safety” and a “sense of being”. They also include various special and unusual rights – such as access to self-selected bathrooms, acknowledgement of identities by others, access to sports by identified gender, allowing of self-identified changes to birth certificates, and expecting adherence to preferred names and third person pronouns.

The *PRISM* report pushes for gender self-identification in law without addressing the arguments that prevented the self-ID provisions in the BDMRR Bill from proceeding. These included lack of proper consultation and the way the proposed law would undermine sex as a societal category on which significant legislation and reporting is based.^{38 48} It instead cites Yogyakarta Principle 31, which states that:

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics.

It does this without considering which others would be impacted by such a policy. It argues for the social and legal transitioning of children and young people, arguing that they:

are protected from discrimination based on gender identity under the United Nations Convention on the Rights of the Child.

This is incorrect. The Convention does not include children claiming a transgender identity.⁴⁹ But that does not stop the Commission from making the leap to declare that:

On this basis, the process of recognition should ensure young people also have access to legal recognition of their gender identity.¹¹

Most worryingly, the report makes no mention of the increasing evidence that young people are choosing a transgender identity for reasons that include a lack of positive role models, prior abuse, autism syndrome conditions, homophobia, and social contagion.^{28 31}

The guidelines also argue for exceptional rights of privacy from teachers and fellow students, saying:

[O]nly the school principal, school counsellor, and a trans student's teachers should be aware of a trans student's gender identity. It is not appropriate for a school to disclose a trans student's gender identity to other students and their families, except with the trans student's permission.⁵⁰

There are dangers for both children and their teachers when a small group is placed beyond the normal arrangements for public education and is offered exceptional levels of privacy.⁵¹ Yet the *PRISM* report proposes that 'trans children' should be guaranteed this.

In short, the approach of the Commission to the evidence, the overstatement of the Yogyakarta Principles, inconsistencies with international definitions and the lack of willingness to address well-founded objections are all serious concerns regarding these documents. Lack of balance is addressed next.

Balancing Rights and Promoting Harmonious Relations

The Human Rights Commission is one of the key organisations at the heart of the current ideological split between transgender rights campaigners and women's rights campaigners.

Current Chief Commissioner Paul Hunt has spoken frequently about the Commission's role in balancing rights. In relation to the Christchurch massacre, he said:

*Very few human rights are absolute.... Balance is a foundational human rights concept. Often a fair and reasonable balance has to be struck between competing rights. In New Zealand, we are already very familiar with striking human rights balances between, for example, freedom of information and the right to privacy.*⁵²

Speaking about the competing interests in access to housing, where both landlords and tenants have rights, the Commissioner pointed out that "*Human rights are relational*".⁵³

In contrast, no such recognition of opposing views or competing interests appears in any of the Commission's public statements on transgender rights. In many instances, its authors appear to have set their agenda and then searched for resources and opinions in local and international law in attempts to legitimise it. The Commission has not sought to balance rights between natal females and transgender people. Neither has it taken into account the different interests of the diverse groups that make up the so-called rainbow community. Yet increasingly there is an awareness internationally that the interests and concerns of the lesbian and gay communities differ from those of transgender and intersex people.⁵⁴ For example, lesbians are under pressure to consider males as sexual partners if the men 'identify as women'.⁵⁵

As well as being champion and advisor with respect to human rights, the Commission's role is "*the encouragement of harmonious relations between individuals and among the diverse groups in New Zealand*".⁵⁶

This is important, because there is a great deal of antagonism in the debates around transgender rights. Transgender people and their allies argue that transpeople face unique challenges related to violence, suicide, mental illness, denigration and judgement, as well as in accessing healthcare, housing and employment. But those who argue there is a conflict of rights and interests between women and transgender people face public vilification, loss of employment, threats of and actual violence, de-platforming, silencing and more.^{57 58 59} Standing up for women should not be regarded as – and in fact is not – an anti-transgender position. Given the Commission's role of supporting harmonious community relationships, should it not take a balancing role in this debate? It has not done this. It appears to have relinquished its balancing

role, favouring transgender people over women as well as over lesbian and gay people.

For instance, the Commission has been decisively in favour of the participation of transwomen in women's sport. This is despite, firstly, significant research⁶⁰ indicating the physical benefits that male-born people retain after reducing testosterone levels, and secondly, sex-based categories in competitive sport being protected by the Human Rights Act.¹ The Commission's total support of transwoman Laurel Hubbard's participation in the Commonwealth Games women's weightlifting event in 2018¹⁰ was published both on social media and in press releases picked up by the media.^{10 61}

If the Commission's role includes responsibility for balance and harmonious relations, and since sexed-based categories in sport are included in the Human Rights Act, why is the Commission so clearly in favour of one group over another? What has happened to the human rights of women to compete with other women of comparable size and weight, rather than with people who have advantages of male physical development – greater body mass, stronger bones, and greater lung capacity? This is completely disregarded by the Commission, as is the long history of women's fight to have their participation in sport taken seriously.

