

WHAT THEY DO IN THE SHADOWS

The rapid implementation of gender ideology in the New Zealand public sector. Part 1

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EXECUTIVE SUMMARY

Part 1 of this paper examines the evidence that there has been institutional capture by gender ideology across the New Zealand government. The paper begins by setting out the processes for proper policy-making in a democratic society. It then describes gender ideology and shows how its promulgation has occurred with almost no public oversight and in the absence of legislation. A history of the situation in New Zealand is outlined, and the unintended impacts of the adoption of gender ideology are discussed.

The pattern of change follows an approach seen in multiple jurisdictions, including significant change that avoids the usual democratic norms. There have been increasingly deliberate moves to embed 'gender identity' as a mandated belief. 'Woman' and 'female' are being redefined as matters of choice, not biology. The potential consequences of this cut across many different aspects of the public sector and hence to the provision of services and decisions about funding. There are already significant impacts. Despite the deferral of proposed self-identification law in 2018/19, moves towards what is effectively agency-specific self-identification have been implemented by stealth in multiple government organisations. Transwomen are beginning to be included in important data sets pertaining to women, with no apparent consideration of the risks or impacts. As in overseas settings, there is evidence of inaccurate information about, and downplaying of, the impacts on rights and protections women have in legislation, and which should be protecting them. Special rights, over and above the human rights shared by the population as a whole, are being promulgated by transgender advocacy groups and these are being adopted by government agencies without any consultation with those whose legal rights are being eroded, primarily women. To acknowledge that transgender people have full human rights is not the same as saying existing women's and sexual orientation rights and protections should be ceded.

Following their adoption of gender ideology, there are claims from government agencies such as the Human Rights Commission that "Everyone has a gender identity". The attempts to embed this across the public sector include asking employees to state their preferred pronouns in meetings and emails. Such practices raise important questions about freedom of belief, thought and speech. Public servants are mandated to provide free and frank advice. Can they do so if they are also required to believe in 'gender identity', a concept for which there is no proof and which appears to have elements of a faith-based belief system?

These measures are introduced by agencies at the instigation of 'rainbow' groups. But the rainbow community is not a singularity with uniform views. Many gays and lesbians refute an ideology that declares sexual orientation to be based on gender rather than sex.

The strong antagonism towards people who do not believe in gender ideology, in wider society as well as in government and academia, makes it difficult to take action or even to discuss the problem. Many high profile public individuals and professional organisations are already keeping their heads down. Some parts of government, including importantly the Public Service Commission, have signed up to the language, definitions and social reclassification by gender that gender ideology demands including, in some cases, by

formalised agreements with third parties. This means that employees are constrained, and that services are delivered in line with the ideology's provisions.

Thus, in the ceding of women's, lesbian and gay rights to transgender rights in recent years, there is little evidence the government's policy-making guidelines have been followed. This paper's conclusions locate the problem legally, in a failure of the constitutional arrangements provided for in the Bill of Rights Act and the Human Rights Act. These arrangements were also recognised by the 2017-2020 government as insufficiently robust. If the issue can be analysed as a failure of governance and public sector policy-making, it could possibly be addressed logically and holistically. The best way forward would be to reconfirm the intent of the existing legislation for those people who are currently losing rights and to implement policy that reverses extra-legal implementation of sex self-identification. Ways must be found to ensure that transgender people themselves have a fair and meaningful rights framework that protects their self-identity without mandating that others believe it.

Finally, the writers suggest that, given the enormity of the changes gender ideology is bringing to society as a whole, the New Zealand people should be asked for their views.

The paper's recommendations can be summarised as:

- clarifying the legal provisions of the Bill of Rights Act regarding freedom of belief, including the Act's undermining by policy changes;
- clarifying the legal provisions of the Human Rights Act that cover discrimination based on sex and sexual orientation;
- requiring a new Crown Law opinion as to birth certificate registration and gender recognition;
- undertaking a Ministerial investigation into the implementation of sex self-identification across the public sector;
- consulting the New Zealand population on gender ideology before any self-identification legislation is re-introduced.

Part 2 of this paper, provided as a separate document, supplies case studies of several government departments as evidence of ideological capture. These are:

- the Human Rights Commission
- the Ministry for Women
- Stats NZ
- the Ministry for Social Development.

1. INTRODUCTION

What's going on?

- *A committee within the Ministry of Health, reviewing standards for midwifery, is told by their Rainbow representative that they must replace the word “mother” with “birthing person”.*
- *The 2021 census will ask us whether we are male, female or some other gender.*
- *You receive a letter from a public servant that has their “preferred pronouns” listed under the signature.*
- *Women receive a health service notification that refers to “those with a cervix”.*
- *Period poverty experienced by schoolgirls is described by politicians as a problem for “young people” who are “menstruators”.*
- *A woman claiming help from ACC for a sexual assault is assigned a male-to-female transwoman counsellor.*
- *The Ministry for Women says it “represents the interests of all women, including transgender women, and it recognises the right of all people to self-identify”.*
- *An 11-year-old girl taken to her GP with a sore throat is offered puberty blockers for no reason other than her tomboyish appearance.*
- *Children come home from school saying they’ve been told it’s possible to be “born in the wrong body”.*

What *is* going on? Who knew about this? Who has been consulted? Who agrees with it?

The transgender rights movement, with its accompanying gender ideology, is increasingly influencing public institutions and the wider culture, in New Zealand and worldwide.^{1 2 3 4 5}

This paper is an examination of the evidence that there has been policy capture and poor democratic process in the ways gender ideology has become embedded in the rules, activities and services of the public sector in New Zealand. It will show how this has impacted the rights of women, of school children and of gay and lesbian people. The changes have been harmful to these groups in, amongst other areas, education, prisons and other accommodation, intimate counselling support, access to services and spaces, the rules governing sports, and the statistics that are collected or not collected. Often the changes cover issues that should be protected, but have not been, by the relevant provisions in the Human Rights Act and the Bill of Rights Act.

Most importantly, what is seen through the lens of transgender human rights as progress is observable through a feminist lens as the disappearance not only of rights but also of the distinct category of ‘woman’ (with the biological meaning) in favour of a definition maintaining that anyone who feels like a woman is one or can become one. This paper focuses on women because men in general do not suffer rights infringements in the same way when female-to-male transmen claim and occupy male social roles and spaces.

Gender ideology is the view that whether a person is female or male is set primarily through innate feelings and perceptions. This contrasts with the traditional and scientific view that biological sex/reproductive features determine who is female and male. Inherent in gender ideology is the expectation that male-born transgender and 'non-binary' people can claim the sex-based rights of natal women.

In New Zealand, as elsewhere, there is an exponential growth in younger people, especially girls, transitioning with drugs and surgery. This trend is supported by an extensive and edgy fashion industry that lauds body dissociation.⁶ The growth in numbers is fully supported by New Zealand's health and welfare system, including social workers,⁷ psychologists,⁸ and health professionals.^{9 10} In 2018, a Bill to introduce gender self-identification through a major change to the Births, Deaths, Marriages and Relationships Registration Act (BDMRR) was considered by the Justice Select Committee. This Bill had been intended as a technical rewrite to allow for technology and other changes related to registrations, because the Act "*lacked coherence, and was difficult to read and understand*".¹¹ Provisions to allow self-identification of gender, with no requirement for medical or legal evidence and the removal of the Family Court process, were introduced after the select committee process. A successful campaign made the case that the scale of the proposed changes needed proper consultation and an impact assessment. Crown Law provided advice that the Bill's provisions, as proposed, risked making the category of 'sex' impossible to define¹² and the legislation was deferred in early 2019.

Despite the deferral of the Bill, there is strong evidence that arrangements to embed self-identification were already underway and have continued across numerous government agencies, including Stats NZ, the Ministry of Social Development, the State Services Commission (recently renamed the Public Service Commission) and the Ministry for Women, as well as within the education, justice and health systems. While the changes are widespread across government, it is the views of the Human Rights Commission that have led the changes. Its submission on the BDMRR Bill on this topic stated "*Sex discrimination is interpreted by the Commission to include discrimination on the grounds of gender identity*".¹³ The source of this view, which is not in law, is covered in a case study of the Human Rights Commission (see Part 2 of this document), which outlines the legislative and policy background to the current situation. 'Gender identity', then, is esconced in the language and in the policy framework.

The writers argue that this has happened through policy capture, which is defined by the OECD as:

the process of consistently or repeatedly directing public policy decisions away from the public interest towards the interest of a specific interest group or person.

*Capture is the opposite of inclusive and fair policy making and always undermines core democratic values.*¹⁴

Examination of how policy-making should ideally take place is the next section of this paper.

That is followed by an explanation of gender ideology and its spread in New Zealand. The implications, impacts and unintended consequences are laid out and the question of rights and 'special rights' are discussed. The paper then outlines the main steps leading to the current situation, before giving brief summaries of some additional examples beyond the detailed case studies that constitute Part 2 of the paper. Finally, conclusions and recommendations are set out.

