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ARTICLE

# Gender Trouble in the Human Rights Act 1993

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Section 21(1) of the Human Rights Act 1993 provides a list of prohibited grounds of discrimination. The list expressly includes sex, but not gender. Accordingly, the Human Rights Act 1993 is at risk of failing to adequately protect gender diverse people from discrimination. This article will argue that even if New Zealand's courts interpreted sex to include gender, Parliament should still amend the Human Rights Act 1993 so that gender is expressly included in s 21(1). Such an approach would ensure broad and guaranteed protection for gender diverse individuals from discrimination and provide a strong symbolic message that New Zealand recognises and respects the human rights of all gender diverse people.

## I Introduction

> [W]ithin the inherited discourse of the metaphysics of substance, gender proves to be performative—that is, constituting the identity it is purported to be. In this sense, gender is always a doing, though not a doing by a subject who might be said to preexist the deed.
>
> —Judith Butler[1]

It was not until third-wave feminism and critical queer theory in the late-1980s to 1990s that mainstream Western scholarship began to fully question the categories of *sex* and *gender*, which were until then assumed to be binary.[2] Academics like Judith Butler, Candace West and Don Zimmerman were key to feminist discourse, questioning previously held conventions and opening up critical discussions on *gender*, at least in

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1 Judith Butler *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, London, 1990) at 24–25.

2 I have italicised the terms *sex* and *gender* in places throughout this article to emphasise the loaded meanings of these terms. A similar approach is adopted by Judith Butler throughout her text. See generally Butler, above n 1.

feminist scholarship.[3] It is clear today that there has also been a shift in the mainstream consciousness regarding gender and that this has led to a greater public awareness of gender diverse identities and the rights of gender diverse people in society.[4]

New Zealand society has been influenced by these developments. Indeed, it would seem that New Zealand society is becoming more tolerant of those who challenge gender norms. However, New Zealand still has a long way to go before its gender diverse population is able to feel comfortable enough to express themselves freely without fear of persecution.[5]

One way of supporting and protecting New Zealand's gender diverse community is to ensure that its members are protected from discrimination. In order to do so, their status and rights need to be explicitly recognised under s 21(1) of the Human Rights Act 1993 (HRA).[6] Section 21(1)(a) of the HRA sets out the prohibited grounds of discrimination which notably include *sex* but not *gender*.

This omission raises three central questions. First, what exactly does *sex* mean in the Act? Secondly, can *gender* be convincingly included within the heading of *sex*? Thirdly, is there a need for the express inclusion of *gender* as a prohibited ground of discrimination in the HRA?

In discussing these questions, this article will analyse how the executive and judicial branches in New Zealand have responded to the omission of *gender* in s 21(1) of the HRA. It will also consider whether legislation and case law from Australian, English, Canadian and European jurisdictions can shed light on the matter.

The article argues that the HRA is potentially at risk of failing to protect New Zealand's gender diverse community from discrimination. It concludes that the failure to include *gender* in the HRA should be fixed by Parliament by way of an Amendment Act with a legislative approach that is similar to Canadian and Australian human rights models. Such an approach would ensure absolute rights to all gender diverse individuals and provide an important signal—domestically and internationally—that New Zealand recognises the human dignity of gender diverse people.

## II Approaches to Sex and Gender

### A *Understanding sex and gender*

As the purpose of this article is to discuss the juristic meaning of *sex* and *gender* in the HRA, it is first necessary to canvas what these terms denote.

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3 See, for example, Butler, above n 1; and Candace West and Don H Zimmerman "Doing Gender" (1987) 1 Gender & Society 125.

4 For the purposes of this article, *gender diverse* will refer to *trans*, *genderqueer*, *agender* and other non-binary gender identities. These terms will be discussed at greater length later in the article.

5 See generally Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (2007) at 36–50. See also Craig Hoyle "Transgender teens face uphill struggle at Kiwi high schools" (20 November 2016) Stuff <www.stuff.co.nz>.

6 The Human Rights Act 1993 is a fundamental piece of legislation to New Zealand and is interlinked with a number of statutes including the New Zealand Bill of Rights Act 1990 and the Employment Relationships Act 2000.

(1) Sex as a biological term?

In common use, the terms *gender* and *sex* are often employed interchangeably. This is due perhaps to the normative emphases of a Western cisgendered society and culture[7] where an individual identifies, or is expected to conform, with the gender they were given at birth—known as *cisnormativity*.[8]

The New Zealand Human Rights Commission adopts the position that *sex* and *gender* are two separate concepts and that the two can be distinguished as *physical* and *non-physical*, respectively. From this starting point, the Commission defines *sex* as "[a] person's biological make-up (their body and chromosomes), defined usually as either 'male' or 'female' and including indeterminate sex."[9] Elisabeth McDonald and Heike Polster also refer to *sex* as a physiological concept.[10] In this view, factors such as sex chromosomes, sex hormones, internal reproductive organs, external genitalia and secondary sex characteristics are relevant in determining one's sex.[11] The definition does not extend to psychological feelings and is purely biological. As such, one approach to the meaning of *sex* is that it should be interpreted in a strict sense to only refer to biological elements of the body and not to include metaphysical concepts such as *gender identity*.[12]

However, there is an ongoing debate over the definitions of *gender* and *sex* and whether there should be any distinction between the two. For instance, in Butler's opinion the distinction between *sex* and *gender* should be dismissed. She argues:[13]

> ... perhaps this construct called "sex" is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all.

According to this argument *sex* can be interpreted in a metaphysical sense to also include *non-physical* attributes.

While it is clear that there is still considerable feminist philosophical disagreement on the gender/sex front, this article will take a pragmatic approach to these debates and assume that it is necessary to clearly distinguish *sex* and *gender* in legislation. This is for two reasons: first, in order to provide certainty in the course of protecting gender diverse individuals from discrimination; and secondly, to provide a symbolic recognition of gender diverse identity rights.

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7 See Elisabeth McDonald and Jack Byrne "The Legal Status of Transsexual and Transgender Persons in Aotearoa New Zealand" in Jens M Scherpe (ed) *The Legal Status of Transsexual and Transgender Persons* (Intersentia, Cambridge, 2015) 527 at 530.

8 See Theodore Bennett "'No Man's Land': Non-Binary Sex Identification in Australian Law and Policy" (2014) 3 UNSWLJ 847; and David Ross Fryer *Thinking Queerly: Race, Sex, Gender, and the Ethics of Identity* (Paradigm Publishers, Colorado, 2010) at ch 3.

9 Human Rights Commission, above n 5, at 12.

10 Elisabeth McDonald "Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993" (2007) 5 NZJPIL 301; and Heike Polster "Gender Identity as a New Prohibited Ground of Discrimination" (2003) 1 NZJPIL 157 at 159.

11 See also Mimi Marinucci *Feminism is Queer: The intimate connection between queer and feminist theory* (Zed Books, London, 2010) at 42 for a detailed discussion of these physiological characteristics.

12 It should be noted that reference to *gender* as a metaphysical concept is made on the basis that gender inherently relates to the philosophy of identity. Furthermore, there is feminist academic precedent for the reference to metaphysics when discussing gender.

13 Butler, above n 1, at 7.

(2) Gender, gender identity and gender expression

Understanding *gender* is a similarly complex endeavour as it can be split into three distinct forms: *gender*, *gender identity* and *gender expression*. In this article, these terms are defined as follows.

*Gender* can be defined as "[t]he social and cultural construction of what it means to be a man or a woman, including roles, expectations and behaviour."[14] Gender also relates to identities beyond the traditional masculine-feminine dichotomy.[15] This definition can further be broadened to include the "roles and relationships, personality traits, attitudes, behaviours, values, relative power and influence" that society can place on an individual, or indeed an individual can place on themselves.[16] These definitions of gender would indicate that gender is a "social/psychological identity" and should not be confused with the purely biological term *sex*.[17]

*Gender identity* can be summarised as "[a] person's internal, deeply felt sense of being male or female (or something other or in between)."[18] According to this view, "[a] person's gender identity may or may not correspond with their sex."[19]

Finally, *gender expression* can be defined as the ways "a person publicly expresses or presents their gender" including their "behaviour and outward appearance such as dress, hair, make-up, body language and voice" as well as their "chosen name and pronoun".[20] In this view, other people "perceive [the] person's gender through these attributes".[21]

Notably, not all of these terms conform with each other. Just as it may be accepted that one's *sex* does not necessarily provide one's *gender*, nor does one's *gender identity* necessarily provide their *gender expression*. A person with female genitalia and XX chromosomes may self-identify as a *man* but still express themselves as a *woman*.

Admittedly, the distinction between *gender identity* and *gender expression* can be a fine one and there is often an overlapping of the two. However, recognising the difference is important to understand how *gender* occurs in society. Furthermore, *gender identity discrimination* can differ from *gender expression discrimination*. Therefore, it is vital that New Zealand's legislature understands the nuances of the terminology before it endeavours to amend s 21(1) of the HRA.