There are many other instances of the Commission having totally absorbed gender ideology and hence refusing to play any kind of balancing role in the current disputes:

- In the *PRISM* report the HRC promotes the social transition of school-aged children, while never mentioning the impacts on other children of being required to endorse the view that change of sex is possible. Neither does it mention that most gender-confused children will desist at puberty if there is no interference with their maturation.⁶² It also disregards the rights of religious students such as Muslims to the single-sex spaces required by their religion.
- It has praised the use of an Mx
- option (meaning a gender of 'other') on voting cards,⁶³ and other self-identification initiatives,⁶⁴ even though gender self-identification legislation has not been passed.
- The Commission continues to advocate condition-free changes to birth certificates, even though there has been no public consultation on such a move – which is partly why gender self-identification legislation was deferred.
- It has given precedence to transgender people on days that celebrate women. For example, it has used the anniversary of CEDAW to promote the need for improvement of rights for transgender people,⁶⁵ even though that Convention specifically addresses the need for the elimination of discrimination against *women*.⁶⁶

In allowing for the over-riding of sex-based rights with transgender rights, the Commission is ignoring what it points out in its 2017 *Briefing to the Incoming Minister*,⁶⁷ which is that not only are these (gender identity) rights not enshrined in law, they could be overturned with a simple test case in a court or a Human Rights Review Tribunal.

The Commission's views fall into the dangerous territory of embedding a belief that it is possible to change sex, while the assertion that "everyone has a gender identity" implies that other people should believe this too.¹¹ This is despite the Bill of Rights Act supporting freedom of belief, which must, of course, mean also freedom *not* to believe any particular ideology. There is no evidence of the Commission making any effort to understand and deal with the concerns of women who see their sex-based rights being eroded in the current push to support transgender people, particularly transwomen. It is little wonder that harmonious relationships are not possible in the present climate.

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Ministry for Women

Background

At the official launch of the Ministry for Women's Affairs in 1986, Labour Prime Minister David Lange told the gathering "Your job is to change the world".¹ He could scarcely have imagined that 30 years later the organisation would be changing the very meaning of the word 'women'.

The work of the Ministry, renamed in 2014 to its current title, has included tracking progress for women on various fronts, a nominations service to get more women on boards of directors, and making policy and recommendations. Since the Pay Equity Unit within the Department of Labour was dissolved in 2009, pay equity has been a big focus of the Ministry's work.

However, from late 2017, the Minister for Women in the Labour-led coalition government, Green Party MP Julie-Ann Genter, implemented policy based on a new definition of women – one that is determined by self-identification. This happened without consultation, without policy analysis or impact analysis and almost entirely without public notification.

Minister Genter brought Green Party promotion of gender ideology to her position in government. Soon after her appointment, she referred briefly to transwomen in a speech on 10 December 2017 at the YWCA equal pay awards that was published on the Beehive website, saying

*I am especially committed to ensuring everyone gets a fair go – Māori, Pasifika, women of colour, Asian women, migrant and refugee women, young and older women, women with disabilities, **trans-women** and everyone working in women-dominated occupations that have been undervalued simply on the basis of gender. (Emphasis added)²*

Online searches of the Ministry and Beehive websites offer no other examples of policy changes, speeches or press releases from the Minister concerning transgender people or advocating that a new definition of women be created to be inclusive of transwomen. A single mention in a speech would not generally be read as equating to a significant policy change without supporting notifications and papers. Neither, surely, would it usually be understood as an intention to do something as dramatic and far-reaching as to collapse the meaning of 'woman' from one based on sex to one based on gender self-identification.

A Lack of Website Search Capability

The Ministry for Women is the smallest of the government's ministries, so a lack of capacity may be the reason for its poor website search capability. Searching for the

word 'transgender' finds only one document, and that is not related to the Ministry's own policies.³ Searches for 'gender identity', 'gender-diverse' and 'non-binary' find only pages that do not contain those phrases. Only by a detailed search of individual documents is it possible to glean a part of what has happened at the Ministry. Importantly, although the Ministry publishes some but not all Official Information Act responses, none can be found through the site's search engine.

Policy-making in the Dark, 2018

Examination of the Ministry's *Statement of Intent 2018-2022* finds transwomen mentioned in its listings related to the Ministry "*building an understanding of working conditions for the diverse groups of women*".⁴ Despite that innovation, there was no policy change or other announcement accepting that transwomen are understood to be women and that self-identification is fully endorsed. For example, it was not notified on the Ministry's or the Beehive website as a news item. The inclusion of transwomen in the pay equity project (see below) was not notified in the Ministry's quarterly newsletter *Pānui Wāhine*,⁵ either to correspond with the new Statement of Intent or since. The section of the Ministry's website that covers its history⁶ and role⁷ does not provide information about the change, and neither do any news stories.⁸ There is apparently nothing about this change that has become part of the Ministry's public record, aside from responses to Official Information Act requests.

Together with the State Services Commission and Stats NZ, the Ministry for Women in 2018 designed and signed a new standard on the measurement and analysis of gender pay gaps, for use by employers and staff groups who "*want to know more about measuring and analysing gender pay gaps in their organisations*".⁹

Transgender people were included as their self-identified gender by default, with the guidelines advising that:

[E]mployees should be included as the gender they choose. Some employees may not identify as men or women but as gender-diverse, or they may prefer not to state a gender identity.