2. MAKING POLICY AND LEGISLATION IN A DEMOCRACY

This section of the paper looks at the way rules, new legislation and public policy are created and changed. This will allow examination of how the topic of interest (policy capture and proper democratic process in regard to gender ideology, especially self-identification) measures up against those rules.

A wealth of contemporary literature on the topic of policy-making ranges from dissatisfaction with proper government process, lack of excellence in democratic process and a move to increasingly fragile and authoritarian forms of democracy, through to examination of ways forward.^{15 16 17 18} New Zealand contributions to the literature vary in their emphasis, but they all contain prescriptions for good quality policy and democratic process. The authors address themes such as openness, access, the scale and breadth of consultation, inclusivity, balancing of rights, risk mitigation, awareness of the need to govern for the future and transparency of process.^{19 20 21 22}

2.1 Democracy and Policy Qualities Schemes in Use in New Zealand

As an OECD member, New Zealand is influenced by the OECD Values of Sound Public Governance and Public Integrity.²³ It cooperates with the civil society organisation Transparency International²⁴ and is also part of the Open Government Partnership,²⁵ an international initiative that takes place between citizens and government to determine areas of priority in improving the provision and quality of information to the public.

Notwithstanding these good provisions, the system is faulty. There is no uniform place where consultations are lodged. There is an all-of-government approach to making legislation but not to rule-making, nor to consultation around service design or policy creation. There is no all-of-government notifications service, so that understanding what decisions and consultations are underway is well-nigh impossible. Tracking what is

happening takes a lot of time for advocacy groups. The New Zealand political and policy scene has had little in the way of deep deliberation or approaches like citizens' assemblies or collaborative budgeting. The Bio-ethics Council, a body created by the Royal Commission on Genetic Modification,²⁶ and which was closed down in 2008-9, was one example of such an approach. (The over-riding of sex with gender and changing the meaning of the term 'woman' might have been an appropriate topic for this kind of body.) Despite attempts over the decades, there is still no way of identifying all the consultation that is taking place at any one time. Officials often consult with trusted stakeholders on the content of bills, in the form of 'pre-exposure drafts', but there is no public notification at this stage and consultation times are generally short.

2.2 DPMC Policy Quality Framework

The way policy is implemented in the New Zealand government is led by the Department of the Prime Minister and Cabinet Policy Project, which has adopted an all-of-government approach to policy-making and has persisted over two administrations.²⁷ The Policy Quality Framework in the Project addresses the needs of policy staff and outlines how policy objectives should be met. It contains guidelines, checklists and other requirements to implement good policy.²⁸

Accordingly, **analysis** should:

- incorporate Treaty and Te Ao Māori analysis
- use relevant analytical frameworks and methodologies
- clearly define the problem or opportunity, rationale for intervention, and policy objectives
- be informed by relevant research and evidence
- assess options to make impacts clear and reveal workable solutions
- reveal diverse views, experiences and insights and engagement approaches
- make any limitations of the analysis and advice clear.

Advice should tell the full story and should: enable a clear and informed decision or next steps; reflect diverse perspectives; be free and frank; be communicated in a clear, concise and compelling way; and outline risks and mitigations.

Finally, **the work completed** should enable effective implementation and should explain how the solution will be monitored and evaluated.

Measured against these criteria, how do the actions of the New Zealand government in relation to gender ideology stack up? Before addressing that question, the paper looks at what gender ideology is, and how it conflicts with and destroys women's legitimate rights.

3. WHAT IS GENDER IDEOLOGY AND WHY IS IT A PROBLEM?

3.1 Gender – Meanings Old and New

Women's oppression has its historical roots and its ostensible justification in female biology and the exploitation of female reproductive labour.... The oppression linked to sex begins at birth, operating through the social imposition of gender. Gender is the label that feminists use to describe the value system that prescribes and proscribes forms of behaviour and appearance for members of the different sex classes, and that assigns superior value to one sex class at the expense of the other.²⁹

Second-wave feminism, which flourished from the 1960s to the 1990s, was committed to dismantling the gender stereotyping that limited the possibilities for women in particular, but also for men. These feminists rejected notions of femininity that decreed women should be attractive, passive, quiet, nurturing, emotionally and physically weak, and submissive to men. It was a primary plank of feminism to show these stereotypes to be inherently unfair, and to work for women to have the same opportunities as men to develop and express the full range of their talents. Feminists also worked to free male children and men from stereotyped gender notions of masculinity. This campaigning work succeeded in the recognition of women's needs in equality and human rights legislation (such as the New Zealand Human Rights Act). It brought about international conventions that protect women, such as the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as well as national frameworks that sought to actively consider women's needs in policy and legislation.

The feminist struggle for 'gender equity' meant a struggle for women to be regarded and treated as equal in value to men. Until very recently, 'gender equity' has maintained that meaning, and for the majority of New Zealanders it still does refer to equality between men and women.

The meaning of 'gender' changed with the onset of postmodern queer theory in universities in the 1990s. Where the 1970s and 1980s saw the establishment of Women's Studies programmes in universities and community education institutions, academic courses changed in the 1990s from 'Women's Studies' to 'Gender Studies'. The change of name was significant, as Gender Studies turned the focus away from analysis of patriarchy to a rejection of biological materialism and the embracing of the idea of gender as 'performance', not related to biology.

The power behind the gender ideology derived from these theories has developed over 30 years or more, and is informed in particular by the ideas of philosopher Judith Butler. Butler

argues that despite the reality of sexed bodies, gender is brought into being by repeated performances of a particular gender role.³⁰

New Zealand-born academic Annamarie Jagose³¹ used postmodern and queer theory to describe a potential community that would include the widest possible combination of 'queered' or non-normative identities. Such a community would be inclusive, experimental and persistently unstable, adding always to its revolutionary potential.

Others, too, emphasised the destabilising aspect of 'queering':

*The term "Queer"...is by definition whatever is at odds with the normal, the legitimate, and the dominant, and aims to destabilize dominant ideas of identity, whether that identity is sexual, gendered, ethnic, national, and political and so forth.*³²

Removed, then, from any concept of 'normal' biological definitions of female and male, gender has been presented as a perception, a feeling, which can be completely different from the physically sexed body. Over time, more assorted genders³³ have been named and claimed:

We now have people referring to themselves as 'genderqueer' or 'non-binary' or 'pangender' or 'polygender' or 'agender' or 'demiboy' or 'demigirl' or 'neutrois' or 'aporagender' or 'lunagender' or 'quantumgender'.³⁴

The definition includes people who self-label as androgynous or transgender. So a man who dresses on alternate days as a woman would be included as transgender,³⁵ as would a man with a beard who says he identifies as a lesbian.³⁶

From this belief system, the term 'gender' has grown to mean 'gender identity'.

3.2 Is There a Coherent Definition of 'Gender Identity'?

Gender identity is "*an elusive controversial concept*", impossible to prove.³⁷ Senior *Economist* writer Helen Joyce speaks of the thought-deadening circularity and self-referential quality of gender identity, which breaks down to "*I feel like a woman. What is a woman? Anyone who feels like a woman*".³⁸

Political philosopher Rebecca Reilly-Cooper illuminates the comparison between this ideology and a religious faith:

This notion of "gender identity as essence" has troubling implications. The unclarity about what kind of a property it is, and its inherently entirely subjective nature, means that the doctrine of gender identity becomes unfalsifiable. Positing the existence of a gender identity is

*thus equivalent to positing the existence of a soul or some other non-material entity whose existence cannot be tested or proved.*²⁹

Human rights lawyer Professor Rosa Freedman, in evidence to the Scottish Parliament, claims, like Helen Joyce, that many definitions of gender identity are self-referential.³⁹ A recent discussion paper from Stats NZ is no different. Shorn of the emotionally loaded language about its being a deeply felt, private and highly personal sense of identity, the department's definition of gender identity is that it means having a gender identity.⁴⁰

The same Stats NZ paper also claims a gender identity is not a stable and enduring characteristic.⁴⁰ Other definitions have described it as revolutionary, ambiguous, fluid, fragmented and dynamic.⁴¹ In contrast, there is also a strong case made that gender identity emerges from within, and acknowledging and acting on this is to be one's true self.⁴² Medication and surgery may help this alignment. Under gender ideology, biological sex is both 'assigned at birth',⁴³ and a spectrum,⁴⁴ and all people have a gender identity and expression.⁴³ People with intersex conditions (disorders of sexual development) are co-opted into the movement as demonstrating this spectrum, even though the vast majority of intersex conditions are in people who are biologically male or female.