The fact that other jurisdictions have decided to include gender identity and gender expression as distinct prohibited grounds of discrimination in their legislation shows that the proposed changes are not unprecedented. A number of Canadian provinces recognise gender identity and gender expression in their equivalent human rights legislation. Furthermore, the Australian Federal Government and some

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14 Human Rights Commission, above n 5, at 12.

15 Bennett, above n 8, at 849–850 and 858; and Rainbow Youth "Gender Identity" <www.ry.org.nz>.

16 UN Women *Gender Mainstreaming In Development Programming* (UN Women, New York, 2014) at 46. See also Anna Louise Strachan and Huma Haider *Gender and Conflict: Topic Guide* (GSDRC, Birmingham, 2015) at 2.

17 Bennett, above n 8, at 849.

18 Human Rights Commission, above n 5, at 12.

19 At 12.

20 Ontario Human Rights Commission *Policy on preventing discrimination because of gender identity and gender expression* (31 January 2014) at 7.

21 At 7.

Australian States intentionally define *gender identity* broadly to include gender expression. These legislative developments indicate the importance of differentiating and explicitly recognising these terms and will be explored later in this article.

(3) Trans

The terms *trans* will refer to any person who does not identify with their assigned birth-gender. The term *trans* is an umbrella term which:[22]

> … includes, but is not limited to, men and women with transsexual pasts and people who identify as transsexual, transgender, transvestite/crossdressing, androgyne, polygender, genderqueer, agender, gender variant or with any other gender identity and gender expression which is not standard male or female …

This includes post-operative individuals and "persons who do not choose to undergo or do not have access to operations and/or hormonal therapy".[23] It also includes non-western terms, such as the Māori and Pasifika terms *whakawahine*, *hinehi*, *hinehua*, *tangata ira tane*, *fa'afafine*, *fakaleiti*, *akava'ine*, *mahu*, *vaka sa lewa lewa*, *rae rae* and *fafafine*.[24]

*Genderqueer* also falls under the *trans* umbrella, which is where an individual does not identify with any particular gender, expresses their gender fluidly and sees their gender as malleable.[25] Alternatively, a person could identify as *agender*, which involves not identifying with any gender and is usually expressed by living as gender neutral as possible.[26]

It is not clear how many trans individuals live in New Zealand.[27] However, numerous indicators provide a rough estimate. For instance, the number of applications to the Family Court to recognise a change in *legal sex* status, [28] the number of *indeterminate sex* passports granted,[29] and the number of trans individuals involved in the Human Rights Commission's Transgender Inquiry Report[30] have led Elizabeth McDonald to estimate that there are "at least a few thousand trans individuals in New Zealand".[31] This may seem like a small population, but it is one that has been consistently found to be persecuted and discriminated against and is, therefore, in particular need for protection under the HRA.[32]

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22 Silvan Agius and Christa Tobler *Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression* (European Commission, June 2011) at 12.

23 Cristina Castagnoli *Transgender Persons' Rights in the EU Member States* (European Parliament Directorate General for Internal Policies, June 2010) at 3–4.

24 Human Rights Commission, above n 5, at 13. The HRC qualifies these terms by saying "[t]erms … which also have wider meanings that are best understood within their cultural context". At 13.

25 Agius and Tobler, above n 22, at 12.

26 At 12.

27 Ministry of Social Development *The Social Report 2016* (June 2016) at 34.

28 Between 1995 and 2007, 114 people have received such passports. Human Rights Commission, above n 5, at [2.9].

29 At [2.9]. 400 of these passports were provided as of April 2007.

30 At [2.8]. Between 400 and 800 trans individuals in New Zealand were believed to be involved in trans organisations or networks.

31 McDonald and Byrne, above n 7, at 535.

32 See Human Rights Commission, above n 5, at 36–46.

### B *Why reliance on sex is inadequate in protecting gender diverse communities*

As will be discussed later, it is risky to expect the courts to use the ground of *sex* to provide protection to gender diverse individuals from discrimination. Indeed, interpretative arguments can be made in the advancement of both strict and liberal approaches to *sex*; and even if a court broadly interpreted *sex* to include social conventions normally associated with *gender*, reliance on *sex* is an approach that is less than perfect. This is for three reasons.

First, it would be unclear how far the courts would be willing to interpret *sex*. Would it, for instance, protect all gender diverse people or would it only protect trans individuals who had undergone some medical treatment such as surgery or hormone therapy? The same issue arises for genderqueer and agender individuals. Rather than undertaking medical intervention, many genderqueer individuals express their gender identity solely, for example, through their behaviour, clothing, name and voice. Without clarity from Parliament in the form of a legislative amendment there is a risk that courts would be unwilling to interpret *sex* broadly—thus failing to protect gender diverse individuals from *sex* discrimination unless they had undergone medical treatment. This is problematic because many gender diverse people are unable to afford the considerable costs involved in treatment for gender reassignment. Moreover, some gender diverse individuals may not, in fact, want to receive medical treatment. Accordingly, an amendment to the HRA to include a broadly worded *gender* provision would ensure that all gender diverse individuals are protected from discrimination.

Secondly, discriminated gender diverse individuals who have not had medical treatment may be dissuaded from litigation because the court might be unwilling to interpret *sex* broadly. Similarly, the lack of clarity in this area means that gender diverse individuals could be dissuaded from using alternative dispute resolution mechanisms.

Thirdly, independent of the legal implications, legislation which protects gender diverse people can have socio-political effects. Parliament is New Zealand's supreme law-making body and legislation that expressly protects gender diverse people from discrimination would carry more symbolic weight than a court ruling to the same effect. Moreover, Parliament, unlike the judiciary, is democratically elected by the people and if such legislation was enacted by Parliament it would explicitly show New Zealand's commitment to the protection and appreciation of all gender diverse individuals.

### C *Reliance on sexual orientation or disability as alternatives?*

There has been some debate as to whether gender diverse communities could rely on the grounds of *sexual orientation* under s 21(1)(m) or *disability* under s 21(1)(h) of the HRA. I will not explore these alternative grounds in detail as they have already been examined by other commentators.[33] In any case, it is highly unlikely that transgender or genderqueer identities could fit under the *sexual orientation* or *disability* headings.

Regarding *sexual orientation*, *gender* is separate from *sexuality* and so it would be strange to interpret *sexual orientation* discrimination as including *gender* discrimination.[34] Indeed, the *Solicitor-General's Opinion on the Human Rights (Gender Identity) Bill* (*Solicitor-General's 2006 Report*) argued that the "exhaustive definition of sexual

33 See McDonald, above n 10, at 303.
34 Polster, above n 10, at 161.

orientation in the HRA" meant gender identity would be highly unlikely to fall within this heading.[35]

Regarding *disability*, there is a suggestion that an individual diagnosed with gender dysphoria[36] could use this diagnosis to fall within the ambit of disability since disability in s 21(1)(h) of the HRA includes psychiatric illness. However, requiring gender diverse individuals to make discrimination claims under the heading of *disability* is offensive to say the least and further marginalises and stigmatises this community. Further, Heike Polster argues that gender dysphoria can simply be a temporary condition, which further limits the application of *disability* as a possible ground for discrimination.[37]

In short, neither sexual orientation nor disability, as prohibited grounds of discrimination, provide much respite, if any at all, for gender diverse communities under the HRA. In light of this, reliance on *sex* for protection against gender discrimination is the most likely ground that a gender diverse person could use under the current HRA. Yet it is clear that this approach is less than ideal.

## III The New Zealand Approach

### A *Gender and the Human Rights Act 1993*

Prior to the HRA, discrimination law was governed by the Race Relations Act 1971 and the Human Rights Commission Act 1977. The latter provided a number of areas—such as employment, housing, and the sale of goods and services—where discrimination on the basis of sex was prohibited. These statutes have since been replaced by the New Zealand Bill of Rights Act 1990 and the HRA, where s 19 of the Bill of Rights Act now refers to s 21 of the HRA to provide an express list of the prohibited grounds of discrimination.

Section 21(1) of the HRA was drafted in the early 1990s. Given that gender identity rights have only recently risen to the forefront of social discourse, the failure to include gender within the prohibited grounds of discrimination is unsurprising. Interestingly, *Mazengarb's Employment Law* does point out that, at the time the Human Rights Bill was at the Select Committee stage, the Human Rights Commission did actually suggest a broadly worded *gender* provision, as opposed to a *sex* provision.[38] However, this approach was not ultimately adopted by the Select Committee and it remains unclear why the Select Committee made this decision.[39]

### B *Attempts at law reform*

New Zealand MPs have made two attempts to enact Bills that would have included *gender* in s 21(1) of the HRA. The first attempt was Labour MP Georgina Beyer's Human Rights (Gender Identity) Amendment Bill in 2006, which was a Private Member's Bill and would

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35 Cheryl Gwyn *Solicitor-General's Opinion on the Human Rights (Gender Identity) Bill* (Crown Law Office, 2 August 2006) at [27]. See also Human Rights Act 1993, s 21(1)(m): "sexual orientation, *which means* a heterosexual, homosexual, lesbian, or bisexual orientation" (emphasis added).

