



16 August 2023

Attorney-General

Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill (Member's Bill 275 - 1) – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/397

1. We have considered whether the Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990.
2. We have concluded the Bill engages ss 13 (freedom of conscience and religion), 14 (freedom of expression), 15 (manifestation of religion and belief) and s 17 (Freedom of Association) of the Bill of Rights Act, but in doing so it is consistent with the Bill of Rights Act.

The Bill

3. The purpose of the Amendment Bill, as set out in the accompanying Explanatory note and General Policy Statement, is to uphold Te Tiriti o Waitangi by taking steps towards ending discrimination against takatāpui and rainbow (LGBTIQ+) people.
4. The Human Rights Act 1993 currently does not specifically prohibit gender discrimination. This Bill would add two new grounds to the list of prohibited grounds of discrimination in s 21 of the Act: gender identity or expression, and variations of sex characteristics.
5. The Bill is not intended to change substantively the already existing grounds of discrimination of “sex” and “sexual orientation”. Rather, the intention, as explained in the Explanatory Note, is to ensure that the human rights protections in the Human Rights Act extend to the trans, intersex and non-binary communities.
6. Clause 4 of the Bill would amend s 21 of the Human Rights Act to specify gender identity or expression, and variations of sex characteristics, as new prohibited grounds of discrimination. Clause 5 makes provision for consequential amendments arising from the amendments to s 21 of the principal Act.

7. Clause 6 consequentially amends the Employment Relations Act 2000 to carry over the new grounds of discrimination into that Act.

The right to freedom of conscience and religion, freedom of expression, manifestation of religion and belief and freedom of association are engaged by clauses 4, 5 and 6

8. On the face of it the amendments set out in clauses 4, 5 and 6 of the draft engage s 13 (freedom of conscience and religion), s 14 (freedom of expression), s 15 (manifestation of religion and belief) and s 17 (freedom of association).
9. Clauses 4, 5 and 6 of the Bill engage these rights because they potentially have a chilling effect on the rights set out in ss 13, 14, 15 and 17 of the Bill of Rights Act.
10. Any such engagement must, however, be balanced against the s 19 Bill of Rights Act right to be free from discrimination. Underpinning that right is the International Covenant on Civil and Political Rights 1966 which requires each state party to the Covenant to prohibit discrimination and guarantee to all persons equal and effective protection against discrimination, including on grounds of sex.¹ The list of prohibited grounds in the Covenant is illustrative and not exhaustive.²

Is any limit on rights under the Bill of Rights Act created by the Bill justified?

11. Section 5 of the Bill of Rights Act provides that the rights under the Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. If clauses 4, 5 and 6 are to be justified, they must serve a sufficiently important purpose, have a rational connection to that purpose, abridge any right no more than reasonably necessary for that purpose and be proportionate considering the importance of their objective.
12. The purpose of clauses 4, 5 and 6, as explained in the Bill's Explanatory Note, is not to change the already existing grounds of discrimination of "sex" and "sexual orientation" in the Act but to ensure the human rights protections in the Act are extended to trans, intersex or non-binary people.
13. We conclude this is a sufficiently important purpose.
14. We further conclude the clauses are rationally connected to that purpose, and that the addition of gender identity or expression, and variations of sex characteristics as new prohibited grounds of discrimination to be no more of an incursion on the rights protected by ss 13, 14, 15 and 17 of the Bill of Rights Act than is reasonably necessary to achieve the objective of the Bill, and proportionate to the importance of that objective.

Conclusion

15. Clauses 4, 5 and 6 of the Bill potentially engage various rights under the Bill of Rights Act. However, having regard to the purpose and content of those clauses

¹ International Covenant on Civil and Political Rights (1966), Arts 2.1 and 26.

² Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 17.2.9.

we consider the Bill imposes a demonstrably justified limit on s 13 (freedom of conscience and religion) s 14 (freedom of expression) (s 15 (manifestation of religion and belief) and s 17 (freedom of association) of the Bill of Rights Act and is therefore not inconsistent with the Bill of Rights Act.

Review of this advice

16. In accordance with Crown Law's policies, this advice has been peer reviewed by Austin Powell, Senior Crown Counsel.



Peter Gunn
Crown Counsel

Encl.



Noted / Approved / Not Approved
Hon David Parker
Attorney-General
17/8/2023