Others, however, argue that using categories derived from this ideological perspective, and lowering the importance given to sex, is simply incoherent.³⁷ Neither is gender identity a reliable category insofar as who is included. For example, the Human Rights Commission defines 'gender' and 'gender identity'⁴⁵ as including transsexuals (people who have had surgery to conform with their identity), cross-dressers, transvestites and also fa'afafine and other Pacific people who, while living as women, by and large understand themselves as male. In this worldview, those who have a gender identity that matches their physical sex are privileged 'cis' people. The ideology holds that whatever people say they are – men, women, non-binary or something else – must be accepted and respected by others.³⁷

That the concept of 'gender identity' has become conflated with 'sex' is at the root of the current problems being discussed elsewhere in this paper. Biology has traditionally been accepted as the scientifically evident basis of sexual difference between males and females to fit their reproductive roles. Without a reliable definition of female and male based in sex, what does it mean to have a 'female gender identity'? Yet, as the case studies will show, many agencies have accepted this circular and illogical definition at the heart of their service delivery.

3.3 Gender Ideology Dissemination

Gender ideology has gathered pace significantly in the last five or six years as transgender organisations have gained access to hitherto unheard of levels of funding. Governments and wealthy private benefactors, as well as large corporations, have funded gender ideology in ways that were never the case for the LGB rights groups of earlier years.⁴⁶ ⁴⁷ Organisations

originally set up to support gays and lesbians, such as Stonewall in the United Kingdom, have morphed into trans rights groups to support the queer community.

The terms lesbian, gay and bisexual are sex-based, and have nothing to do with 'gender'. Trans and intersex have nothing to do with sex-based attraction. Many of the original rainbow flag-bearers are withdrawing from the symbol in dismay.⁴⁸ Others – primarily lesbians – have been shunted out of rainbow activities, on the grounds that their same-sex attraction is exclusive and therefore transphobic.^{49 50 51}

Stonewall, which was founded in 1989 to defend gay and lesbian people, is paid for training the public sector and academia in gender awareness, and is now accused by many British academics of stifling debate.⁵² The extensive reach of the ideas that gender is real, that sex is a spectrum, that transwomen who are attracted to women are actually lesbian, has led to a situation in which any "*academic interrogation of Stonewall's ideas and policies is condemned as a transphobic act*".⁵³ Stonewall's income has almost doubled over the five years since it adopted fully trans-inclusive policies, to £8.5 million per annum, and the staff has more than doubled to 160 in the same period.⁵⁴

New Zealand organisations seem to be similarly placed. For instance, Rainbow Youth's fundamental purpose has moved from supporting gays and lesbians to supporting "queer and gender diverse" people.⁵⁵ As in the United Kingdom, New Zealand trans activists have been given funding never dreamed of by gay and lesbian rights groups, with millions of dollars of funding going into the sector for advocacy.^{56 57 58}

On the advice of strategists, transgender advocates hitched their wagon to the LGB horse and cart. Activists timed their campaigns to take advantage of such moves as same-sex marriage.² As noted above, the LGB movement was co-opted and stretched to become the LGBTQIA+ rainbow, whose strands had and have very different politics and different aims. Both this acronym and SOGIESC, adopted by the Human Rights Commission, have been used to create an apparent equivalence between lesbian and gay people and trans and intersex "identities".⁴³ What is also new is that these changed rainbow organisations now have access to school classrooms. In New Zealand, as elsewhere, transgender advocacy organisations, in the name of rainbow communities, are funded by government to teach the elements of a gendered worldview in which children learn people can be 'born in the wrong body'.⁵⁹

Training in gender ideology^{60 61 62 63} has been carried out in New Zealand by numerous organisations. These have been granted government contracts to work in the public sector as well as in the education system, and are permitted to sign up agencies to particular standards for supporting beliefs in gender. For example, the Department of Conservation and Department of Foreign Affairs and Trade provided training to all staff at a forum from InsideOUT.⁶⁴ Amongst others, the Auckland DHB, the Ministry for the Environment, the New Zealand Defence Force, the Government Communications Security Bureau and numerous tertiary institutions have signed up to the Rainbow Tick, a private company that advises, trains and audits and whose business model involves annual re-registration.⁶⁵ The trainers

then have the credentials to approach more and more government workplaces and schools. But these organisations do not have the full or even the only story about the rainbow community. What they do have is the ability to seek further funding based on past funding, in a merry-go-round of ideological influence.

These efforts by NGOs have been formalised and embedded into the education system despite the legislation that ensures school boards and parents must be periodically consulted about the health curriculum.⁶⁶ *Mates & Dates*, a trial programme covering respectful relationships and consent, was fully funded by the Accident Compensation Corporation for the 2020 year. Available to all New Zealand secondary schools and delivered by contracted facilitators, it is framed in the context of gender identity, distinct and separate from sex.⁶⁷

In September 2020, the Ministry of Education's updated guidance on relationships and sexuality education was released. It re-emphasised the duty of schools to teach a curriculum that embeds gender ideology.⁶⁸ The guidance was solely about informing and implementing the updated advice in schools. By providing pre-packaged, ideologically based courses and downplaying the attention to the role of the school community, the guidance comes close to flouting the Education Act provisions for local decision-making about health (and therefore sexuality and relationships) education. (See section 5 for more on these guidelines.)

3.4 What's the Problem?

Gender is being reified as reality, while the biological reality of sex is minimised. In this new reality, anyone can 'transition' to the opposite sex or, since sex is regarded as a spectrum, where 'opposite' is non-appropriate, can transition anywhere along the spectrum. This can include a person's feeling they are neither female nor male nor indeed any other gender. Gender fluidity, where one's sense of gender moves and changes, is part of the belief system. But claiming a gender different from birth sex has come to mean effectively being recognised to all intents and purposes as the adopted sex, and especially an expectation that gender trumps sex. Thus legal recognition of a self-defined gender identity in Human Rights Law, as the Human Rights Commission proposes should happen,⁴³ would effectively confirm the self-identification that has been happening informally and with next to no consultation.

The conflation of the concepts of sex and gender is a major contribution to the implementation of gender ideology. Gender ideology professes that gender identity is separate and different from sex and indeed it is. However, to claim a different gender identity is effectively a claim to be, and to be regarded in all respects as, and to have the rights of, another sex. So in the following discussion we use the term 'sex self-identification' to mean claiming and purporting to be another gender and therefore claiming the associated sex-based rights. If sex self-identification is legitimised, any changes to birth certificate legislation become almost irrelevant. How this belief has been covertly implemented into public policy is the crux of much of this article.

Many people, including many feminists, simply do not believe in gender identity. They believe socially constructed gender is a trap and that men and women should be free to dress and behave as they wish, without assigning gender labels to the behaviour. The work of feminists over the past 50 years means that gendered stereotypes have, for the most part, become less restrictive. That is why it is particularly distressing to see such stereotyping used in the diagnosis of gender dysphoria^{10 68} and forming a large part of the justification for transitioning.

The belief that one can be 'born in the wrong body', that a person with male chromosomes and sexual organs can feel he is really a female, and can transition to becoming a woman, is the crux of the issue. If 'woman' is no longer defined as 'adult human female' and instead means 'anyone who feels like one', what then, is a woman and what does it mean for women's sex-based rights? How can policy and legislation be based on unproven, elusive, faith-based concepts? Within this worldview, women as a political class disappear as a belief in gender is mandated. So how can the injustices experienced by women as a class be addressed? As Rebecca Reilly-Cooper states:

*Some of these injustices are directly connected to the material conditions of female biology, such as lack of access to contraception, abortion and obstetric healthcare, lack of research into and medical treatment for female diseases, under-provision of maternity benefits and employment rights, female genital mutilation. Some are less directly connected to female biology, but are a result of being read as female and living in the subordinate sex role, such as sexual and physical violence, sexual harassment, unequal pay, lack of political representation, unequal division of domestic labour and many, many more. All are products of, and manifestations of, a social order organised to perpetuate male dominance and supremacy and female passivity and subordination.*²⁹

In other words, *sex matters*. An approach that nullifies women's visibility⁷⁰ as a distinct class puts in doubt the human rights protections and other provisions and goals that should accrue to women.

3.5 The Transgender Phenomenon

Although there have always been men who dressed as women, in different settings and for different reasons, the 20th century saw the beginnings of medical intervention for men so unhappy with their identity that sex-change operations were regarded as a solution to depression and distress. Thirty or forty years ago, the people who transitioned were predominantly male, in their later years, and often had been married and fathered children. They were referred to, and called themselves, transsexuals. This term is now considered outdated.