36 The medical term for "the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender". American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, American Psychiatric Publishing, Arlington (Virginia), 2013) at 451.

37 Polster, above n 10, at 182–183.

38 *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [4021.10].

39 At [4021.10].

have included gender identity as a standalone prohibited ground of discrimination. The Bill defined *gender identity* as:[40]

> [T]he identification by a person with a gender that is different from the birth gender of that person, or the gender assigned to that person at birth, and may include persons who call themselves transsexual, transvestite, transgender, cross-dresser, or other description.

This was a relatively broad and inexhaustive definition and would have allowed the courts to extend the meaning of the term—a particularly important consideration as the terminology relating to gender is constantly expanding. On the other hand, the definition lacked a reference to gender expression and was largely focused on trans identities, rather than other identities such as genderqueer or agender identities. Due to the Labour Government wishing to distance itself from controversial and "politically correct" legislation—especially in the wake of the Prostitution Reform Act 2003 and the Civil Union Act 2004—the Bill was withdrawn before it was even debated.[41] The decision was also made in light of a Crown Law legal opinion, signed by the acting Solicitor-General Cheryl Gwyn, which was published at the time.[42] This legal opinion stated that the New Zealand courts would be likely to interpret *sex* to include gender identity anyway, irrespective of the absence of *gender* in the HRA.[43] Thus, the term *sex*, under s 21(1)(a) of the HRA, was considered by the New Zealand Government to be broad enough to effectively protect gender diverse people from discrimination and Georgina Beyer's Bill was deemed to be unnecessary.

The second attempt by an MP to include *gender* in the HRA was in 2014 when Louisa Wall included a Supplementary Order Paper to the Statutes Amendment Bill (No 4) which would have included *gender identity* under *sex*.[44] The amendment would have included gender identity under sex—rather than proposing an amendment to insert *gender* as an independent prohibited ground of discrimination—because Statutes Amendment Bills must inherently avoid controversial law amendments.[45] Louisa Wall argued that because of the *Solicitor-General's 2006 Report* and the Government's statements at the time, it was not controversial for gender identity to sit alongside *sex* in s 21(1)(a) of the HRA.[46] However, this argument failed and the Supplementary Order Paper was withdrawn on the basis that this attempt to reform the HRA was too contentious for a Statutes Amendment Bill.[47] The resulting inference is that the question of whether or not *sex* can be interpreted to include *gender* remains a contentious issue.

Presently there seems to be no political will for the current government to amend the HRA. That notwithstanding, it should be noted that the inclusion of gender identity is on both the Green Party's and Labour Party's agendas.[48] As will be explored in the next Part,

40 Human Rights (Gender Identity) Amendment Bill 2004 (225-1), cl 4.

41 "Beyer to withdraw transgender rights bill" *The New Zealand Herald* (online ed, New Zealand, 22 August 2006. See also (23 August 2006) 633 NZPD 4794.

42 Gwyn, above n 35.

43 At [30].

44 Supplementary Order Paper 2014 (432) Statutes Amendment Bill (No 4) 2014 (188-2).

45 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005) at 324. See also Standing Orders of the House of Representatives 2014, SO 305(2).

46 Supplementary Order Paper, above n 44 (explanatory note).

47 "Gender identity knock-back 'an insult'" *GayNZ* (online ed, New Zealand, 7 July 2014).

48 See Green Party of Aotearoa New Zealand "Sexual Orientation and Identity Policy" (20 January 2014) <www.greens.org.nz>; and Louisa Wall "Labour embraces the rainbow" (27 August 2014) New Zealand Labour Party <www.labour.org.nz>.

despite these failed legislative attempts to improve and fortify gender rights in the HRA, it appears that the New Zealand courts have provided some, albeit very limited, indications that they would interpret gender to fall under the heading of sex discrimination.

### C *The New Zealand judicial response so far*

To date, no New Zealand court has had to directly consider the issue of whether *sex* can include *gender* under s 21(1)(a) of the HRA. The highest authorities on the matter are a number of obiter statements in the High Court, Court of Appeal and Supreme Court. The recent case of *Hemmingson v Swan t/a Barker's Groom Room* is the closest a New Zealand court has ever been to dealing with a discrimination case involving a trans person.[49] In *Hemmingson* the plaintiff was a hairdresser who had been dismissed after telling her employer that she wished to transition to be a woman. Unfortunately, the judgment focused predominantly on the issue of whether or not the plaintiff had been dismissed and whether this dismissal had been procedurally fair.[50] The judgment concluded that constructive dismissal had occurred and that the process of dismissal had not been procedurally fair under the Employment Relations Act 2000.[51] While the case did not explicitly discuss whether or not discrimination had occurred, the Employment Relations Authority impliedly affirmed that it had when it asserted that:[52]

> This is a situation in which Ms Hemmingson was merely expressing her gender identity. She was the same person, working alongside the same employees, with the same skills, doing the same job, from the same premises, for the same clients.

Whilst there is now some precedent for gender diverse individuals, or at least trans individuals, to bring a claim of constructive dismissal, it is still unclear whether they could successfully bring a claim of *gender discrimination* under *sex discrimination*.

With regard to interpreting s 21(1)(a) of the HRA, the New Zealand courts have taken the approach that *sex* can be interpreted to include *gender*—or at least that the terms are somewhat synonymous. In *Attorney-General v Otahuhu Family Court* Ellis J agreed with the amicus curiae's statement that: [53]

> Sex has both a biological and social meaning. When used in its social sense, *it encompasses the idea of gender*, which takes in psychological and societal factors. Self-identification and the perception of others in society are relevant to the concept of gender.

However, this statement is obiter as Ellis J concluded that the issue of sex discrimination under the HRA was not a primary issue of the case.[54]

In *Quilter v Attorney-General*, Thomas and Tipping JJ made a number of obiter statements to similar effect.[55] For instance, Tipping J commented that "[t]he New Zealand legislature has signalled that discrimination on the grounds of sexual orientation *and gender* should not be sanctioned by the Courts of this country."[56] The fact that they

49 *Hemmingson v Swan t/a Barker's Groom Room* [2016] NZERA Auckland 212.
50 See [26]–[51].
51 See [27] and [48]–[49].
52 At [33].
53 See *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 (HC) at 608 (emphasis added).
54 At 631. See also 608.
55 *Quilter v Attorney-General* [1998] 1 NZLR 523.
56 At 581 per Tipping J (emphasis added).

referred to gender as a prohibited ground of discrimination indicates that Thomas and Tipping JJ considered sex to include the notion of gender, or at least that the terms were substantially synonymous.

Thomas J clarified his position two years later in *Living Word Distributors Ltd* where he stated—in a separate judgment which nonetheless concurred with the majority—that:[57]

> … irrespective of any such authority, sexual orientation cannot plausibly be included within the word "sex" or the phrase "matters such as sex" in the context of the [Films, Videos, and Publications Classifications] Act. In general terms, this exclusion follows from the fact that the Act is in part directed at the censorship of pornographic sex and not at preventing discrimination based on sex. In an enactment directed at discrimination, the word "sex" may be tenably defined to include "gender", but that extension would not ordinarily be appropriate in a statute dealing with the censorship of pornographic sex.

Why Thomas J made an abstract reference to the HRA and gender discrimination remains unclear. The case was about freedom of speech in the distribution of a video under the Films, Videos, and Publications Classification Act 1993 and had nothing to do with gender or sex discrimination under the HRA. Whatever the reason, this is arguably the closest a New Zealand judge has ever been to directly addressing the interpretation of sex discrimination as including gender.

More recently, the Supreme Court in *Air New Zealand Ltd v McAlister* indicated that sex in the HRA included gender—or that the two were synonymous.[58] This case involved a pilot, Mr McAlister, who claimed that he had been discriminated against on the basis of his age in the course of his employment with Air New Zealand. In the course of its majority judgment, the Court stated that:[59]

> The Air New Zealand argument is also inconsistent with s 26 of the HRA (which is applied by s 106 of the ERA). Section 26 provides an exception for those working outside New Zealand in some circumstances. Such an exception would be unnecessary if foreign laws and customs were treated as the reason for discrimination, not the age, *gender* or other prohibited ground which occasions their application.

In the excerpt above, it appears that the majority—like Thomas and Tipping JJ in *Quilter*—refer to *gender* as a prohibited ground of discrimination. Since gender is not actually explicitly mentioned in ss 21 or 26 of the HRA, this would indicate that the Supreme Court sees *sex* as including—or being synonymous with—*gender* under the Act. However, the comment is again obiter and not binding.

Since then, there have been no further cases that have considered the interpretation of *sex*. While there have been a number of cases that dealt with trans individuals wishing to change their official registered sex under s 28 of the Births, Deaths, and Marriages Registration Act 1995, these cases are not particularly helpful as that Act already distinguishes *sex* and *gender identity*.

It is unclear then whether the New Zealand courts would actually recognise *gender identity* as falling within *sex*, as concluded in the *Solicitor-General's 2006 Report*. Before I turn to consider approaches taken in other jurisdictions, I first consider what other

57 *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) at [83].