At the Diverse Thinking Governance Summit of 2018, the Acting Chief Executive of the Ministry, Helen Potiki, revealed that the category 'women' included men by self-identification. The notes of her speech are on the conference website, and state:

*The Ministry for Women wants to meet the needs and support the aspirations of **all women and girls and their communities** through a focus on improving outcomes for Māori, Pacific, and other diverse cultures, those that identify as lesbian, gay, bisexual, **transgender** and intersexed (LGBTI), and those with disabilities. (Emphasis added)¹⁰*

This conference speech was not included as a news item on the Ministry's website or reported in its newsletter. Only information within Official Information Act (OIA)

responses actually demonstrates the shadow policy of the organisation. An OIA response from 10 August 2018 revealed that:

*The Ministry for Women's policy position is to take an **inclusive approach to recognising all people who identify as women and girls. This is in line with the United Nations approach to women's human rights.** This is reflected in the Minister for Women's speeches, publications and ministerial requests, as well as in Ministry correspondence. (Emphasis added)¹¹*

No impact assessment or any other work was carried out in 2018 by the Ministry¹² on the proposed BDMRR Bill to enact gender self-identity. It might have been considered important to understand any unintended consequence, for example. The proposed legislation was deferred in February 2019, yet the Ministry's response to an OIA in 22 June 2020¹³ stated specifically that:

*"The Ministry for Women represents the interests of all women, including transgender women, **and it recognises the right of all people to self-identify.***

In doing so, the Ministry has considered New Zealand law and international conventions. In particular, we follow the legal definition set out in human rights legislation, which states that all people, regardless of their sexual orientation or gender identity, have the same human rights and freedoms. All sexual and gender minorities in New Zealand have these rights. This aligns with recommendations made by the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW).

There is no exact date for when the Ministry adopted the above definition but it is noted in the Ministry's Statement of Intent 2018-2022 and Annual Report 2019, both of which are publicly available.

*The Ministry has not undertaken an in-depth social impact assessment of accepting the right of all people to self-identify. However, **we do not consider there is evidence that the rights of women are being damaged as a result of the right of all people to self-identify.***

The Ministry for Women has not undertaken any public consultation on the definition you have raised. (Emphases added)

Despite the BDMRR Bill being withdrawn more than 16 months earlier than that response, the Ministry for Women has acted as if self-identification is in place. The Ministry appears to be confused about the general rights that accrue to all people, the specific rights that are in the Human Rights Act – i.e. sex, sexual orientation –

and those that are not – i.e. gender identity. As to CEDAW, the Ministry's assessment is contradicted by human rights lawyer Professor Rosa Freedman. In 2018, she responded to similar claims made by Labour MP Louisa Wall about the extent of CEDAW, saying that it:

*distinguishes between the discrimination that women experience **on the basis of their sex** (e.g. child brides, lack of reproductive rights, etc) and those experienced **on the basis of gender** (e.g. lack of education, gendered expectations of roles in the family, etc)... CEDAW was created to protect women from discrimination, and therefore **including individuals with male biology even if they are trans women would be outside of the scope of the treaty.** (Emphases added)*

Professor Freedman added that:

Some countries have been including [sexual orientation and gender identity] issues in their state reports to CEDAW, but the idea that [the Convention] requires them to do so, let alone to enact domestic legislation, is wrong.¹⁴

Bringing in Gender, 2019

Together with the Department of Prime Minister and Cabinet's policy team, the Ministry developed a toolkit called *Bringing in Gender*, launched in 2019. The toolkit's purpose is the proper inclusion of gender in policy work across government. There is little to indicate that it too is using self-identified gender as a reference point. On the website, a tab with extra information (not visible from the main page and not searchable) contains the following text:

Datasets usually still measure sex as binary. Keep in mind that gender is more fluid than sex and the lack of data on specific population groups such as gender-diverse people doesn't mean there isn't a problem. In the past, government forms (from the national census to medical or education enrolment forms) have provided only two choices when it comes to gender: male or female. People who identify as gender diverse are excluded by this approach, and they are also made invisible for statistical purposes. As a result, services don't fit all individuals and information reinforces a binary view.¹⁵

Once again, the Ministry's stance and explanation of a major change is covert rather than overt. The assumption, however, is that sex can be a spectrum and that sex diversity exists.

The Equal Pay Amendment Act, 2020

The purpose of the Equal Pay Amendment Act 2020 is to:

*[i]mprove the process for raising and progressing pay equity claims, and to eliminate and prevent discrimination **on the***

basis of sex in the remuneration and employment terms and conditions for work done within female-dominated jobs.
(Emphases added)¹⁶

Although ‘employee’ and ‘agreement’ are defined in the Act, neither ‘women’ nor ‘female’ are. All references to these words relate to issues around women’s lower-paid and lower-status employment.¹⁶ Yet self-identified women *are* included, as had been agreed in the measurement guidelines drafted in 2018.⁹

The pay comparisons for the New Zealand public sector for 2019 presumably used those criteria. They show an historically exceptional result in terms of a lessening of the gender pay gap. The change was the largest in 17 years and the pay gap fell from 12.2% in 2018 to 10.5%.¹⁷ Whether self-identified women (transwomen) i.e. people who were likely to be in better paid, traditionally male occupations, had any effect on the reduction in the pay differential cannot be known.

The Briefing to the Incoming Minister 2020

The Ministry’s briefing to the new Minister advises her of the Ministry’s need to be “*politically neutral, to provide free and frank advice, and to be open and transparent*”.¹⁸ However, in its section on pay equity it fails to mention the work carried out with the State Services Commission and Stats NZ on including transwomen in pay equity, as described above. In its section on the views of stakeholders it cites the Gender Justice Collective as being representative of women and girls, and quotes extensively from a self-selecting survey *YouChoose2020*, which was carried out by the collective in the lead-up to the 2020 election. The collective wanted to find out “*what matters to women and non-binary people, trans women, intersex people, and takatāpui*”. While the recommendations themselves are mostly unsurprising, the survey was couched in the language of gender ideology and presupposed a belief in gender identity that made it difficult for those of differing views to participate. The collective records its mission as follows:

*We use feminism as a shorthand for intersectional feminism: a feminism that is not exclusivity (sic) focused on eradicating sexism but one that is invested in dismantling all systemic hierarchies including white supremacy, patriarchy, capitalism, ableism, heterosexism, transphobia, colonialism and more.*¹⁹

The use of this organisation begs a question about whether it is lack of capacity, naivety or ideological capture that sees the Ministry use a survey from an organisation primarily dedicated to “*dismantling all systemic hierarchies*” rather than focusing on the situation of women and girls.