Recent discourse on trans issues has moved away from the language of transsexuality, which defined transsexual people in terms of the experience of dysphoria, and towards the notion of talking about transgender people who are defined in terms of their “gender identity”. This significantly broadens the category of people who now refer to themselves as trans. Many people who now self-define as trans may not experience any dysphoria at all, may have no desire to modify their bodies in any way, and may have no intention of ever engaging in a process of transition to live in the gender role associated with the opposite sex. What this means is that being trans is now entirely a matter of self-definition and self-identification.²⁹

The original term *gender identity disorder* that applied to people who felt their body did not fit their designated sex has been replaced with a new term – *gender dysphoria* – which, it is argued, removes the stigma of a mental health element to the diagnosis. Although the terminology has changed, research shows transgender people still have high levels of co-morbid mental illnesses.⁷¹ There is little evidence that medical and surgical transition addresses the underlying problems and what evidence does exist is not of a high quality.^{72 73}

Over the last couple of decades, the rights of transgender people have been given priority in many countries, and societal acceptance of transgender people has increased dramatically. Often extreme vulnerability – including alleged high levels of suicide, violence, murder and mental health issues – is presented as the reason transgender people deserve special rights. While close examination has shown these claims to be frequently over-stated,^{46 74} they remain a powerful and influential component that drives public support and access to funding streams.⁴⁶ What transactivists claim as their ‘human rights’ are in fact *special* rights, as will be explained below.

The money trail that enables all of this has been well researched by a number of writers,^{5,46,47,74,75} and some of the funding has come to New Zealand organisations.⁵⁸ Amongst the extremely wealthy and powerful men who have become transwomen are American entrepreneur Martine Rothblatt and billionaire transwoman Jennifer Pritzker, as well as George Soros’s Open Society Foundation. The money they provide is injected into public processes that influence the United Nations and multi-lateral organisations, as well as

governments. A resource prepared on behalf of the International Gay and Lesbian Youth Organisation (IGLYO) advised activists to keep a low profile, to align extensive changes with lesbian and gay rights, and to use the youth wings of political parties.² All of this creates serious doubt as to whether the ascendancy of gender ideology is really a civil rights issue in the normally understood sense.

The first New Zealand conference on transgender issues was held in 1971⁷⁶ and addressed the legal and medical aspects of this relatively new phenomenon. The numbers affected at that time were exceedingly small. Estimates are that the transgender community now represents about 0.5% to 1% of the population.⁷⁷ The figures for the 2019 Household Economic Survey will be available in late 2020, with data from a sample of 28,000 people.⁷⁸ The visibility of the community has increased rapidly over the past decade, with changes in the age, sex and numbers of people transitioning – from a small number of mostly older males to much larger numbers of mostly much younger females.

Trans advocates often allege there will be negative impacts and even ‘erasure’ of transgender people if there is any discussion about women’s rights being impacted by trans rights.⁷⁹ The usual conventions about informed debate and academic freedom have been severely impacted by these claims.⁸⁰ Associated with this is a social media battle, in which women who speak about gender identity as a danger to women’s rights are subjected to vigorous attempts to de-platform and punish, threats to their employment and threats of horrific, often sexualised, violence.⁸¹ Women critical of replacing sex in policy and law are painted as akin to Nazis, as hateful fascists who are denying transgender people the very right to exist.⁸²

3.6 Self-identification of Sex

Self-identification is the term used for the idea that a person can change their sex label with no social, legal or medical pre-conditions or evidence of any kind.

Transgender advocates and their allies take the view that transition is largely related to personal well-being and personal preference. They argue people should not be confined in bodies they feel they don’t belong in and that there are no negative outcomes of this approach. Men who declare a female identity claim the right to be regarded in all respects as female, to use female services, resources and facilities, to take up positions designated as women-only, and to take part in women’s sports.

Achieving a transgender identity has become much less onerous for anyone in New Zealand, even without physical or medical changes. This is due to policy changes made in government despite the deferral of the introduction of sex self-identification into law. If a clinician advises that a person is transgender, this alone suffices to confer a transgender identity. The 2018 medical guidance on gender-affirming treatment calls for no diagnosis save following the person’s self-belief.⁹ The advice to schools is that their values should

*“ensure the rights of all ākonga [learners] to self-expression, self-identification, and support”.*⁶⁸

Coupled with this, Official Information Act responses from 2018 show that the Family Court’s system for changing birth certificates requires *no medical or surgical treatments* for claiming a transgender identity.⁷⁹ This is despite the relevant legislation stating the contrary, that change will be granted only if the person:

*has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to a different gender identity.*⁸³

Somehow, this has been interpreted by the Family Court to mean:

*there is no requirement for some (or any) surgery or specific medical treatment, such as hormone treatment before a declaration will be issued.*⁸⁴

At the same time, multiple New Zealand government agencies are encoding gender self-identification in their services, including an ‘other’ option into their data collection regimes, despite the deferral of the proposed self-ID legislation.^{85 86 87} New Zealand schools allow social transition of pupils, including new names and pronouns. Some even allow for the possibility that these transitions be made without parental knowledge.⁸⁸

3.7 Ordinary Rights and Special Rights

Transgender people are due all the rights other people have, in terms of protection from unfair discrimination in education, employment, housing, and so on. To date, there have been two attempts in New Zealand to introduce gender identity into the Human Rights Act. Neither was successful, because of the lack of a parliamentary majority to support them. The right to hold a particular religious, political or philosophical belief demands nothing of others save tolerance for difference. But gender ideology appears to make some claims that are unusual, if not unique. For a start, they are a mix of belief claims (like religious freedom) and special needs claims (like disability or other disadvantage). These claimed rights also appear to impinge on other rights. They come under three headings:

a) *The demand for everyone to believe in gender ideology or to behave as though they do*

Biological sex cannot be changed – but we are asked to speak as if it can. When we are told “Trans women are women” we are meant to believe a biological man has literally changed into a woman. And whether or not we believe in gender identity we are asked to act as if in agreement with that belief and to accept that we too “have a gender identity”. So we are being asked to use new language to endorse these beliefs

– terms such as ‘cis’ and ‘trans’ – and the pronouns transgender people and non-binary people are constructing for themselves. The ceding of the definition of sexual orientation from one based on sex to one based on gender is also a new ‘right’ of this kind.

b) *The demand to cede access to spaces and services that belong to natal women by legal right*

The ideology demands rights for people who are male but identify as women to use services, resources and rights set aside for natal women. These special rights start to extend far beyond the kinds of positive discrimination aimed at levelling the playing field for disadvantaged people.

c) *The demand that others align with transgender peoples’ self-perceptions*

If you are aware someone is transgender, the pressure for this information to remain private or not discussed goes well beyond normal social politeness and sometimes beyond common sense. This is already happening in media coverage of transgender people. A story about young women seeking mastectomies is presented as a story about men,⁸⁹ actors and musicians are treated reverentially on the announcement of a trans or non-binary ‘coming out’.⁹⁰ Even male prisoners identifying as women and facing trial for typically male-pattern crimes are spoken of as women.^{91 92} In Canada, feminist writer Meghan Murphy was banned from Twitter⁹³ because she identified Jessica (Jonathan) Yaniv to her followers with the words “That’s him”.⁹⁴ This breached Twitter’s policy on hateful conduct,⁹⁵ even though Yaniv was still using both names on social media. The credence given to the newly created offences of ‘dead-naming’ and ‘misgendering’ is added to general accusations of ‘transphobia’.

To understand how exceptional these new ‘offences’ are, it is helpful to consider what would happen if they were generally available to anyone who wanted to claim them. Religious communities who do not drink tea or coffee could mandate that these are banned for everyone. Those who believe in transubstantiation could demand that others be forced to acknowledge that as a truth. Anyone, including people with malign motives, could demand a new name and identity and insist their past not be known, spoken about or assessed by others. What kind of society would we live in were such a large leeway be given to everyone’s self-assessments and identity demands?

While these special ‘rights’ are not in place legally in New Zealand, they are beginning to be embedded through government policy, by means of pressure and protest from transgender activists, and through developing norms and codes of practice, such as those of social media platforms⁹⁵ and the State Services Commission guidelines for pronoun usage.⁹⁶

Such changes have been made largely without legislative intervention, but rather through legal opinion, case law and policy approaches, including some that have canvassed the rainbow community. These have not taken account of unanticipated consequences and how such risks might be mitigated. As transgender rights have advanced, there has been no consideration of the actual and potential losses for women.

This is not to say a rights framework for transgender people might not offer *forms* of the rights being claimed, through social negotiation, proper legislative process and indeed through general courtesy. British philosopher Professor Kathleen Stock has discussed ideas for special arrangements, and suggested:

*individuals and institutions...should sympathetically encourage the voluntary use of preferred pronouns in interpersonal contexts for trans people, as a therapeutic device. But in the services of retaining a much-needed grip on reality, we must not enforce this practice, and nor should we banish reference to sex from those many discourses where we still absolutely need to discuss it.*⁹⁷

Another British academic, Rebecca Reilly-Cooper, has pointed out that:

*Like biological females, trans women are frequently victims of male violence and sexual predation, and so they too have an interest in having access to safe spaces away from men. Ideally, there would be sufficient time, resources and physical space for trans women to have their own facilities and spaces where appropriate.... However, given inevitable constraints on resources, the provision of safe spaces and facilities exclusively for trans women may not always be achievable. Such cases present us with difficult challenges, and careful thought and deliberation will be required to determine...how best to balance the competing interests and claims at stake.*²⁹

The point is that these kinds of arrangements are unique and the framework for them should be through social negotiation and not imposed. Democracy and the social contract may be severely compromised when conditions are implemented without discussion or participation. The implementation in policy of these extra rights without consideration of the impacts on women are behind numerous unanticipated consequences.