58 See *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [43].

59 At [43] (emphasis added).

interpretative considerations a New Zealand court might take in deciding the scope of *sex* in s 21(1) of the HRA.

D *New Zealand interpretive considerations*

The courts, in applying a narrow construction of s 21(1)(a) to exclude gender, could render the HRA ineffective in protecting the rights of gender diverse people. In this situation future problems could arise. For instance, an employer could successfully argue that they are not being discriminatory for dismissing a transgender employee on the grounds of their gender expression or identity rather than their biological sex. Thus, it is important to reflect on the interpretive considerations that courts could use in determining whether to include *gender notions* within *sex*.

First, the court must view s 21(1)(a) within "its text and in the light of its purpose" as per s 5(1) of the Interpretation Act 1999. The long title of the HRA states that it is:

> An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights

The emphasis on "better protection of human rights" may imply that courts are permitted to interpret provisions broadly so as to reflect the fluid nature of human rights—noting that notions of gender are quite recent developments. The primary Covenants that relate to the HCR include the International Covenant on Civil and Political Rights (ICCPR), the United Nations Declaration of Human Rights (UNDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). While none of these treaties expressly refer to *gender*, arts 2(1) and 26 of the ICCPR require signatory states to recognise, inter alia, the rights set out in the Covenant and apply national laws without discriminating on the grounds of sex. Furthermore, both art 2 of the UNDHR and art 2 of the ICESCR require signatory states to not discriminate—on matters prescribed by the Covenants—based on *sex*.

Notably, in 2008 the New Zealand government signed a Statement addressed to the United Nations General Assembly that clarified these United Nation treaties. The Statement "reaffirm[ed] the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation *or gender identity*".[60]

The Statement is important because New Zealand courts must refer to New Zealand's international obligations when interpreting legislation and must interpret legislation consistently with them "unless the contrary is clearly shown or unless the language used does not allow that outcome".[61] Thus, the judiciary would be required to take the Statement into account, as well as the statement's role in clarifying the ICCPR, UNDHR, and the ICESCR. Accordingly, this interpretive technique would favour the interpretation of sex to broadly include gender identity.

Moreover, it is the opinion of the New Zealand executive that sex can include gender in the HRA discrimination framework. Michael Cullen—in his role as the Attorney-General

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60 *Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly* A/63/635 (2008) at [3] (emphasis added).

61 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [32].

when the *Solicitor-General's 2006 Report* was published—held this view.[62] The current Government also holds this view and has stated "that discrimination on the grounds of gender identity is already prohibited under the Human Rights Act as sex discrimination".[63] Moreover, the New Zealand Human Rights Commission (NZHRC)[64] and the Ministry of Business, Innovation, and Employment (MBIE) have also made similar statements[65] (although the NZHRC argues that a specific provision for gender rights would be ideal).[66]

Despite these arguments in favour of a broad interpretation of *sex* in New Zealand legislation, opponents could argue that if Parliament intended gender to be included in s 21(1) it would have done so expressly.

This argument becomes even stronger when reference is made to s 67(2) of the HRA, which expressly prohibits job advertisements that are discriminatory on the basis that they provide a "gender connotation".[67] The fact that Parliament expressly referred to *gender* discrimination in this provision adds to the argument that Parliament has considered the terms *gender* and *sex* to have distinct meanings. It should also be noted that s 67 was an original provision of the 1993 Act and this reference to *gender* has not been included by later amendments. Furthermore, s 67 is heavily based on s 32 of the prior Human Rights Commission Act 1977, which originally referred only to *sex*. This leads to the inference that because Parliament intentionally and concurrently omitted *gender* from s 21(1) of the HRA, but included *gender* in s 67, it must have intended that the two words have distinct meanings. Consequently, it is arguable that Parliament, therefore, did not intend *sex*, as used in the HRA, to include *gender notions*.

Furthermore, in support of a broad interpretation of *sex*, there are three specific pieces of New Zealand legislation that expressly differentiate between the terms *sex* and *gender identity*. These are ss 28–31 of the Births, Deaths, Marriages, and Relationships Registration Act 1995, which consistently distinguishes gender identity and an applicant's nominated sex; s 30 of the Electronic Identity Verification Act 2012; and s 2(1) of the Marriage Act 1955.[68]

In the course of the research for this article, I was able to find a total of 34 Acts which expressly refer to *gender*.[69] The express inclusion of *gender* in these Acts implies that

62 "Beyer to withdraw transgender rights bill", above n 41.

63 Human Rights Council Working Group on the Universal Periodic Review *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: New Zealand* A/HRC/WG.6/18/NZL/1 (2013) at 66.

64 See Human Rights Commission *Te Rito: Human Rights Case Studies* (May 2012) at 14. This is a case study of a claim of discrimination against a trans person. The Commission advised that the trans person was protected under *sex* in s 21(1)(a) of the Human Rights Act 1993.

65 See "Discrimination against transgender people" Employment New Zealand <www.employment.govt.nz>.

66 Human Rights Commission, above n 5, at 93.

67 For instance, by writing *postman* or *stewardess*.

68 This was amended by s 5 of the Marriage (Definition of Marriage) Amendment Act 2013, with marriage now defined as "the union of 2 people, regardless of their sex, sexual orientation, or gender identity". Definition of "marriage" in Marriage Act 1955, s 2(1).

69 Births, Deaths, Marriages, and Relationships Registration Act 1995; Care of Children Act 2004; Citizenship Act 1977; Civil Service Act 1908; Cluster Munitions Prohibition Act 2009; Corrections Act 2004; Crimes of Torture Act 1989; Customs and Excise Act 1996; Dog Control Act 1996; Dunedin Waterworks Extension Act 1875; Eden Park Trust Act 1955; Education Act 1989; Electronic Identity Verification Act 2012; Harmful Digital Communications Act 2015; Human Assisted Reproductive Technology Act 2004; Human Rights Act 1993; Identity Information Confirmation Act 2012; Immigration Act 2009; International Crimes and International Criminal Court Act 2000; International Finance Agreements Act 1961; Interpretation Act 1999; Land

Parliament does not view the terms *sex* and *gender* as synonymous and that *sex*—as used in the HRA—cannot be read to include gender notions. This argument is further reinforced when considering that Parliament has been given the opportunity to include *gender* in the HRA twice—first through Georgina Beyer's Bill and later by Louisa Wall's Supplementary Order Paper—yet Parliamentary support was not given to include gender as a separate ground of discrimination.

Moreover, the interpretive tool of noscitur a sociis can be used to narrowly interpret the meaning of *sex* in the HRA.[70] Section 21(1)(a) of the HRA states that sex "*includes* pregnancy and childbirth".[71] While sex is not exhaustively defined in this section, the interpretive tool of noscitur a sociis could be used to interpret the words "pregnancy and childbirth" as forming a class of biological manifestations. Such an interpretation would mean that *sex* is limited to biological characteristics. Assuming that gender identity is a social or cultural idea—a metaphysical concept—rather than a physical concept, then gender identity would not be able to fall under this biologically constricted interpretation of sex.

Finally, Elisabeth McDonald questions the likelihood of a court taking a liberal approach to the issue of interpreting *sex*. She uses *Quilter* as an example of a court taking a conservative approach to the interpretation of the HRA.[72] McDonald also points to the fact that "section 21 contains a closed list of prohibited grounds that have been traditionally extended by legislative amendment, not by judicial interpretation".[73] However, as society advances towards greater recognition of gender diverse identities, it is possible that the courts will move to reflect these social values, thereby adopting a more liberal interpretation.

As reasoned above, there are persuasive arguments both for and against the adoption of a broad interpretation of *sex*. It follows that the law in this area is still uncertain. In such cases, courts may choose to look at overseas jurisdictions for guidance. Also, New Zealand MPs might again see the need to pursue an amendment of the HRA to clarify the law. Therefore, reference to the legislative approach of other jurisdictions is relevant to this discussion. Accordingly, in the next Part of this article I examine the issues concerning *sex* and *gender* in discrimination law in the European Union (EU), England and Wales, Australia and Canada.

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Transport Act 1998; Legislation Act 2012; London and New Zealand Bank; Limited Act 1928; Maritime Security Act 2004; Marriage Act 1955; Mental Health (Compulsory Assessment and Treatment) Act 1992; National Animal Identification and Tracing Act 2012; Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002; Property Law Act 2007; Prostitution Reform Act 2003; Sentencing Act 2002; Tutae-Ka-Wetoweto Forest Act 2001; and the Wills Act 1837 (UK). It should be noted that some of these Acts have had *gender* inserted by Amendment Acts. However, this list does not include the Amendment Acts.

70 See *Civil Aviation Authority of New Zealand v Witschke-Rudd* [2015] NZCA 280, [2015] 3 NZLR 749 at [32]. The Court of Appeal translated noscitur a sociis as "it is known by its associates" and explained that "[i]n plain language it is a contextual principle whereby a word or phrase is not to be construed as if it stood alone but in the light of its surroundings." At [32].