Discussion

If there is any doubt about the incredible strides the transgender movement has made without democratic oversight, with the barest of public notifications and

with information that is coded or misleading, the actions of the Ministry for Women and its 2017-2020 Minister are a case in point. It appears that the government ministry responsible for women's issues has made a fundamental change regarding who is included in its core demographic. The Ministry has decided to create a definition of woman/women based on biology to one based on self-identification.

Information about the change is not to be found by searching the Ministry's website. The notifications have been added as single-word additions to the Ministry's accountability documents by listing transwomen as a category of women alongside disabled, Māori, lesbian and refugee women. There have been no press releases or speeches notified on the Ministry's website nor any communications to interested parties through the organisation's newsletter. There has been no consultation, impact analysis or related policy work to make the decision. The Ministry cannot even say when the decision was made. The most significant information about the change of approach is contained only in Official Information Act responses that are not to be found by using the search functions on the agency's website.

The Ministry's commitment to accepting self-identified gender has taken place despite self-identification not being included in New Zealand law. This has happened almost entirely under cover. The dates of the available documents show that the Ministry has both anticipated self-identification legislation that is not yet in force and has continued *despite* the deferral of the law.

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Stats NZ

Introduction

Stats NZ works in international cooperation with a number of other countries, including the United Kingdom, the United States, Canada, Australia, the Republic of Ireland, and Scotland. Many of these countries are preparing to include gender diversity and related topics in their next national censuses. Stats NZ states that continuing to learn and share experiences with other National Statistical Offices will be an important part of building robust practices moving toward New Zealand's 2023 census.¹

The Stats NZ website outlines the ongoing work being done to collect more data on what it calls Aotearoa's rainbow community, with the ultimate aim of including diversity topics in all social surveys and the 2023 census. The department says it has been working alongside interest groups and agencies for several years to better understand these topics and how to collect more robust data about them. However, those interest groups have not as yet included gender-critical women's rights groups, such as Speak Up for Women. Elsewhere, the engagement has been patchy. In contrast to the work on the sex and gender identity standard described below, there was no advisory group appointed for the sexual orientation standard.²

The department introduces its policies as being based on inclusivity:

Stats NZ is working to meet the strong need for data collected about New Zealand's population to be more inclusive.

Data that captures the diversity of the population in terms of sex, gender identity, and sexual orientation has been very limited, both in New Zealand and around the world.

Stats NZ recognises the collection of information that adequately reflects the diversity of New Zealand's population has not been inclusive for all, and has not met the information needs of sexual and gender minority groups.

We are committed to doing better. We are working to collect robust data about sex, gender identity, and sexual orientation. This will result in information that will raise understanding and improve decision-making.

We know that some individuals and community groups have a strong interest in seeing data that better reflects who they are, because data has the power to change lives.¹

Examination of the Stats NZ website shows that New Zealand has followed Canada and the United Kingdom in accepting the language of gender ideology, using terms

such as *gender diverse, non-binary genders, different sexual identities, and gender spectrum*.

Statistical Standard for Gender Identity V1.0.0, 2015

In 2015, Stats NZ announced a world first in a new gender identity statistical standard. 'Gender diverse' would join 'male' and 'female' categories in a new gender identity classification that would record the identity of all people, including those who see themselves as different from male or female.³

Stats NZ said the statistical standard for gender identity was developed through consultation with groups representing people with different gender identities and with government organisations who would use the new classifications.

Announcing the standard, Stats NZ's classifications manager Jo-anne Allan said that:

The term gender diverse is fairly new but we believe that over time it will be widely used and accepted. We recommend this term for official statistical use.

We believe the gender diverse population see it as a step towards being seen, counted, and understood. The standard expands gender identity categories beyond the current female/male boundaries.³

The department said that as leaders of the Official Statistics System (OSS), Stats NZ had developed the statistical standard for gender identity in order to:

- *standardise definitions and measures of gender identity data across the OSS, to improve accessibility, interpretability, and comparability of data, and reduce duplication of effort*
- *meet human rights requirements for data collection and to support the legal requirements of the Human Rights Act 1993*
- *enable policy-makers to develop measures that will address matters of importance affecting gender minority groups. This will more adequately address the needs of these people across the gender identity spectrum in areas such as health, social, education, and employment.*

The standard uses the following definitions:

Gender identity: *A person's internal sense of being wholly female, wholly male, or having aspects of female and/or male. A person's gender identity can be expressed in several ways, and may or may not correspond with the sex recorded at birth.*

Gender: *The social and cultural construction based on the expectation of what it means to be a man and/or a woman, including roles, expectations, and behaviour.*

Sex: *The distinction between males and females based on the biological differences in sexual characteristics.*

Sexual orientation: *A person’s sexual orientation can be derived from their sexual attraction, sexual behaviour, and/or sexual identity.*⁴