4. IMPLICATIONS, IMPACTS, AND UNINTENDED CONSEQUENCES

There appears to have been a complete lack of assessment across the New Zealand government of the risks of implementing self-identified gender and its associated special rights. The unintended consequences of allowing men to identify as women, including in sport, in prisons, and in sensitive settings like counselling or refuges, have simply not been considered.

Altering the definition of the word 'female' so that it now means 'any person who believes themselves to be female' is not only conceptually incoherent, it also removes the possibility of analysing the structural

*oppression of female persons as a class, by eradicating the terminology we use to describe the material conditions of their existence.*²⁹

Secularity and rational thinking have been strongly impacted upon, because gender ideology is effectively a faith-based system, with no material or empirical basis. Yet this ideology is being taught in our schools and throughout government departments without opportunities for debate or for permission to opt out of the instruction:

Increasingly, there are aspects to trans activist claims that have a wider impact on societal norms. For instance, we are expected to censor or change our **language**. There are moves against using words related to women and femaleness, lest this hurts the feelings of transgender people.⁹⁸ Since in this worldview males can be women and females can be men, saying that “only women menstruate” is considered offensive. It is now “people” who menstruate, “people” who seek abortion services⁹⁹ and “people” who give birth. In the name of including transgender people, the language is being changed to *exclude* women and girls.^{100 101 102}

Another language issue is the use by government agencies of the term ‘cisgender’, which is an ideological device. Since ‘cis’ means “non-trans”, it turns women into a subset of a new class that has been created to include men who claim female identity.⁹⁶

In the **justice system**, New Zealand’s prison rules allow men to be legally self-identified and categorised as women, and thus incarcerated with women, while retaining entirely male bodies. This means female prisoners are no longer protected from men. There has been significant advocacy on behalf of transgender prisoners, but virtually none for the women impacted.^{103 104} New guidance was issued in 2018 in the form of protocols for different aspects of the prison stay. The guidelines fully endorsed self-identification, saying that:

*Trans prisoners’ management will not depend on whether they have legal recognition of their gender identity or whether they have undergone medical steps, such as hormone treatment, or surgical steps.*¹⁰⁵

And

A person’s ability to identify with a particular gender, or no gender, must be respected.

And

[T]rans people in prison are managed in a way which....is not dependent on the gender of person the prison usually houses.

The guidelines make it clear that the transgender prisoner’s privacy is paramount, so although some Corrections officers may know a prisoner is transgender this information is

withheld from the women with whom the transwoman shares accommodation. Department of Corrections protocols permit self-identifying transwomen to be housed in the female estate unless they have been convicted of a serious sexual assault. So no protection for female prisoners exists if the transwoman has been convicted of other violent crimes. If a male prisoner already holds a birth certificate, granted as the result of a Family Court sex change determination, the prisoner will be recorded and held in prison as a woman even though, as described above, the treatment may not have required either medicine or surgery.¹⁰⁶ Transgender prisoners would generally be accommodated in single rooms, although a recent report suggests that this arrangement is not always complied with.¹⁰⁷

The guidance provides for individualised management and a support plan which, while being shared across prison staff to facilitate delivery, must also be kept confidential. There are arrangements to facilitate gender change documentation, privacy and consideration of access to medical, social and privacy needs, including allowing the prisoner to specify clothing.^{108 109} No consideration at all is given to how women prisoners might fare under these conditions, despite evidence of assaults by transwomen.¹¹⁰ Female prison staff are also at risk from such prisoners, and assaults on them that are typical of male rather than female patterns of violence (including rape) have been reported in the United Kingdom.¹¹¹ The current situation does not reflect the long-standing United Nations Human Rights Guidance that the sexes be imprisoned separately.¹¹²

In the United Kingdom, following specific training for judges,¹¹³ the Equal Treatment Bench Book advises judges that defendants must be addressed by their pronoun of choice.¹¹⁴ Thus women who have been attacked by male-bodied transwomen¹¹⁵ have been ordered to refer to their alleged attacker in court as female.^{116 117} The distress imposed on a sexual assault victim who has been attacked by a man, but is forced in a courtroom to pretend her attacker is a woman, can only be imagined. As Sheila Jeffreys points out, this severely undermines women's right to justice.¹¹⁴

So deeply captured is the British judiciary that an Employment Court judge told a feminist who had lost her work contract because she expressed her opinion that biological sex is real and people cannot change sex, that:

*holding that humans are sexually dimorphic is incompatible with human dignity and fundamental rights of others [and] not worthy of respect in a democratic society.*¹¹³

This extraordinary judgment is currently being appealed.¹¹⁸

Freedom of speech is gravely threatened. The New Zealand government is committed to implementing a hate speech law in the aftermath of the Christchurch massacre. There is a danger that failing to uphold a belief in gender or speaking about a transgender person's previous identity or name could fall foul of such a law, as has happened in the United Kingdom.¹¹⁹ There, the role of curbing hate speech has fallen to the police. They are responsible for investigating and warning people against saying or writing things that are now considered offensive, albeit not criminal.¹²⁰ There is strong evidence that people will claim

something is 'transphobic' when it is not.¹²¹ This, coupled with a police force that has undergone gender and sexual identity training,⁶⁴ sets up conditions where the police no longer accept the legitimacy of views that do not support gender ideology.

The fundamental freedoms of public servants to provide **free and frank advice**¹²² are under threat when the State Services Commission advises public servants to be "allies" to transgender people.⁹⁶ What rights of speech will remain for those who fundamentally disagree with the idea of gender identity, who believe that children should not be transitioned, or that it is not possible to change sex? What of those whose research shows the discrimination women are facing? Do they keep quiet rather than risk censure or career ruin? Under these conditions, the freedom supposedly granted through the Bill of Rights Act to believe (or to *dis*believe) is at risk.

Freedom to gather in protected spaces is already threatened. Groups of women cannot meet to discuss issues of common interest without men who claim to be women making a claim on those gatherings or seeking to have them closed down as trans-exclusionary. Lesbians cannot meet as lesbians if any man can self-identify as a lesbian.

Neither can **lesbians** depend on the sexual orientation protections of the Human Rights Act if, as has happened, government agencies define sexual orientation to be optionally *same-gender* attraction.^{43 123} In 2018, a lesbian organisation was banned from a Wellington Pride event, apparently for not being inclusive of men.⁵⁰

There are poor prospects for any lesbian who agrees to date a male purporting to be a lesbian woman if she is subsequently sexually assaulted or raped. Sadly, most lesbians are already aware of the likelihood of this kind of entrapment. The issues are even wider than that. Some people dedicated to gender ideology claim that "*genital preferences are transphobic*".¹²⁴ A recent piece of United Kingdom research outlined the pressure lesbians are under to date transgender-identified males who regard themselves as women.¹²⁵

In the **sciences**, a hostile environment has developed internationally, where uncritically supporting gender ideology is more important than balancing evidence for and against it.¹²⁶ A general climate of fear – of causing offence, of being accused of transphobia – means that reasoned debate has become almost impossible.⁸⁰ Even in New Zealand, senior scientists appear to be tailoring their words to present the complexity of sexual development as a spectrum.^{44 127} It would be simple for scientists to say "We understand the sentiment and the desire to step out of labels of boxes – but in the matter of sex in humans, a binary or dichotomy is unavoidable. Expression, interests, creativity are absolutely on a spectrum, but biological sex is not. We either have a developmental pathway that supports the production of small or large gametes. There is no third gamete. There has never been a recorded case of someone producing sperm and eggs and no hybrids exist. It's either one, the other or neither." That many scientists in New Zealand and beyond don't make this point and instead stay silent or kowtow to gender ideology perspectives appears to be evidence of an element of ideological capture.