71 Section 21(1)(a) (emphasis added).

72 McDonald, above n 10, at 314.

73 At 314.

## IV The Legal Approach of Other Jurisdictions

This Part focuses on the European Union, England and Wales, Australian, and Canadian jurisdictions as they provide an insightful body of case law on discrimination of gender diverse individuals. Their respective human rights legislation is also useful in regards to considering how New Zealand's HRA could be better drafted to explicitly protect gender diverse individuals from discrimination.

### A *European Convention on Human Rights*

The European Union's European Convention on Human Rights (ECHR) is considered to be one of the more liberal human rights codes in the Western world. However, even with this liberal approach to their human rights code, the ECHR is silent on the matter of gender. Article 14 sets out the grounds of prohibited discrimination in the following way:[74]

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as *sex*, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status*.

The article is non-exhaustive, as indicated by the catch-all "other status". Therefore, other prohibited grounds of discrimination can be judicially included to this list. Under the ECHR, the use of art 14 can only arise when the article is used in conjunction with other rights within the Convention.[75] For gender issues, the most common article that is used in conjunction with art 14 is the incredibly wide-reaching art 8—the right to respect for private and family life—which states that:[76]

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Prior to 2002, the European Court of Human Rights (ECtHR) adopted a conservative approach on the issue of gender discrimination against trans people. The cases of *Rees v United Kingdom*,[77] *Cossey v United Kingdom*[78] and *Sheffield v United Kingdom*[79] all resulted in the Court stating that the relief sought—that is, the ability for trans people to change their *sex* on the birth register—was too great a burden to put on member states.

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74 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [ECHR], art 14 (emphasis added). The Convention is now known as the European Convention on Human Rights.

75 Ivana Radacic "Gender Equality Jurisprudence of the European Court of Human Rights" (2008) 19 EJIL 841 at 842.

76 ECHR, art 8.

77 *Rees v United Kingdom* (1987) 9 EHRR 56 (ECHR).

78 *Cossey v United Kingdom* (1991) 13 EHRR 622 (ECHR).

79 *Sheffield v United Kingdom* (1999) 27 EHRR 163 (ECHR).

However, with the 2002 case of *Goodwin v United Kingdom*,[80] the ECtHR reversed its position, opting for a more liberal approach to interpreting arts 14 and 8. In that case, Ms Goodwin, a post-operative trans woman, wished to receive her pension and social security rights because she had reached the age of 60—the age that allowed women to claim their pension rights. The United Kingdom argued that her trans identity should not be recognised and that she should be required to wait until the age of 65—the age of retirement for men. The Court, sitting as a Grand Chamber, found that Goodwin's lack of access to pension and social security rights was in breach of her right to private and family life.[81]

Accordingly, the EU model shows that a trans-discrimination case can be successfully argued on the basis of a breach of *private and family life* without any recourse to considering whether the discrimination falls under the ground of *sex*—or even *other statuses*.[82] I contend that such an approach is commendable as it allows greater flexibility for the Court to recognise new forms of gender discrimination. While it would be a radical change to New Zealand's human rights law, such a provision could be applied in New Zealand and would arguably afford gender diverse groups broader rights.

On the other hand, it remains questionable how far a gender diverse person must go before their gender expression or identity is recognisable in law. Must they have undergone surgical treatment or hormonal treatment? Or—in the case of a transgender individual—must they simply meet certain gender-expectations of the *other* gender (for example, clothing and behaviour)? Further, what expectations would a court place on a genderqueer or agender individual to qualify for sex discrimination?

In relation to transgender individuals, this issue was dealt with to some extent in *L v Lithuania*.[83] While the claimant had not completed full gender reassignment surgery, he had undertaken breast removal surgery and hormonal treatment was prescribed, meaning that the level of medical intervention was nevertheless quite high.[84] In this case, the claimant's argument on art 8 grounds was successful.

It remains open to debate how far a gender diverse person must go before they will be recognised by the ECHR. This is an important question to ask as it could be an issue that arises in New Zealand—would a genderqueer, agender, or pre-operative trans person be less likely to be recognised under the HRA than a post-operative trans person? While not explicitly raising this question, McDonald in her chapter emphasises that "almost all the cases cited in which transgender people have made a successful (sex) discrimination claim concern *post-operative* MtFs".[85] According to this pattern it seems then that a genderqueer or pre-operative trans person would be less likely to be recognised under the *sex* provision in the HRA.

In the more recent case of *PV v Spain*, the ECtHR found that *transsexualism* falls under *other statuses* per art 14, not *sex*.[86] While the case is not available in English, the Registrar of the Court released a summary of the case in English. Of particular interest is the statement that "transsexualism was a notion covered by Article 14, which contained a non-

80 *Goodwin v United Kingdom* (2002) 35 EHRR 18 (Grand Chamber, ECHR).
81 At [93].
82 ECHR, art 14.
83 *L v Lithuania* (2008) 46 EHRR 22 (Section II, ECHR).
84 At [11].
85 McDonald, above n 10, at 309–310.
86 *PV v Spain* (35159/09) Section III, ECHR 30 November 2010.

exhaustive list of prohibited grounds for discrimination".[87] The case shows that the courts are not forced to resort to interpreting sex discrimination to include gender. It also indicates an unwillingness by the courts to merge these distinct terms.

Again, this is an interesting approach and should be considered for any future amendment to the HRA. Could an *other status* provision be included in addition to New Zealand's list of prohibited grounds of discrimination? While the right to private and family life under art 8 may be too radical an addition to our human rights law, the addition of an *other status* provision to the list of prohibited grounds of discrimination could be more palatable. Such an amendment would provide New Zealand courts with far greater flexibility in recognising other groups and minorities that are not currently recognised.[88]

### B *European Directives*

Also important are the Directives of the European Parliament. The Directives are laws which are binding on member states, although the choice of methods employed to meet the Directives' requirements are left to each member state. There are a number of anti-discrimination Directives that are relevant, as well as decisions from the European Court of Justice (ECJ).[89]

The 1996 case *P v S*[90] considered the European Council Directive of Equal Treatment 1976.[91] As set out in its title, this was a Directive which required states to enforce equal treatment "for men and women as regards [to] access to employment, vocational training and promotion, and working conditions". In particular, art 5(1) of the Directive of Equal Treatment required states to ensure "that men and women … be guaranteed the same conditions without discrimination on grounds of sex". In this way its effect is similar to the New Zealand HRA framework.

In *P v S*, the claimant successfully brought a *sex* discrimination claim on the basis that she had been made redundant due to her transgender status. The Court agreed and held that:[92]

> *Such discrimination is based, essentially if not exclusively, on the sex* of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, *he or she is treated unfavourably by comparison with persons of the sex* to which he or she was deemed to belong before undergoing gender reassignment.

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87 Registrar of the European Court of Human Rights "Restriction of contact arrangements between a transsexual and her six-year-old son was in the child's best interests" (press release, 30 November 2010).

88 See, for example, *R (on the application of RJM) (FC) v Secretary of State for Work and Pensions* [2008] UKHL 63 at [42]–[45], where the House of Lords recognised that 'homelessness' could fall under 'other status'.

89 Note that Directives are separate from the ECHR. The European Court of Justice (ECJ) determines issues of European Law but does not determine issues concerning the ECHR.

90 *P v S* [1996] ECR I-2159.

91 Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

92 *P v S*, above n 90, at [21]–[22] (emphasis added).

> To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.

The Court in *Richards v Secretary of State for Work and Pensions* took a similar approach to *P v S*, concluding that the prohibition of discrimination based on sex could also protect those who had received gender reassignment surgery.[93] This case involved a transgender woman who successfully argued that she should receive her pension at the age of 60. While this case had a similar fact pattern as *Goodwin*, the plaintiff, rather than relying on the ECHR, argued that she was discriminated under Council Directive 79/7.[94] The Court concluded that:[95]

> The scope of Directive 79/7 cannot thus be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, *the scope of that directive is also such as to apply to discrimination arising from the gender reassignment of the person concerned*.

Thus, *P v S* and *Richards* provide international precedents that New Zealand courts can consider in determining the scope of *sex*. However, these cases involved claimants who had undergone reconstructive surgery and this again raises the question of whether or not a New Zealand court would be likely to provide protection to a gender diverse person, who has not had medical treatment, under the HRA.

### C *England and Wales*

Since the adoption of the ECHR in the United Kingdom Human Rights Act 1998 (UKHRA), the UK has been bound by and can apply the ECHR in domestic courts.[96] As a result, a large number of transgender claims are brought through the Convention itself and, consequently, many cases are made under art 8 of the ECHR. Cases brought after the enforcement of the UKHRA are often of limited help due to their emphasis of art 8 over art 14, meaning that any discussion about whether the term *sex* includes *gender notions* is brief.