Consultation on a New Standard for Sexual Orientation, 2018

In 2018, Stats NZ announced it was in the process of creating a framework for sexual orientation and a statistical standard for sexual identity. In April 2018, the department used a public submissions process to collect feedback on this proposed framework and standard. They received 924 submissions during the three-week consultation period.⁵

Over 80 percent agreed with the proposed framework, definitions and terminology, and question design. Those who offered suggestions for change mostly focused on inclusivity, with many submitters saying the proposed framework and definitions did not fully cover the scope of sexual orientation. Suggestions included removing binary language, updating some definitions to reflect modern usage, and including more aspects and identities that were not present in the proposed framework. Some 12% of submitters wanted the framework wording changed. Among the ideas proposed were: (a) to include non-binary and other minority identities; (b) to include gender and sex, rather than solely a biological element; and (c) to make sexual orientation categories gender-based rather than sex-based. Other suggestions included expanding the framework to include: (a) indigenous identities (e.g. takatāpui – in the adopted meaning of being a member of the LGBTQIA+ community rather than in the original sense of intimate companion of the same sex);⁶ (b) asexuality; and (c) multiple identities.⁵ All these proposed changes are indicative of gender ideology.

Although this consultation was about *sexual* identity, not *gender* identity, there is obviously overlap in discussing these various concepts. It would appear that the comments from submitters served to influence both the sexual orientation standard and later work.⁷

Gender Pay Gap Measurement and Analysis, 2018

Together with the State Services Commission and the Ministry for Women, Stats NZ designed a new standard for pay gap measurement, for the guidance of employers and staff groups wanting “*to know more about measuring and analysing gender pay gaps in their organisations*”.⁸

The guidelines say:

*[E]mployees should be included as the gender they choose. Some employees may not identify as men or women but as gender-diverse, or they may prefer not to state a gender identity.*⁸

It is relevant to note that since 2018, all public sector workforce information has been collected by self-identified gender, affecting not only pay data, but roles held by transwomen being counted as held by women.⁹

Household Economic Survey, 2019/20

Stats NZ decided that the 2019/20 Household Economic Survey (HES) would, for the first time, ask respondents to describe their gender. Combined with a question about sex at birth, this information would help the department to better reflect gender minorities in the data collected about New Zealand's population. The HES is a sample survey of households in Aotearoa. Since the 2018/19 HES, the department collects responses from over 20,000 households.

In future, three questions – sexual identity, sex at birth, and gender – will be included as part of the core demographics collected in all Stats NZ household surveys. This is the first time that 'gender' has been used with the meaning of 'gender identity' or 'self-described gender'. The Government Statistician and Minister for Statistics agreed that Stats NZ should continue working on ways to collect information on these topics, with a clear direction that these questions will be included in the 2023 census.

The department stated that since developing the content for the 2018 census they had increased knowledge about best practice to ensure quality data could be collected on these topics, both from research in the area and international advances at other statistics offices.

Review of the Sex and Gender Identity Standards, 2019/2020

In December 2019, Stats NZ announced it was conducting a review of both the sex and gender identity statistical standards.¹⁰ The department said it would be consulting other government agencies and key stakeholders over the course of the review and would be seeking public feedback on any proposed changes.

Stats NZ convened an external advisory group of topic experts to help with aspects of the gender identity review. The listing of the advisory group names shows them almost all to represent transgender interest groups.²

The new proposed standard for New Zealand is similar to the Canadian standard for *Gender of [a] Person*, released in 2018.¹¹ The Canadian standard includes 'cisgender' and 'transgender' people in the definitions of male and female. The New Zealand standard does not as yet use the term 'cisgender', which means 'non-transgender'. Some women have strongly objected to this term, on the same basis that they would object to being described as 'non-men'.¹²

In July 2020, following a delay caused by the Covid19 pandemic, Stats NZ launched its consultation process on the new standards.¹³ The consultation paper used the

term 'gender', as it did in the Household Economic Survey described above. Despite 'gender' being a term already loaded with multiple meanings, the definition supplied is:

a person's social and personal identity as male, female, or another gender such as non-binary. Gender may include the gender that a person internally feels ('gender identity'), and/or the gender a person publicly expresses ('gender expression') in their daily life. A person's current gender may differ from the sex recorded at their birth and may differ from what is indicated on their current legal documents. A person's gender may change over time. Some people may not identify with any gender.

The consultation paper provides an almost identical definition for the phrase 'gender identity'.

The proposed changes, if adopted, herald the effective replacement of data on sex (physical reality) with data on gender (defined in this case as a belief) across all New Zealand's public sector over time, except where the sex factor is a requirement. In the examples given from Canada, some aspects of healthcare and health research would require sex information.¹⁴ These changes were not signalled as part of Stats NZ's *Strategic Intentions 2019–2023*, as might be expected for changes to what is described as "an important and complex topic".¹⁵ Neither was this change signalled by the previous work outlined above.

The main proposal in this consultation is that government information collected for the census and for all other purposes, including service delivery, compliance and regulation, surveys and analytics across all domains of government record-keeping, will in future capture the information using a 'gender by default' principle.