Women's spaces and services no longer have protected access for the female sex when gender ideology overrules the interests of women and girls. As well as prisons, these spaces include toilets, accommodation, counselling spaces for vulnerable women, hostels, school camps, refuges and safe houses, as well as single-sex competitive sport. These are all available to men who identify as women, including those whose identity may be intermittent, unstable or opportunist. The consequence is that services intended for women are becoming mixed-sex services. Local councils, schools and other authorities are designing unisex toilets and changing rooms. This means that not only trans-identified males but other men can access these places, including men who are seeking opportunities to access women and girls when they are vulnerable by being in a state of undress.¹²⁸

The current gender-affirming approach will ensure **over-diagnosis of a transgender identity**. When New Zealand's education, health and social services are predicated on the reality of gender identity, there is danger of confusing the support of transgender people with co-opting young others into an identity that they would not otherwise have adopted.^{9 68 129} There is already good evidence that young lesbians and gay men are uniquely vulnerable to a decision to transition.⁹⁹ Neither the *Mates & Dates* training nor the new guidance on relationships and sexuality education issued by the Ministry of Education give any consideration of the reasons young people, girls in particular, would perceive gender change as an attractive choice.¹³⁰ Nor does the guidance acknowledge evidence of social contagion¹³¹ as a reason for the increase in numbers of those wishing to transition.

Collection of statistical and other data already works to the detriment of women in multiple different ways.¹³² When public policy moves away from sex-based information, as is happening now, in order to accommodate the wishes of trans advocates, even less information will be kept about women. When, as is proposed by Stats NZ,⁴⁰ sex data will not be collected whenever it is not explicitly required, the government risks adding to the under-representation of women's data.

Pay equity data that does not actually measure women's pay because transwomen are included cannot be used to fairly determine pay differentials between women and men. The State Services Commission developed the pay equity guidelines together with Stats NZ and the Ministry for Women.⁸⁷ The figures released in July 2020, covering 2019, with its dramatic lowering of the gender pay gap,¹³³ are also the first iteration of the new measurement arrangements. While there is no proof trans-identified males in well paid roles have skewed the result, there is no evidence that they have not. (There is more information on this in the Stats NZ case study in Part 2.)

Data collection by self-identified gender will also work against **the interests of the transgender community**. Without accurate information, their health and other needs cannot be properly understood and met. That there is insufficient data for this group was borne out by the survey *Counting Ourselves*, which was carried out by the transgender community.¹³⁴

Looking at **global implications**, it is noted that the United Nations Agency for Women in 2019 announced it is no longer focused on women's rights but rather "*equality of all genders*", including "*the full range of gender diversities that exist*".¹³⁵ The organisation's Executive Director, Phumzile Mlambo-Ngcuka, claimed that "*sexual orientation and gender identity*" are core values of the Sustainable Development Goals. The possible impact of this could be that billions of dollars in aid meant for women may be redirected if United Nations agencies take it upon themselves to redefine the internationally agreed goal of 'gender equality' away from women's rights. When it promoted its association with Rainbow Pride Month 2020, UN Women profiled three transwomen and a gay man, because "*Pride is a protest, and marginalized communities must be centre-stage*".¹³⁶

5. POLICY CAPTURE BY GENDER IDEOLOGY IN NEW ZEALAND

The steps leading to the current situation are discussed in full in the Human Rights Commission case study in Part 2. The main elements have been as follows:

a) Human Rights Gender Identity Amendment Bill, 2006

On 23 August 2006, then Labour MP Georgina Beyer's Private Member's Bill proposing the inclusion of transgender people in the categories of those protected from discrimination under the Human Rights Act 1993 was presented into Parliament. It was withdrawn after the first reading.¹³⁷

b) Crown Law Opinion, 2006

The Beyer Bill's withdrawal happened immediately after a Crown Law legal opinion concluded that the Human Rights Act did not need to be amended because:

*[T]here is currently no reason to suppose that "sex discrimination" would be construed narrowly to deprive transgender people of protection under the Human Rights Act.*¹²

The Crown Law opinion, in seeking to demonstrate how existing case law precluded the need for legislation, took the widest possible interpretation of trans identity. It included pre- and post-treatment transsexuals, cross-dressers and transvestites, as well potentially as people who might adopt a third gender.¹³⁸ It ignored well-founded cases that proposed there were limits to a transgender identity³⁷ and instead outlined how transgender people could be protected under the sex-based, as well as potentially by the sexual orientation and mental health rights, in the existing Act. Because it has never been defined as to whether transwomen were to be protected by the sex-based rights of their original sex category, i.e. male, or sex-based rights of the sex that they are claiming, i.e. female, the implication is that they are to be protected by the adopted category. This effectively voids the rights of biological women.

Despite the lack of clarity, this legal opinion¹² has since 2006 guided the approach of the Human Rights Commission to the issue of transgender rights.⁴⁵ This is so even though the HRC's 2017 *Briefing to the Incoming Minister* recognised that these rights are vulnerable to a legal challenge – including a Human Rights Tribunal challenge.¹³⁹

c) *To Be Who I Am*, 2008

In 2008 the Human Rights Commission report *To Be Who I Am* was an investigation of transgender people's lives, with the purpose of identifying policy and legal loopholes. Amongst its recommendations were:

improving transgender people's access to public health services, and better treatment and standards of care for gender reassignment services.... [T]he requirements for changing sex details on a birth certificate, a passport and other documents should be simplified,

while

*maintaining a statutory test that is robust and ensures a high standard of integrity in official birth records.*⁴⁵

It is important to note that the 2008 report was not proposing sex self-identification.

d) *Driver's licences and passports*, 2012/13

Since 2012/13, people who want to change the sex-marker and their gendered name on their driver's licence and passport have been able to do so. A notarised declaration statement is all that is required. It is not related to any confirming medical treatment or legal process. While there are good reasons for these documents being made available to people who need them, there appeared to be no public notification or open consultation of the intent of either the Transport Agency or the Department of Internal Affairs to make these changes. There was merely an announcement from the Human Rights Commission once the arrangements were in place.¹⁴⁰ No subsequent press releases and no ministerial announcements appeared, either before or after the changes.

e) *The Statutes Amendment Bill*, 2014

A further unsuccessful attempt to change the law was made in 2014 when Labour MP Louisa Wall introduced a proposed amendment to the Statutes Amendment Bill to include transgender rights in the Human Rights Act. The intent was to reintroduce the provisions of the Beyer Bill.¹⁴¹

f) *The Births, Deaths, Marriage and Relationships Registration Amendment Bill* 2018/19

The BDMRR Bill was introduced into the house in 2018, went through the select committee process, was amended to include sex self-identification following this process, and was then

deferred in February 2019.¹⁴² As described above, it is now apparent policy initiatives to implement sex self-identification were underway prior to the Bill being introduced, and they have further gathered pace since.

g) Wholesale implementation of sex self-identification

In the past two years, an almost ubiquitous proliferation of gender ideology initiatives, including self-identification, have been seen across government. In this respect there are parallels between the situation in New Zealand and the similar covert implementation of self-identification in Scotland.¹

The following examples are from agencies not covered in the detailed case studies in Part 2. They represent only a small percentage of the instances where departments have either implemented sex self-identification, employed the ideas and language of gender ideology as policy or deployed techniques of moral suasion to mandate a belief in gender ideology by public servants.

The State Services Commission (SSC) and the rainbow network

The State Services Commission, whose role includes best practice across the public sector, led the work of implementing gender ideology across the public sector.¹⁴³ In 2018 the Commission launched a new standard for the collection of public sector workforce information, which advised public servants:

Our expectation is that all agencies will move to using the Statistical Standard for Gender Identity, as this is a better measure of diversity.
(Emphasis added)¹⁴⁴

The Commission's *We Count 2019* staff survey is part of an annual initiative focused on data collection about the sector. It was centred entirely on the rainbow community.¹⁴⁵ The survey was carried out jointly with the Cross Agency Rainbow Network (CARN) as part of its work on workforce and talent management.⁶⁴ This happened because the Commission and the Network had "*identified a lack of available workforce data about the New Zealand public service rainbow community*".¹⁴⁶ The work involved the creation of a typography of "sexual identities" that were:

*expanded from the categories noted in the Stats Standard based on advice from CARN e.g. asexual and pansexual has been included as response options in the questionnaire.*¹⁴⁶

In order to "fully represent the diversity" of the sector, staff members who self-reported as both gay and transgender were, in an unusual statistical approach, counted twice in the findings.¹⁴⁵ This lends credence to the idea that heterosexual males who identify as women are actually lesbian. SSC also supports CARN in other ways. In CARN's 2019 report, multiple agencies outlined their successes across the public sector. CARN will be hosting a two-day public sector rainbow conference at Parliament in 2021.⁶⁴ The network is

experimenting with its own branding, as are other agencies' rainbow groups. Five of CARN's member agencies report that they are intending to sign up, or have already done so, to the Rainbow Tick.^{63 65}

In mid-2020 the Commission followed up on these initiatives with an announcement that staff should announce their pronouns in their emails and at meetings, because

Having pronouns in an email signature signals you as an LGBTQIA+ ally.

As well as SSC,⁹⁶ a number of agencies, including Crown Law¹⁴⁷ and Stats NZ,¹⁴⁸ have adopted 'preferred pronoun' use.