However, there has been some discussion by the courts about whether transgender discrimination falls within art 14 under the catch-all provision of "other status[es]". English courts have approached the *other status* provision with a liberal interpretation. Recently, in *Carpenter v Secretary of State for Justice,* Thirlwall J cautiously stated that she would "take a generous approach to the interpretation of 'other status' and accept that being a post-operative transsexual person does constitute 'other status' within article 14".[97] As the Court recognised, this was the first ever case that recognised "other status" to include post-operative transsexual individuals. Again, this is another example of how New Zealand could adopt an *other status* category in s 21(1) of the HRA.

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93 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3602.
94 Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1978] OJ L6/24.
95 *Richards*, above n 93, at [24] (emphasis added).
96 Schedule 1 of the Human Rights Act 1998 (UK).
97 *Carpenter v Secretary of State for Justice* [2015] EWHC 464 (Admin), [2015] 1 WLR 4111 at [32].

Also of relevance is *Chief Constable of West Yorkshire Police v A*.[98] This case originated in the English court prior to the adoption of the ECHR in the UKHRA. The claimant was a post-operative trans woman who wished to become a police constable. Her application was denied on the basis that she would be unable to fulfil her search powers under s 54(9) of the Police and Criminal Evidence Act 1984. This was because the legislation required the officer to only search people of the same sex. The claimant argued that this was discrimination and a breach of the European Directive of Equal Treatment, as well as a breach of the Sex Discrimination Act 1975. The case cited the decision of *P v S*, with Lord Rodger and Baroness Hale agreeing with the approach in that case.[99] The House of Lords ultimately found that discrimination had occurred on the basis that it was a breach of *sex* under the 1976 Directive 76/207.[100]

Interestingly, in light of the recent Brexit decision, sex and gender discrimination cases will eventually be dealt within England rather than through the ECHR framework.[101] Furthermore, the current Conservative Government intends to implement an alternative *British Bill of Rights*.[102] There is, therefore, a chance that future case law from England and Wales could provide illuminating analysis on this issue.

### D *Australia*

Australia has had a particularly progressive legislative response to the issue of distinguishing *gender* and *sex*. Prior to 2013 Australia was in a similar legislative situation as New Zealand, with *gender* missing from the Federal Sex Discrimination Act 1984. In 2013, however, the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 came into force. With this amendment, the Sex Discrimination Act 1984 now specifically recognises *gender identity* as a prohibited ground of discrimination.[103] This is a commendable model and one which the New Zealand legislature should look to if it wishes to make a similar amendment to the HRA.

Furthermore, in addition to the above Federal Act, all the state-level legislatures—except for the Northern Territory—currently recognise *gender* as a prohibited ground of discrimination in their respective Human Rights statutes. The combination of federal and state-level law dealing with sex and gender-based discrimination means that Australia has an incredibly progressive gender-rights framework that the New Zealand's legislature should look to emulate.

Due to this explicit legislative response the case law in Australia determining the issue of whether or not *gender* fall within *sex* is largely settled. However, three cases at Tribunal and District Court level are useful to discuss.

The first case is *M v A*, a Queensland Anti-Discrimination Tribunal case involving a trans individual who claimed discrimination on the ground of *sex* under the Queensland Anti-

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98 *Chief Constable of West Yorkshire Police v A* [2004] UKHL 21, [2005] 1 AC 51. See also Gwyn, above n 35, at [6]–[9].

99 *Chief Constable of West Yorkshire Police v A*, above n 98, at [17].

100 Directive 76/207, above n 91.

101 *Brexit* refers to the British exit of the European Union.

102 Jessica Elgot "UK bill of rights will not be scrapped, says Liz Truss" *The Guardian* (online ed, London, 22 August 2016).

103 Sections 5B and 5C of the Sex Discrimination Act 1984 (Cth). 'Gender identity' is defined in s 4(1) of the Act and "means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth".

Discrimination Act 1991.[104] While the Act now recognises gender identity as a prohibited ground of discrimination, the case was brought under a previous version of the Act which recognised sex but not gender identity. M, a trans woman, argued that she had been discriminated on the grounds of *sex* when she was refused service at a grocery store. Savage SC held:[105]

> The Act, (prior to "gender identity" amendments irrelevant to the present case) recognized that a person with a transsexual background may be discriminated against because of his/her new sex or his/her previous sex, regardless of his/her transsexual background. Each such case plainly falls within the Act's proscriptions against discrimination on the basis of sex (or of a characteristic imputed on the basis of this attribute-s.8(b)) whether that be on the basis of the legally assigned pre or post operative sex of a complainant.

Savage SC invited both parties to elaborate on this ground of discrimination, but neither responded to this invitation. Instead, both parties accepted that transgender discrimination could fall under *sex-based* discrimination.

M was successful in her case with Savage SC stating that:[106]

> M was plainly treated differently (and thus discriminated against contrary to the provisions of the Act) in the above regards. That discrimination was on the basis of sex and lawful sexual activity. M was treated differently to other female members of the public who were not presumed to be men, in that she was ridiculed outside the premises and refused service …

While it is a low-level decision, *M v A* provides further support to the interpretation that gender identity issues can fall under *sex-based* discrimination.

The second case is *Williams v Independent Pub Group t/a Brahma Lodge Hotel*, which was decided in the District Court of South Australia.[107] Williams was a drag-queen performer who was harassed by a barman after he tried to use the female bathrooms. Williams claimed he was discriminated against on the grounds of his *chosen gender*.[108] Judge Cole held that Williams could not bring a claim of chosen gender discrimination because he was only an occasional drag artist and did not always present himself as a woman. This was despite the fact that he had been a drag artist every Thursday night for over 25 years, identified himself as psychologically genderqueer and wished he could have a physiological sex-change. The Court held that:[109]

> It is implicit in the concept of "chosen gender" in s 5(5) that the choice to dress as a member of the opposite sex is taken for much of the time, on an enduring basis. A person

104 *M v A* [2007] QADT 8.

105 At [12].

106 At [36].

107 *Williams v Independent Pub Group t/a Brahma Lodge Hotel* [2014] SAEOT 1.

108 Prior to 2016 s 29 of the Equal Opportunities Act 1984 (SA) included *chosen gender* as a prohibited ground of discrimination. *Chosen Gender was* defined in s 5(5) as: "(a) the person identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the opposite sex; or (b) the person, being of indeterminate sex, identifies on a genuine basis as a member of a particular sex by assuming characteristics of particular sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the particular sex."

109 *Williams*, above n 107, at [39].

> of chosen gender chooses to live, for much if not all of the time, in the manner of the gender he or she was not identified with at birth. Performing as a drag queen for a few hours a week is not a case of chosen gender.

The case highlights South Australia's previous and curious use of the statutory term *chosen gender* to protect its gender diverse community, a term that is arguably limiting and inflexible. In 2016 the Parliament of South Australia amended the Equal Opportunities Act 1984 by replacing *chosen gender* with *gender identity*, the latter term being a broader prohibited ground of discrimination.[110] It is possible that the plaintiff in *Williams* could have successfully sued for discrimination if *gender identity* had been a ground of discrimination available to the plaintiff at the time. Such a case shows how important it would be for the New Zealand legislature to ensure that any amendment to s 21(1) of the HRA would need to be wide-ranging and flexible in order for the courts to be able to broadly apply it.

Thirdly, a brief mention should also be made of *O'Hara v Yarra Community Housing Ltd*.[111] This case involved a trans woman's claim that she was discriminated on the basis of her *gender identity*.[112] The case was dismissed for lack of evidence. However, it is a case worth mentioning as it shows how a trans person can bring a discrimination claim using *gender identity* rather than *sex*. The importance of this is that a victim of gender discrimination will feel more willing to make a court claim with this explicit protection. Further, a judicial decision-maker is able to focus court resources on the facts and evidential matters of the case—as opposed to the legal issue of whether or not the claimant is able to bring a discrimination claim in the first place.

The following table shows Australia's state-level response to sex and gender discrimination:

| **Australia** | | |
|---|---|---|
| **State/Territory** | **Statute** | **Description** |
| Australian Capital Territory | Discrimination Act 1991 | Section 7 includes *gender identity* as a prohibited ground of discrimination. |
| Australian Capital Territory | Human Rights Act 2004 | Section 7 expressly states that the Discrimination Act 1991 works in conjunction with the Act, but s 8 provides a list of examples (not exhaustive) of prohibited discrimination which includes *sex* but not *gender*. |
| Northern Territory | Anti-Discrimination Act 1996 | Section 19 includes *sex* as a prohibited ground of discrimination, but not *gender*. |
| New South Wales | Anti-Discrimination Act 1977 | Sections 38A–38B include *transgender* as a prohibited ground of discrimination. |
| Queensland | Anti-Discrimination Act 1991 | Section 7 includes *gender identity* as a prohibited ground of discrimination. |

110 The Equal Opportunities Act 1984 (SA) was amended by the Statutes Amendment (Gender Identity and Equity) Act 2016 (SA). Sections 14–30 of the Amendment Act replaced all references to *chosen gender* in the Equal Opportunities Act 1984 with *gender identity.*

111 *O'Hara v Yarra Community Housing Ltd (Anti-Discrimination)* [2012] VCAT 1380.