'Gender by default' is explained in the consultation document as:

*....an approach that defaults to the collection of gender data as opposed to sex at birth. Defaulting to a specified variable facilitates consistency of data collection. **Collection of sex at birth information should be viewed as an exception where there is a specific need.***

In most cases a person's gender – their social and personal identity – is most relevant for policy making and research rather than their sex at birth. Gender based analysis is used in a range of areas, from income equality to health and education. (Emphasis added)¹³

The statement that a person's gender is more relevant for policy-making than their sex at birth is astonishing, and its implications for women are discussed below. The new principle means that there will be no requirement to capture sex data except

where it is explicitly demanded. If the Canadian model is followed, sex data will be required in the health sector only. Even there, the collection of data will be selective.

In the Stats NZ discussion document, a workflow is provided to identify when sex data needs to be collected by government, and says this will happen “*where necessary*”.¹⁶ The workflow does not give any examples to explain this, or how it would work in practice. From the documentation, it seems that no risk or impact assessment¹⁷ of the proposal has been carried out. Moreover, the workflow description proposes following the Canadian approach which, as discussed above, covers the collection of sex (or gender) data only for selective health purposes.¹⁴

The consultation paper appears to have given little if any consideration to the importance of sex-based information. All the documents referenced relate to the specific concerns of transgender and intersex people. There is no evidence of research into impacts related to the failure to collect sex-based data or to replace data on women with data on self-identified women.

This proposed change, then, is all the more important because of the differing needs that removing sex will occlude. The collection of statistical and other data already works to the detriment of women in multiple different ways.¹⁸ When public policy moves away from using sex-based information, as is happening now, even less information will be kept about women. If, as is proposed by Stats NZ,¹³ sex data will not be collected whenever it is not explicitly required, the government risks adding to the under-representation of women’s data. There are many examples showing that New Zealand’s collection of data on women (by sex) is lacking. Whether it involves design, drug testing or automobile safety, women are frequently an afterthought.¹⁸ For instance, of more than 1000 research reports from the NZ Transport Agency, only a very small number are described as having information about sex or as mentioning females or women. In another example, sex-based data *is* not collected even where it would reveal interesting insights.¹⁹ In a 2019 historical review of family violence, data was collected by the Ministry of Justice,²⁰ but apart from in cases of rape, the sex of the perpetrator was removed from the categories of offence in the summary reporting. The implications of such omissions are that:

*If in all cases the sexes continue to be mixed then we will not be able to gather data to assess or address sex inequality such as the pay gap, unequal political representation, different patterns of criminality and victimhood or to monitor and plan for health. This will be harmful for women because distorted statistics will give a distorted picture of actual real world inequality rooted in the biological and reproductive differences between women and men.*²¹

Discussion

The call for information about transgender people to be recorded in public data is a valid one and the adoption of 'gender identity' as a statistical category has moved incrementally over the last few years to capture this information, alongside sex, intersex and sexual orientation. However, Stats NZ has regarded as 'best practice' overseas examples where the legislative situation is substantially different from New Zealand. The trajectory over this time has shown a marked preference for the gender ideology thinking reflected by a few overseas jurisdictions. For example:

- the creation of a sexual orientation standard that says sexual orientation may be defined as *same-gender* or *opposite gender* orientation. This is effectively arguing that lesbian women and gay men no longer have a defined category of being same-sex attracted.⁵
- the decision in 2018 to include people in pay equity calculations by self-identified gender – a full two years before the consultation on sex and gender identity had even occurred.⁸ Pay equity is one of the most crucial datasets. (This topic is covered in full in the Ministry for Women case study.)
- the use by Stats NZ staff of pronoun statements in email signatures.²²

These are all testament to the influence that gender ideology advocates and thinking have in the department.

The final step in this process is that Stats NZ has proposed to replace sex data with gender identity data in most cases, or not to collect it at all. This is a proposal as extraordinary as it is dangerous. The Stats NZ decision that self-identification is fully endorsed in data collection is unusual and controversial. By whose assessment is gender identity – recast as 'gender' – most relevant? Not by most women, for whom statistics are important measures of progress. Discrimination from long-embedded patriarchal perspectives and misogyny have not magically disappeared. Physical and mental health, occupational differences, access to money and roles of influence in the public and private sectors, the perpetration of and vulnerability to violence and any number of other issues continue to have sexed dimensions. Without accurate data on women, neither improvements for them nor the rolling back of their participation can be measured.

Sex matters, and the associated issues have not disappeared because some males regard themselves as female. Women are not just small men. The differences related to our female biology are significant. Policy and record-keeping need to take account of our needs in regard to menstruation, pregnancy, childbirth, parental leave and childcare.

The Stats NZ approach proposing a category of woman defined by self-identified gender effectively confounds the meaning of 'woman'. Legislation that would have made this legal has been deferred. A change of sex-marker on a birth certificate

currently requires a Family Court process and a medical diagnosis. The proposal is therefore a sign that Stats NZ is effectively supporting the extra-legal implementation of self-identification. Other factors include:

- the proposed supplanting of the usual meanings for ‘gender’, replacing them with a new meaning of ‘self-identified gender’ or ‘gender identity’;
- the proposed adoption of the approach taken in Canada, a country where self-identification has been allowed in law, without addressing concerns that:
 - the situations of the two countries are not comparable, as self-identification is not in New Zealand’s legislation²³
 - the Canadian standard proposes not collecting sex or even gender data in most circumstances – something that is not made clear in the New Zealand consultation document²⁴
 - the Canadian legislation still lacks a public gender-based impact assessment and has had significant negative consequences;²⁵
- the adoption of terms from gender ideology, such as ‘cis’ and ‘assigned at birth’, that are incomprehensible, meaningless or even insulting to many in the population;
- the lack of evidence that any groups concerned about self-ID were consulted about the proposed changes. There is no evidence of the risks and unanticipated consequences for women being considered; nor of examining whether there are risks to work that has – until now – relied on datasets and series that are standardised to sex;¹⁶
- the taking on board of ‘non-binary’ identities, for which there is no legal status. This explicitly goes against a main reason for the deferral of the New Zealand self-ID provisions, which was that the definition of ‘sex’ would collapse;²⁶
- the capitulation to a gender ideology perspective that regards some data about transgender people as irrelevant or inherently inaccurate, including:
 - the failure to consider an important category of ‘trans’ people who are most at risk – *detransitioners*, who may revert to understanding themselves as their birth sex, many with severe mental health and medical sequelae. There is strong evidence that transgender communities do *not* want this data collected^{27 28}
 - the failure to account for information that transgender people remain by and large in the occupations, relationships and sex-based crime categories that they would have been in prior to being transgender – in particular, that violent crimes, typical of males, are already being reported as female crimes;

- other data that is controversially regarded as normalising gender ideology. For instance, unlike the sexual orientation standard, there is no lower age for children in the gender identity standard. This is despite the fact that most children who express a gender preference different from their sex grow out of this during adolescence;²⁹
- the advisory body's lack of diversity means they would be unlikely to take a broad societal view of the disadvantages of a failure to collect sex-based data – even if they were alerted to shortcomings. (This is part of a trend – evidenced in the countries Stats NZ identifies as displaying 'best practice' – to stop collecting data about women at all,¹⁶ in addition to the information about Canada above).
- the failure to consider whether there are legal protections that may apply to the collection of statistics relating to female experience as a protected characteristic in law.

These serious and systemic potential problems demonstrate the extent to which Stats NZ has endorsed a gender identity ideology perspective in its creation of these standards. This will impact record-keeping across New Zealand, with serious consequences for future researchers examining the position of women and consequent inability to identify progress or lack of progress and to address demonstrable inequities and inequalities.

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Ministry of Social Development

Stirrings of Discontent, 2018

In July 2018, when the coalition government's winter fuel payment was launched, the Ministry of Social Development (MSD) sent a notification notice to almost 400,000 people, including about 60,000 claimants and superannuitants whose names were wrong. It appears that in these letters the name was extracted from data that contained the birth name rather than the current one. Many people were slightly inconvenienced by this – those who had married, divorced, whose name had been corrected or who had changed their name for other reasons, as well as people who had changed gender. But it was the transgender community whose concerns were raised in media coverage, with claims of “dead-naming” that was incompetent, a breach of privacy law and very distressing.¹ The name release was regarded as so significant that the associated media story appended a list of counselling and suicide prevention organisations.

It appears that this incident, and the backlash against it, was at least in part responsible for the implementation of gender self-identification at the Ministry. The other element was the canvassing by transgender organisations, which persuaded the Ministry that self-identification should be part of their service offering to the public.^{2,3}

The wholesale implementation of gender self-ID at MSD has occurred as if it were a simple administrative matter, akin to a change in benefit rules. Rather than improving processes to prevent administrative errors in future, it appears that the Ministry, under pressure from rainbow organisations, set about a wholesale implementation of gender self-identification across its services.³

Announcing Self-identification, 2019

In December 2019 Gender Minorities Aotearoa announced that:

Thanks in part to the activism and political advocacy of a number of individual trans people and some community organisations, the Ministry of Social Development has carried out community consultation and added a 'gender diverse' option to their systems.

You can choose whether to use male, female, or gender diverse, just the same way you can choose ethnicity – with no supporting documentation. You do not need to change your birth certificate or other ID to change your gender marker with MSD.

....[I]f you are currently getting support from MSD (Work and Income/WINZ, and StudyLink), you can update your gender

marker in person or by calling WINZ 0800 559 009 or StudyLink 0800 88 99 00. (Emphasis in the original)²

The only form of announcement made by MSD was an update made in the Work and Income Map on 2 December 2019. The purpose of the Map (Map does not appear to be an acronym) is to:

provide policy guidelines to staff based on the legislation administered by the Ministry of Social Development.

These policy guidelines are the standards that operationalise legislation for staff to follow when assisting clients.⁴

The Map's new information on gender identity self-registration explained that:

Map has been updated with gender inclusive language and avoids using gender based rules where appropriate. When an external agency is providing services to a specific population based on gender or sex, the provider will determine the specific entry criteria. Forms and online applications have also been updated with 3 gender options for people to choose from, male, female, and gender diverse. See:

- *Core policy Relationship status for benefit*
- *Social Housing, Assessment of eligibility Bedroom allocation⁴*

So as from December 2019 several things have changed:

- The new rules apply to all MSD clients – beneficiaries on job seekers, single parent, superannuation and disability benefits; students with grants or living allowances; and organisations that deliver services on behalf of clients.
- The advice to clients is that they can register with a self-identified gender of male, female or other.
- Standard forms have been changed to accept self-identification, so that the department now collects gender data rather than sex data, by default.
- Other changes were made as part of the implementation of the new policy. An example is the rules around sharing of rooms in state and social housing by children who may now be of different genders, as well as of different sexes. Additional consideration is given to the transgender child, whether male or female, in consideration of *their* privacy needs.⁵
- There is an expectation on every external service provider to the Ministry that it follows this advice and allows for gender self-identification in the delivery of services.