In other initiatives reported by CARN, the New Zealand Police implemented what they described as a third gender option in an implementation of sex self-identification, rather than risk misgendering.¹⁴⁹ Significantly, the change was also to facilitate moving people to *prison* with correct names and gender.¹⁴⁹ The Electoral Commission announced it had made the same change in 2019, in anticipation of the 2020 election.¹⁵⁰

The Family Court and sex marker change

The Family Court is currently the organisation that allows people to change the sex marker on their birth certificate, using a process the self-identification provisions were intended to halt. On the Ministry of Justice website, the conditions for changing sex marker on a birth certificate include:

*living with a different gender identity than the one that is recorded on your birth certificate, and **you have had medical treatment to change your gender.*** (Emphasis added)⁸³

Following the deferral of legislation to make the change without pre-conditions, the Family Court process has been simplified and made cost-free to the applicant. Essentially, forms are presented to the Family Court for the decision to be made. There are few pre-conditions, but the Court can require that specific people, e.g. marriage partners, are informed before the change is granted. But as described earlier, there is a discrepancy between what the Family Court says on its website⁸³ and what is revealed in Official Information Act requests⁸⁴ that apparently allows for a registration of change of legal sex with no medical preconditions.

What this means is:

- a)** Despite the law requiring conformation with the opposite sex to some extent (and case law had reduced this considerably from a full sex change), there are now few pre-conditions to a change of sex marker save the informing of family members.
- b)** The current affirmative-only guidelines for medical treatment mean clinicians are obliged to take people presenting as transgender at their self-assessment and must seek not to diagnose but to support them on their unique journey to their intended destination.⁹

c) With only a doctor's confirmation that a person has presented believing themselves to be another sex, together with the completion of a cost-free application form, the bar for self-identification that ensures the most significant endorsement of legal sex-change – that of the sex marker on a birth certificate – is set far lower than envisaged by legislators and goes beyond the Human Rights Commission's own consultation with the transgender community.⁴⁵

Education, self-identification and gender ideology

The teaching of sex and sexuality has up until now been part of the responsibility of school boards under successive Education Acts. This covers health education, on which the board must consult with parents at least every two years.⁶⁶ As described above, the ACC pilot *Mates & Dates* programme was funded for nationwide delivery in the 2020 school year.⁶⁷ It is an otherwise well designed and well received anti-bullying and pro-consent programme,¹⁵¹ which embeds gender ideology. It is delivered not by teachers but by contracted community organisations whose usual activities involve working with at-risk youth.¹⁵¹ There is both anecdotal¹⁵² and hard⁸⁸ evidence that some of the providers are going beyond the materials prepared by ACC. In some cases they are using teaching ideas from organisations like the controversial UK organisation Mermaids, including tools such as the genderbread person and the notion that sex is a spectrum.¹⁵³

In September 2020, the Ministry of Education launched new relationships and sexuality education guidelines intended for immediate deployment.⁶⁸ Their endorsement of gender ideology in schools includes proposals that males who identify as female are entitled to use the girls' toilets and changing rooms, and that unisex facilities be provided. In addition, the Labour Party's 2020 election manifesto says

*We will **ensure** schools apply guidance to create safe and inclusive school environments for all students, [and] work with schools on providing gender neutral bathrooms. (Emphasis added)*¹⁵⁴

which would appear to indicate a desire to override parental input into the health curriculum for each school board. Intended for teachers, leaders and boards of trustees, the documents cover guidance about classroom approaches to gender ideology that “make explicit the key learning at each curriculum level” but also address whole-of-school impacts. As in other government agencies, the guidance provides for self-identification of sex. This includes a sex marker of ‘other’ again, despite the lack of legislation endorsing this or any evidence that such a category exists outside of self-identification. The documents use the whole panoply of gender ideology terms, such as ‘cisgender’, sex ‘assigned at birth’, ‘heteronormativity’. They introduce such ideas as that to be gay is to have ‘same gender’ and not ‘same sex’ attraction. Science teaching is impacted by ideas that include “*how biological sex **has been constructed and measured over time***” (emphasis added).

Not only are boys who identify as girls to be fully included in girls' sports, students and teachers are advised that they can help by “*exploring and challenging gender ... binaries in physical activity and sport*”. This approach appears intended to ensure that children know the

“right” answer about whether boys belong in girls’ sports and changing rooms. The advice on access to changing rooms and toilets sympathises with “*those who are trans, non-binary, or intersex, [who] may feel vulnerable having to change clothes in front of others*”. There is no consideration of whether girls feel comfortable with boys using their facilities or in using mixed facilities. Nor are the impacts on girls of having boys as ‘special’ girls in the classroom considered.

The guidelines mandate the use of preferred names and pronouns and ensuring that “*all school forms allow for genders in addition to male or female (eg, gender diverse, non-binary, takatāpui)*”.

A detailed Official Information Act request about the guidelines to the Ministry of Education reveals that there has been little thought of the problems that this creates for teachers.¹⁵⁵ The OIA response advises that the Teachers Councils guidance says that teachers will “*apply high professional standards and sound ethical decision-making in their work*”. It would appear that this professionalism is expected to see them as regarding sex as constructed through ideology when teaching the RSE curriculum, and at other times as inherent in biological fact. The authors seem not to be aware of the Australian guideline *The Australian Safe Schools Programme*, which was withdrawn in 2017 when it was realised that transgender affirmative teaching and protocols were causing a huge spike in the numbers of young people questioning their gender and identifying as transgender.¹⁵⁶

The Justice Select Committee and the conversion therapy petition

In 2019, the Justice Select Committee considered a petition that would have outlawed homosexual conversion therapy, which tries to ‘correct’ a person’s natural sexual orientation. The Committee was urged by the petitioner to widen the scope of the original petition to include transgender people. It was reported as follows:

*We acknowledge Max Tweedie’s statement that the original intent of his petition was to ban all types of conversion therapy, rather than focusing solely on gay conversion therapy. Our report refers to conversion therapy generally, to reflect this intent and capture the issues raised by both petitions.*¹⁵⁷

Such an approach would have outlawed counsellors, psychologists and others from exploring with children and young people why they think themselves to be in ‘the wrong body’ and want to embark on a path of medical intervention. The Select Committee decided to hear the petition as if it had included transgender people, even though many people may not have signed it if this had been the case. In the event, a researched paper from Speak Up For Women, a group focused on challenging the move to self-identification, was presented to the Select Committee after the hearing, explaining why outlawing exploratory counselling would be problematic.¹⁵⁸ The Committee subsequently noted in its report on the petition that it was important to differentiate between conversion therapy and counselling and that they believed:

*more work needs to be done before any decision is taken to ban it. In particular, thought must be given to how to define conversion therapy, who the ban would apply to, and how to ensure that rights relating to freedom of expression and religion were maintained.*¹⁵⁷

6. CONCLUSIONS

The issues outlined in this paper indicate a failure of governance and public sector policy-making in the face of a well funded and highly influential international campaign. There is scant evidence that the government's own policy framework is being followed in any meaningful way. Surely the deferral of a law should have curtailed action by government agencies instead of hastening it? What have been the evidential requirements that should have placed constraints on embedding in policy a concept with no scientific or factual basis? How has the State Services Commission issued requirements for specific forms of belief and speech when its role of excellence in the public sector demands the need for free and frank advice?

The case studies in Part 2 offer detailed examples of governance failure.

Meanwhile, the new government elected in November 2020 is dedicated to significant initiatives that have the possibility of further embedding gender ideology and diminishing women's and others' rights. Proposed legislation includes an anti-conversion therapy bill, anti-hate-speech legislation, Human Rights Act changes and re-activation of the Births, Deaths Marriages and Relationships Registration Bill and its self-identification provisions. There will also be further impacts from the policy approaches already adopted in the uncontrolled implementation of sex self-identification.

The women's rights encoded in equalities and human rights legislation during the second-wave feminism of the 1970s to the 1990s were hard fought for. These rights help balance the cultural disadvantages that women suffer because of their female bodies and other sex-based discrimination. The services, provisions and spaces gained through the operation of these rights remain highly relevant to women, as do the terminology and tools of analysis that make sense of women's experience.^{29 159} In our own country, as long as the level of male violence against women continues to be a major scourge and women are still undervalued in relation to men, and on the global scale as long as practices such as female genital mutilation, child brides, and rape as a weapon of war plague our world, women's sex-based legal rights will remain essential.