112 *Gender identity* being a prohibited ground of discrimination under s 6 of the Equal Opportunity Act 2006 (Vic).

| | | |
|---|---|---|
| South Australia | Equal Opportunity Act 1984 | Section 29(2a) includes *gender identity* as a prohibited ground of discrimination. |
| Tasmania | Anti-Discrimination Act 1998 | Section 3 (interpretation section) includes definitions of *gender identity*, *transgender* and *transgenderism*. Section 16 includes *gender* and *gender identity* under the prohibited grounds of discrimination. |
| Victoria | Equal Opportunity Act 2010 | Section 6 includes *gender identity* as a prohibited ground of discrimination. |
| Victoria | Charter of Human Rights and Responsibilities 2006 | Section 8 recognises that everyone has the right to enjoy human rights without discrimination. The interpretation section in s 3 defines *discrimination* in relation to the prohibited grounds of discrimination in s 6 of the Equal Opportunity Act 2010. Section 6 of the Equal Opportunity Act 2010 includes *gender identity*, however gender identity is essentially defined in relation to trans or intersex individuals only. |
| Western Australia | Equal Opportunity Act 1984 | Sections 35AA and 35AB recognise *gender history* as a prohibited ground of discrimination. Gender history effectively refers to any trans individual. |

### E *Canada*

Canada, like Australia, has a number of provinces that recognise gender notions in their respective human rights laws. However, Canada lacks a formal legislative recognition of gender at a federal level, with s 3(1) of the Canadian Human Rights Act 1985 referring to *sex* but omitting *gender*. Interestingly, like in New Zealand, an attempt was made in 2015 to amend the Canadian Human Rights Act 1985 to include *gender identity* via a Private Member's Bill. Unfortunately, this Bill was watered down and eventually dropped in the Senate.[113] However, the current Government, under Justin Trudeau, has introduced a similar Bill that will recognise *gender identity* and *gender expression* rights.[114] This is interesting as the lower Canadian courts have consistently stated that sex-based discrimination can include gender identity discrimination anyway. In any case, it is admirable that the Canadian Liberal Party is pushing for gender diverse individuals to enjoy specific recognition in human rights legislation at a federal level despite their already-positive position in court.[115]

The possible federal law change in Canada notwithstanding, there is a huge amount of transgender case law in Canada ruling on the issue of whether or not *gender notions* can fall within *sex*. So far, the Canadian courts have consistently taken a liberal approach to this issue and have interpreted *sex* broadly to include post-operative and pre-operative trans individuals.

An appropriate starting point for these discussions is the pair of cases *Vancouver Rape Relief Society v British Columbia (Human Rights Commission)*[116] and *Waters v British Columbia (Ministry of Health Services)*.[117] Cheryl Gwyn, in her *Solicitor-General's 2006*

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113 An amendment to the Bill watered down the effectiveness of the Bill. See Janyce McGregor "Transgender rights bill gutted by 'transphobic' Senate amendment" *Canadian Broadcasting Corporation* (online ed, Toronto, 27 February 2015).

114 Bill C-16 had its Third Reading in November 2016 in the Canadian House of Commons and is currently in its Second Reading in the Senate. The long title of the Bill is: An Act to amend the Canadian Human Rights Act and the Criminal Code 2016 (C-16). See also Ashifa Kassam "Canada to introduce new laws against transgender discrimination" *The Guardian* (online ed, London, 17 May 2016).

115 See Liberal Party of Canada "Liberals Stand Up for Trans* Rights" (17 August 2015) <www.liberal.ca>.

116 *Vancouver Rape Relief Society v British Columbia (Human Rights Commission)* 2000 BCSC 889.

117 *Waters v British Columbia (Ministry of Health Services)* 2003 BCHRT 13 at [133]–[135].

*Report*, cited these cases as examples of the Canadian courts using an expansive meaning for the term *sex* in the discrimination framework.

*Vancouver Rape Relief Society* was decided by the British Columbia Supreme Court and involved a trans woman who was refused a counsellor position at the Vancouver Rape Relief Society. She argued that she had been discriminated against on the basis of her sex under the British Columbia Human Rights Code 1996. Davies J ultimately held that sex includes "transsexualism" and that a broad approach should be adopted when interpreting human rights legislation:[118]

> I do not accept the petitioner's premise that by prohibiting discrimination on the basis of sex, the legislature intended to redress only male/female social, economic and political issues. I also do not accept that its failure to amend the *1984 Act* or the *present Code* to specifically include gender identity or transsexualism as enumerated grounds of discrimination should be taken to mean that the legislature did not intend that human rights protection on the ground of sex did not extend to transsexuals. ...
>
> It is well settled law that human rights legislation is to be approached purposively giving it a fair, large and liberal interpretation with a view to advancing its objects.

However, this statement was obiter and did not bind future courts—a fact that was omitted from the *Solicitor-General's 2006 Report*. Furthermore, the case has been critiqued as being context-specific to Canada due to the application of art 15 of the Canadian Charter of Rights and Freedoms, which is more broadly worded than s 21(1) of the HRA.[119] Nevertheless, the decision is of relevance to New Zealand.

*Waters* was also cited in the *Solicitor-General's 2006 Report* as a case interpreting *sex* to include *gender notions*. The case concurred with the decision of *Vancouver Rape Relief Society* and also held that *sex* can include transsexual identities in human rights legislation.[120]

These decisions have been upheld at similar provincial levels by a large number of cases—including *Montreuil v Canadian Forces Grievance Board*[121] and *Dawson v Vancouver Police Board (No 2)*[122]—and it would seem safe to expect higher Canadian courts to follow the same approach.

The former case involved a claim by a trans woman that the Canadian Forces Grievance Board discriminated against her—on the ground of *sex*—under the Canadian Human Rights Act 1985. The claimant successfully argued that the Board did not give her the position of Senior Grievance Officer due to her transgender status. The Tribunal held that:[123]

> The Board was not able to provide a reasonable explanation justifying its decision not to hire Ms. Montreuil for a grievance officer position and for these reasons, I find that there

118 At [52]–[53].

119 McDonald, above n 10, at 306–307.

120 *Waters*, above n 117, at [133]–[135]. This case involved a transgender man, who had partially completed genital surgery, who brought a successful discrimination lawsuit against the Canadian government on the basis that the government did not pay for complete *female-to-male* surgery whereas it did pay for *male-to-female* surgery.

121 *Montreuil v Canadian Forces Grievance Board* 2007 CHRT 53.

122 *Dawson v Vancouver Police Board (No 2)* 2015 BCHRT 54.

123 *Montreuil*, above n 121, at [72].

> is a "subtle scent of discrimination". I therefore find that the Board discriminated against Ms. Montreuil on the basis of sex (transgender) contrary to sections 3 and 7 of the *CHRA*.

This is an important case as the claimant had not undergone any form of surgery for her trans status and expressed her gender only through her aesthetic choices, for instance, by her attire, behaviour and name. Thus, this case provides a persuasive precedent for New Zealand courts to recognise genderqueer and pre-operative trans individuals under s 21(1)(a) of the HRA.

The latter case, *Dawson*, involved a claim by a trans woman that the Police had discriminated against her by referring to her by her legal name (Jeffrey), providing inadequate care during her detention and taking overly exhaustive body searches on her. The tribunal held that no discrimination had arisen in regards to the searches, although discrimination did arise in regards to her medical treatment.[124] Again, it made this decision from the starting point that transgender identities fall under the discrimination category of *sex*.[125]

The Canadian cases illustrate another jurisdiction that is willing to recognise gender rights under the heading of sex-based discrimination. Together they provide an illuminating and persuasive set of cases for a New Zealand court to consider should such an issue arise.

The following table provides Canada's provincial-level response to gender and sex-based discrimination:

| **Canada** | | |
|---|---|---|
| **Province** | **Statute** | **Description** |
| Alberta | Alberta Human Rights Act RSA 2000 c A-25.5 | Like Ontario, New Brunswick and British Columbia, the Alberta HRA 2000 provides for a number of activities where certain types of discrimination are prohibited. This Act prohibits discrimination occurring in a range of activities and recognises *sex*, *gender*, *gender identity* and *gender expression*. |
| British Columbia | Human Right Code RSBC 1996 c 21 | Like the Ontario and New Brunswick Codes, the British Columbia HRC 1996 provides for a number of activities where certain types of discrimination are prohibited. This Act prohibits discrimination occurring in a range of activities and recognises *sex* and *gender identity and expression*. |
| Manitoba | The Human Rights Code SM 1987 c H175 | Section 9(2) recognises *sex* and *gender identity* as prohibited grounds of discrimination. |
| Manitoba | The Discriminatory Business Practices Act SM 1987 c D80 | This Act relates to the running of a business. Section 1(1) recognises that *sex* is a prohibited "attribute" to discriminate against. The Act is silent on the matter of *gender*. |
| New Brunswick | Human Rights Act NSNB 2011 c 171 | Like Ontario, British Columbia and Alberta, the New Brunswick HRA 2011 provides for a number of activities where certain types of discrimination are prohibited. This Act prohibits discrimination occurring in a range of activities and recognises *sex* but not *gender*. |
| Newfoundland and Labrador | Human Rights Act SNL 2010 c H13.1 | Section 9(1) recognises *sex*, *gender identity* and *gender expression* as prohibited grounds of discrimination. |
| Nova Scotia | Human Rights Act RSNS 1989 c 214 | Section 5 recognises *sex*, *gender identity* and *gender expression* as prohibited grounds of discrimination. |

