

Human Rights (Gender Identity) Amendment Bill

Member's Bill

Explanatory note

General policy statement

This Bill provides for “gender identity” to be included as one of the prohibited grounds of discrimination in section 21 of the Human Rights Act 1993.

Gender identity

Discrimination against individuals on a number of grounds is prohibited in respect of specified grounds or groups of individuals by section 21 of the Human Rights Act 1993. While the majority of people in society identify during their lives with the gender with which they are born, some do not. People whose identification with a gender different from that with which they are born, often known as “transgendered” people, are subjected to discrimination in employment, housing, and in some matters covered by the law. Transgendered people are not referred to in section 21, and thus appear not to be protected by the anti-discrimination provisions of the Human Rights Act 1993. The Bill will afford protection from discrimination on the grounds of “gender identity” to those to whom the definition of **gender identity** applies, for the same reasons that other grounds of discrimination are prohibited.

It has never been tested in the courts whether “sex” in section 21(1)(a), or “sexual orientation” in section 21(1)(m) cover transgendered people. While it may be arguable that “sex” may do so (and it appears that the arguments go both ways), it is unlikely that sexual orientation would do so, because gender identity is, quite simply, not a sexual orientation. Much discrimination occurs at a

day-to-day level, making a “test case” through litigation highly unlikely or impractical.

Explicit reference to transgendered people, in terms of the words “gender identity” is necessary to put the issue beyond doubt. Explicit reference to “gender identity” provides transgendered people with the ability to point to a clear statement of law indicating that discrimination against them is prohibited, thereby increasing the chances of preventing such discrimination from ever taking place.

Gender identity is outlined in the Bill as referring to “the 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”. This includes transgendered people, who are born one gender but identify with the other gender. It also includes those known as “intersex”, who are of indeterminate gender at birth, but who are assigned a gender with which they later do not identify.

“Labels” used by those the Bill is designed to protect

The definition to be included in section 21 of the Human Rights Act 1993 provides that gender identity “may include persons who call themselves transsexual, transvestite, transgender, cross-dresser, or other description”. This is intended to ensure that the labels that individuals may place upon themselves, or which may be placed upon them by others, do not determine whether that individual comes within the provisions of the Act. The provisions of the Act apply to those for whom identification with a different gender from their original birth gender, or assigned birth gender, is a reality. Thus the list is intended to be indicative only, and not exclusive. Gender identity is defined as more than simply dressing in the clothes of the opposite gender.

“Assigned” gender

Some individuals who may be of indeterminate gender when they are born, and who are sometimes know as “intersex”, are usually assigned a gender at birth. Sometimes, but not always, intersex people are assigned the “wrong” gender. The section is intended to apply to an individual for whom that assigned gender is not the gender the individual identifies with later in life.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides for the Bill to come into force on the day after the date on which it receives the Royal assent.

Clause 3 sets out the purpose of this Bill.

Clause 4 sets out the words to be inserted into the Human Rights Act 1993.

Clause 5 sets out exceptions to the prohibition on discrimination on the ground of gender identity that relate to authenticity and privacy.

Clause 6 redefines “sex” in certain sections of the Human Rights Act 1993, to include “gender identity” as appropriate

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The Parliament of New Zealand enacts as follows:

1 Title

(1) This Act is the Human Rights (Gender Identity) Amendment Act **2004**.

(2) In this Act, the Human Rights Act 1993¹ is called “the principal Act”.

¹ 1993 No 82

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Purpose

The purpose of this Act is to include gender identity in the prohibited grounds of discrimination in section 21(1) of the principal Act. 10

4 Prohibited grounds of discrimination

Section 21(1) of the principal Act is amended by adding the following paragraph: 15

“(n) gender identity, which refers to the 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.”

- 5 Exceptions in relation to authenticity and privacy** 5
Section 27(2) of the principal Act is amended by inserting, after the words “political opinion”, the words “, gender identity”.
- 6 Definition of sex for purposes of sections 27(4), 45, 46, 47, 58(1), and 59 of principal Act** 10
For the purposes of sections 27(4), 45, 46, 47, 58(1), and 59 of the principal Act, **sex** includes gender identity, as appropriate.