The best way forward would be legislation and policy to cater properly for those people who are losing rights – women, gay and lesbian people, children, especially girls – as well as ensuring transgender people have a fair and meaningful rights framework that protects their self-identity without mandating that others believe it. It is perfectly possible for example, as

the United Kingdom Equality Law demonstrates, to continue to treat women differently on the grounds of sex, and to provide single-sex spaces and services that exclude males irrespective of whether they hold a legally changed birth certificate, provided such exclusions are proportionate and legitimate.¹

The Labour-led coalition of 2017-2020 began a process of recognising that the constitutional arrangements related to the protection of human rights have been inadequate. A specific case was National Party legislation to outlaw voting by prisoners. This demonstrated a need to harden constitutional protections by ensuring that if governments legislate in contravention of the Bill of Rights Act there is a route to correction through the courts. A Bill of Rights Amendment Act is currently before Parliament to achieve this. But to date there has been no action in relation to the wholesale confounding of women's sex-based rights through public policy changes and the reinterpretation of human rights law.

The prospects for correcting the impacts of this unlegislated imbalance are challenging. The two agencies women should be able to rely on to have their back on the issues of women's rights – the Ministry for Women and the Human Rights Commission – are the very ones whose approach appears to have been enthusiastically led by gender ideologues for whom women's rights and concerns take second place to those who claim transgender and non-binary identities.

Measures such as the State Services Commission guidance on pronouns and the changes in the relationships and sexuality education guidelines are said by the departments concerned to be undertaken at the behest of the 'rainbow community or communities', who base their case on inclusiveness. But these well-meaning institutions are being misled. The rainbow community is not a singularity with a uniform set of views. There are some who support gender ideology, but others regard its adoption with deep concern. Many of these concerns go unspoken because of the hostility directed at any who voice them.

The extra-legal efforts to implement sex self-identification across multiple departments, even as the law was deferred, affects women, gay and lesbian people and children – particularly girls. Across government, gender identity has become more important than biological reality. The Human Rights Commission's interpretation of the Crown Law opinion oversteps the mark. To acknowledge transgender people have full human rights is not the same as saying that existing women's and sexual orientation rights and protections should be ceded. Women, lesbians and gay men were not considered either in the drafting of the Crown Law legal opinion or in the Human Rights Commission's interpretation of it.

Compounding these impacts are the affirmative interpretation of the medical approach to transitioning and the loosening of requirements to self-identification that have taken place since 2006 despite the advice at that time from the Human Rights Commission. In many respects there are few barriers to self-identification, and few preconditions. The deferred law and two attempts to embed transgender people in the human rights framework have failed – but have instead been implemented by policy work that has occurred in the dark. The original intent of the legislation supporting sex marker changes was accompanied by a belief that the numbers of people transitioning would be small and the bar to entry would remain relatively

stringent. Affirmative medical treatment and policy changes in the Family Court process have ensured neither of these suppositions is now true.

Male-born people have access to and therefore impede women's access to all of the services and protections exempted for them in the Human Rights Act. The availability of women-only sports, counselling, training and education, have all been undermined, as have roles intended for women to represent women's interests, such as in political parties. Women's access to safe women-only spaces is not guaranteed. This means that these are no longer services for women in the way that was intended. The undermining of the protections has been coupled with a partisan, discriminatory and unbalanced approach across government, as the Human Rights Commission's comments on transwomen in competitive sport showed when it favoured transwomen over women (see the HRC case study in Part 2).

Meanwhile, children's relationship with both their own bodies and material reality has been impacted as gender ideology has taken root in both the health and education systems. There are impacts on many children who would otherwise be gay or lesbian, as well as on girls who must now share facilities with boys.

Gender ideology has had the upper hand even in policy work on sexual orientation, as evidence from the Human Rights Commission, Stats NZ and the Ministry of Education has shown. Gay and lesbian people have had the definition of their sexuality changed fundamentally from one based on sex to one based on gender, which is not something they have been consulted about.

Freedom of speech and the right *not* to believe in gender identity has been removed as the State Services Commission and the HRC have introduced and capitulated to the quasi-religious language of gender ideology and have mandated belief in such notions as multiple genders.

When 'consultation' has occurred, it has been limited largely to transgender advocates, as is demonstrated in the case studies in Part 2. Often, as in the case of the Ministry for Women, as well as with the change of sex marker on passports and driver's licences, decisions have been made in conditions so opaque they have no place in a healthy democracy.

So, in the ceding of women's, lesbian and gay rights to transgender rights that began 14 years ago, there is little evidence that the government's policy-making guidelines have been followed. There has been very little public process or attempt to research issues in the way that good public policy development demands. Instead, governments of all shades have allowed a situation to develop where there is deep societal antagonism on this issue. The atmosphere is so toxic and so deeply polarised that few politicians or media personnel are prepared to address the topic. Many professionals, too, are scared of speaking out, even though there is much disquiet in the air.

Simply by the continuous logic of the 2006 legal opinion, which remains untested in law, multiple waves of covert policy-making have taken account of the needs of only one small group and not those who actually constitute the majority of the population.

It is the untrammelled entry of 'gender identity' into public policy that is the concern in all of the foregoing. Transgender people of course should be – and are – fully protected by the human rights legislative framework that applies to everyone. But there are some special considerations too. The difficulties gender ideology brings in its wake appear to be largely because of the desire, driven largely by compassion, to pretend that the legal fiction created by gender recognition laws is not actually a fiction but reality. Kathleen Stock suggests a solution that does not render the fiction invisible. Instead:

We have to remain clear-eyed that legal transition is, and always was, fictional, not actual. The existence of a legal category of trans people implicitly asks people to inhabit a fiction in which trans people are actually members of another sex, even if many don't actually believe these equivalences to be real.⁹⁷

Supporting this perspective, feminist barrister Julian Norman said when she spoke at the House of Lords:

Freedom of belief extends beyond the right to religious practice and incorporates the right to hold and to express deeply held beliefs.

The European Court has described [freedom of belief] as “one of the most vital elements” for those it affects, and commented that “the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.” A belief (or disbelief) in an innate gender identity would in my view certainly fall within the protected category of deeply held beliefs.

Norman goes on to say:

It cannot be beyond the wit of the legislature to protect the beliefs of those who believe they have an innate gender, protect the rights of others to agnosticism on the point, whilst also maintaining sex based protections.¹⁵⁹

Having been involved with this issue for several years, the writers of this paper believe the vast majority of the population has no idea that a new belief system has been systematically installed in our public institutions. Stats NZ consultations about new standards on gender identity, for instance, have reached mostly those who are already engaged with the topic, either as advocates of gender ideology or as opponents.

It is our view that something as fundamental as a belief it is possible to change sex should not be imposed upon a population whose permission or opinion has not been sought. There is no valid basis of information from which to operate, without gauging informed public opinion.

For millennia, human societies have lived with the material reality of two sexes, whose bodies have been designed by nature for the reproduction of the species. Suddenly, this reality is being turned upside down, with people required to accept that the two sexes are interchangeable and indeed that there are more than two sexes and some people who are of no sex at all. The enormity of this societal change can scarcely be overstated. Nor should the potential for backlash, once people become aware of the implications, be underestimated.

In addition, we live in a secular society where we are free to practise or not to practise religion, with freedom from any pressure to believe in a religious faith and strict rules forbidding religious instruction in state schools. Yet now we have what is in effect a faith-based system of belief imposed on our children, our public servants, and gradually society at large, in contradiction of the freedom not to believe.

We suggest consultation to gather public opinion should be carried out by Stats NZ before any legislation to establish self-identification is re-introduced. Given the emotional temperature and hostility surrounding discussions of gender, the topic cannot be fairly dealt with using the usual processes without an assurance that New Zealand endorses its own legal provisions for freedom of belief. A consultation process would need to put in place special arrangements to fairly recognise the employment and other threats to people who, in the current toxic environment, risk voicing their opposition to gender ideology. Otherwise those risks could deter the collection of significant perspectives in both the select committee and in other consultative processes.

Recommendations

If women and gay and lesbian people are not to cede more ground to the point where the Human Rights Act provisions related to sex and sexual orientation are meaningless and the Bill of Rights Act provisions related to freedom of speech are totally undermined, a serious all-of-government resolution is required.

Possible approaches could include:

- **Clarifying the legal provisions of the Bill of Rights Act** to allow for freedom of belief both for those who believe in the concept of gender identity and those who do not;
- Amending the **Bill of Rights Act** to give citizens a right to appeal any public policy changes undermining the Act;

- Clarifying the legal provisions of the **Human Rights Act** that cover discrimination based on sex and sexual orientation;
- Requiring a **new Crown Law opinion** to correct the 2006 document and to take account of local and international case law and evidence to inform how birth certificate registration and other gender recognition legislation should be framed;
- Building on the findings from this paper, **undertaking a Ministerial investigation** of the implementation of sex self-identification across the public sector, and identifying and correcting the wrongs that have been promulgated against women's and gays' and lesbians' rights;
- **Gauging public opinion on this issue** before any self-identification legislation is re-introduced, by consulting with New Zealanders on whether self-identification should be allowed and whether transwomen should be legally permitted to access women's spaces, roles, sports etc. Such a consultation process would need to ensure that opinions are able to be expressed without fear or favour.

The case studies (Part 2) follow in a separate document.

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