124 *Dawson*, above n 122, at [253] and [269].
125 At [39].

| | | |
|---|---|---|
| Ontario | Human Rights Code RSO 1990 c H19 | Like British Columbia, Alberta and New Brunswick, the Ontario Human Rights Code 1990 provides for a number of activities where certain types of discrimination are prohibited. This Act prohibits discrimination occurring in a range of activities and recognises *sex*, *gender identity* and *gender expression*. |
| Prince Edward Island | Human Rights Act RSPEI 1988 c H-12 | Section 1 recognises *sex*, *gender identity* and *gender expression* as prohibited grounds of discrimination. |
| Quebec | Charter of Human Rights and Freedoms CQLR c C-12 | Section 10 recognises *gender identity or expression* as prohibited grounds of discrimination. |
| Saskatchewan | The Saskatchewan Human Rights Code SS 1979 c S-24.1 | Section 2(1)(m.01) recognises *gender identity* as a prohibited ground of discrimination. Interestingly, s 2(1)(o) states that *sex* also includes *gender*. |

## V A Proposed Gender-Rights Model

### A *Summary of foreign law*

As we can see, the international trend in interpreting the use of *sex* in human rights legislation has been to interpret the term liberally. Therefore, there is a solid base of persuasive foreign precedents which New Zealand courts can turn to for guidance. However, despite this, there are two problems with this body of precedents.

First, most of these cases involved a trans individual who had undergone some form of transgender surgery or hormone treatment. Even if New Zealand's courts decide to include gender under s 21(1)(a), it remains unclear whether the courts would require some level of medical commitment before protecting a gender diverse person from discrimination. This lack of clarity is concerning as it points to the real possibility that a significant portion of this community could lack protection against discrimination if they did not have medical treatment.

Secondly, a reliance on the courts to interpret *sex* to include *gender* still ignores the symbolic importance of a democratic and legislative response to this issue. Federal and state-level laws of Australia and provincial-level laws in Canada show that these jurisdictions have chosen to include gender rights in their human rights legislation not only in order to better recognise gender identity rights but also to demonstrate their commitment to gender diverse communities. The Parliament of Canada's recent second reading of a gender rights Bill, in the Senate, also serves to emphasise how the need to recognise gender diverse identities is growing and provides a signal to other jurisdictions that the human dignity of gender diverse people deserves protection.

How then can these findings be used to inform a possible future amendment to s 21(1) of the New Zealand HRA with the intention to better protect gender diverse people?

### B *A potential legislative model for New Zealand*

New Zealand should begin by expressly including *gender identity* and *gender expression* in s 21(1) of the HRA. This is the response that the Canadian Provinces of Alberta, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and Quebec have commendably taken. It is also the approach which the Canadian Federal Government is

currently undertaking. Additionally, it would be ideal for s 2(1)—the interpretation section—to include wide definitions of *gender identity* and *gender expression*. So long as these concepts are broadly defined, the courts will be able to protect *all* gender diverse individuals in situations covered by the Act and not only post-operative trans individuals.

The need for a widely-defined gender-provision is also illustrated by the South Australian case *Williams v Independent Pub Group t/a Brahma Lodge Hotel*.[126] In that case the District Court was limited in its ability to protect gender identity rights because the non-discrimination law only protected trans individuals who were in a constant state of living in their adopted gender expression.

The Australian Human Rights Commission's 2011 Report on *Addressing sexual orientation and sex and/or gender identity discrimination* found that a broadly defined gender identify provision was more desirable than one that was defined narrowly.[127] It pointed to state-level anti-discrimination legislative terms that were limited in their ability to provide broad-level gender identity protection.[128] For instance:[129]

> 'Chosen gender' implies a choice, which many gender diverse people do not feel they have, believing their condition to be innate.
>
> 'Gender history' is problematic for those at the beginning of a transition and those who are not seeking medical or surgical treatment.
>
> 'A gender reassigned person' is particularly problematic for those who for various reasons (such as cost, personal choice, or pre-existing medical conditions) do not seek medical or surgical treatment. Gender diverse people require protection whether or not they pursue reassignment treatments.
>
> 'Recognised transgender person'—recognised by whom? This also does not cover sex and/or gender diverse people who do not identify with terms such as transgender.
>
> 'Transsexuality' is a term referring to only one group of people, and not embraced by all sex and/or gender diverse people.

Thus, New Zealand should adopt the broadly defined terms of *gender identity* and *gender expression* if it wishes to provide the best protection for gender diverse individuals.

Section 21(1) of the HRA would also benefit from the inclusion of the catch-all provision of *other status*, an amendment in line with art 14 of the ECHR. The ECtHR, for instance, has applied it to a number of areas, including fatherhood, marital status, membership of an organisation, and place of residence.[130] However, including an *other status* provision in the HRA would require further research to explore the possible consequences of having this broad catch-all non-discrimination right.[131] Having this non-exhaustive ground of discrimination in s 21(1) would also allow the courts to ensure that any new developments in gender rights that were not covered by *gender identity* and *gender expression*

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126 *Williams*, above n 107.

127 Australian Human Rights Commission *Addressing sexual orientation and sex and/or gender identity discrimination: Consultation report* (2011) at 26–27.

128 At 26.

129 At 27.

130 European Union Agency for Fundamental Rights *Handbook on European non-discrimination law* (Publications Office of the European Union, Luxembourg, 2011) at 118.

131 Another possible amendment to s 21(1) would be to include *intersex* as a prohibited ground of discrimination. This is an approach that the Australian Federal Parliament took in its Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013.

provisions would likely be safeguarded too. However, I contend that the recommendation to include *other status* is not as paramount as including specific *gender* rights in the HRA.

These amendment suggestions for the HRA would look something like the proposal below:

**2 Interpretation**

(1) In this Act, unless the context otherwise requires,—

...

**gender expression** refers to how someone expresses their sense of, or lack of, gender which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means and other expressions of gender, including dress, speech, name and mannerisms

**gender identity** refers to each person's deeply felt internal and individual experience of gender, or lack of gender, including the personal sense of the body, which may or may not correspond with the sex assigned at birth

...

**21 Prohibited grounds of discrimination**

(1) For the purposes of this Act, the *prohibited grounds of discrimination* are—

(a) sex, which includes pregnancy and childbirth:

(aa) gender, which includes gender identity and gender expression:

...

(m) sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation:

(n) other status.

The suggested definitions in cl 2(1) above are widely framed and can capture all non-binary forms of gender, such as trans, genderqueer and agender persons. They are essentially a hybrid of the accepted definitions that New Zealand's Human Rights Commission,[132] the European Parliament Directorate General for Internal Policies Policy Department,[133] the Ontario Human Rights Commission[134] and the Australian Human Rights Commission[135] used in their past reports on trans rights. Including such definitions would put New Zealand at the forefront of progressive non-discrimination legislation and would be meeting one of the principles of The Yogyakarta Principles, a set of best-practice legislative human rights standards relating to gender and sexuality.[136]

132 Human Rights Commission, above n 5, at 12.
133 Castagnoli, above n 23, at 3.
134 Ontario Human Rights Commission, above n 20, at 3.
135 Australian Human Rights Commission, above n 127, at 5.
136 "The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity" (March 2007) The Yogyakarta Principles <www.yogyakartaprinciples.org> at 10–11. The Yogyakarta Principles are a collection of gender and sexuality human rights principles that were adopted by a group of human rights experts at a meeting from 6 to 9 November 2006 at the Gadjah Mada University in Yogyakarta, Indonesia.

## VI Conclusion

The title of this article is a reference to Judith Butler's seminal *Gender Trouble*, a post-structural feminist commentary that pointed to the socially constructed and performative nature of gender and sex.[137] The book was written at a time of expanding academic thought on gender and sexual issues, although it has only been in recent years that Western societies have begun to recognise, at a mainstream level, the identities and rights of gender and sexual minorities. In light of these changing social perceptions, it is evident that s 21(1) of the HRA is in need of reform if it is to remain relevant to, and reflect, society's values.

This article is a challenge to the New Zealand legislature to find the courage and political will to amend s 21(1) to better protect those who do not fit within the *conventional* gender binary of Western society. It is clear that a grey area of interpretation remains for the New Zealand judiciary regarding the issue of whether gender identity rights can arise in s 21(1)(a) and, if so, to what extent. Having examined our common law neighbours and the EU, it is apparent that New Zealand should adopt a broad *gender* provision in the HRA. Doing so will secure New Zealand a position at the vanguard of human rights legislation and demonstrate that gender diverse communities deserve express acknowledgment in human rights legislation.

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137 Butler, above n 1.