OIA Request about the Change, 2019

Despite the extensive ramifications of the change, including by implication the meaning of 'male' and 'female' changing to a 'gendered' definition rather than a sex definition, there was no public announcement by the Minister of Social Development about this, nor by Work and Income New Zealand (WINZ), nor by the Ministry itself.

In response to a subsequent Official Information Act (OIA) request, it was revealed that the effective implementation across MSD of self-identification by gender involved no consultation, no policy analysis, and no risk mitigation or impact assessment. Neither was there a proposed evaluation of the changes – in fact these have been implemented wholesale in a way that will almost preclude changes in future. There was no pilot process to assess impacts. Other consequences – training for staff, new processes, new data fields, communications with NGOs – were not considered as policy work, according to the OIA response.³

There was also no consultation with parties with alternative views about gender identity and self-identification, such as Speak Up For Women. No opinions were canvassed as to the wisdom of implementing a policy that effectively makes 'sex' as a category meaningless in the delivery of the Ministry's services. The move was carried out despite the Crown Law opinion on exactly this issue earlier in the same year. The opinion was instrumental in the withdrawal of the self-identification legislation in the Births, Deaths, Marriages and Relationships Registration Bill because, amongst other reasons, self-identification of gender collapsed the meaning of 'sex'.^{6,7} MSD undertook no analysis of impacts on the organisations delivering services on its behalf, such as accommodation providers or social services. Nor were flow-on effects of self-identification to other departments examined, such as the transfer of student loans to the Inland Revenue Department when study is completed.⁸

The same Official Information Act response reports that there were no formal meetings with community groups, let alone a wider canvassing of opinion about the decision to implement self-ID and a third gender option. Instead, MSD policy staff contacted organisations by phone to discuss the most appropriate language to use. The consultation results consisted of handwritten notes and entries in a table.³ The preferences of a few government departments – the Human Rights Commission (whose advice was to keep the work out of the media), the Department of Internal Affairs, the State Services Commission and the Social Investment Agency – were canvassed. Five rainbow organisations and two youth health centres which support transgender patients (and which all hold the same beliefs in gender identity and the affirmative-only approach) were also contacted. The reason for the lack of wide-ranging consultation and the failure to adopt any of the DPMC Policy Quality Framework criteria⁹ (see Part 1, section 2.2 of this paper) was said by MSD to be that, in their view, the decision to change to a self-identification model **was not regarded as policy work.**

Questions Arising from the Decision

The approach raises a number of important questions, aside from the obvious one. Why has an assumed (and often unstable) identity of feeling become a more important data point than biological sex?

How can the MSD assess the quality of its policy advice when it says that changes which have significant impacts both between and within agencies, as well as delivery impacts on contracted NGOs, are not policy changes in the first place?

How can MSD justify the evidence-free implementation of self-ID taking place within months of the law to do the same thing being deferred? And why did the agency's processes to implement the change not cross-check against this important decision and raise questions about the wisdom of the action?

Why did the department not await the results of the Stats NZ consultation on sex and gender identity before proceeding with this change?¹⁰

How is accurate data possible for research and policy work around welfare benefits, e.g. accurate data on mothers and fathers who are using the Domestic Purposes Benefit, if people are recording themselves as non-binary or the opposite sex, with absolutely no preconditions or documentation required? How is relative hardship or the impacts of policies on women to be gauged if the category of 'sex' has been lost? How are transgender service users to be identified and their outcomes and needs tracked and improved upon, if their data is subsumed into the male or female category?

The ramifications for social housing policy are confusing, as there is no lower age limit for gender identity in the new policy. Does a 15-year-old boy become eligible to share a room with a younger girl if the data stored about the boy is changed? How are Non Government Organisations (NGOs) providing services on contract to the Ministry supposed to have tooled up to implement this change without warning or guidelines? How would any of them question these decisions or manage the additional costs they incur?

What happens with fraud issues and the department? With self-ID, the person being prosecuted will automatically be regarded by the courts system as their identified gender rather than their actual sex. In that case, how would such a person be matched against other crimes committed in the name of their birth sex?

Given that the Ministry expects all its providers to take similar action, how will they protect women and girls in shelters (in the way envisaged by the Human Rights Act) if any man – including males with malign intent – can identify as a woman? The contracted NGO must presumably accept self-assessment at face value, since there appears to be no policy analysis or advice about keeping records of both sex and self-identified gender?

Are the Ministry's Heartland Services included? These are the Ministry's 28 rural and provincial centres that provide access to all government services. What about the other non-MSD services provided from these locations to people who are now recorded by a self-declared name and sex marker of their choice?

What happens where the Ministry's services intersect with those of other agencies, such as when students finish their courses and their loans are transferred to the Inland Revenue Department? Will that department also receive information by self-identified gender? What about record-keeping of students by the Ministry of Education? By NZQA?

If a major government agency can avoid the government's good practice guidance on policy quality by simply asserting that what they are doing is "not policy work", surely that approach goes against both the spirit and the intent of the policy framework. That MSD's initiative was implemented only months after a law to achieve the same objective had been deferred is alarming, given the serious reasons Crown Law supplied against it. Surely the agency would have been aware of this, and of the proposed work by Stats NZ to create a standard for gender identity across government? The Ministry could not have missed the strong public campaign that was mounted against the new law, including potential reputational damage to Ministers had the unconsulted change gone ahead. This somewhat reckless approach by a government agency to accede to the demands of one sector of society and ignore existing legal guidance and the deferral of the law is, in essence, a clear example of policy capture in the face of multiple contra-indications.

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