

19 February 2021

██████████  
Speak Up For Women

By email to: [contact@speakupforwomen.nz](mailto:contact@speakupforwomen.nz)

Tēnā koe ██████,

**Re. Speak Up for Women's opinion/submission on the Human Rights Commission's Prism report**

Thank you for your email dated 22 October providing the Human Rights Commission (the Commission) with a copy of Speak Up for Women's feedback on our Prism report published in June 2020.

With my colleagues Commissioner Saunoamaali'i Dr Karanina Sumeo and ██████████, we met with you and ██████████ at our Wellington offices on 1 December to discuss your feedback. Thank you for giving us your time. I also acknowledge your subsequent follow-up email on 8 December sharing information and links from the UK.

As we stressed in our meeting, the Commission is dedicated to supporting and promoting human rights for everyone, including the rights of women and transgender persons. The Equal Employment Opportunities Commissioner, Dr Sumeo, has a particular interest in promoting the economic, social, and employment interests of women. You may wish to explore some of our past and current work in the area of women's rights, including the [Tracking Equality at Work](#) report and interactive tool, [our documentary](#) on the 125<sup>th</sup> anniversary of the suffrage movement, [calls to amend](#) Equal Pay legislation, and the recently announced [Inquiry into the Pacific Pay Gap](#). The Commission has also been involved in other issues closely aligned with women's rights, such as our submission to the Law Commission regarding abortion law reform.<sup>1</sup>

We have considered your submission and comments in our face-to-face meeting, including your concerns that women's rights are being subsumed or usurped by the rights of transgender people. We do not share the view that the rights of women and transgender people are at odds with each other. Indeed, all people have the same human rights and freedoms and are born free and equal in dignity and rights.

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<sup>1</sup> New Zealand Human Rights Commission [Submission of the Equal Employment Opportunities Commissioner on Abortion Law Reform](#) (2018)

As described at our face-to-face meeting - and in the report itself - the process to begin drafting Prism began in 2018 with public consultation meetings open to all people with a diverse sexual orientation, gender identity and expression, and sex characteristics (SOGIESC). These were publicly advertised on our Facebook page (for Auckland,<sup>2</sup> Wellington,<sup>3</sup> and Christchurch<sup>4</sup> respectively). Through the feedback and information gathered, the Commission established clarity around the top human rights issues for the communities we spoke to. These included the right to be free from discrimination, the right to information and to recognition before the law, as well as rights to health, education, and work. A chapter is devoted to each.

Each of the six chapters presents up to date information on the selected right as well as recommendations to organisations, individuals, and decision makers to advance that right in New Zealand. These recommendations came directly from the communities we spoke to and were not constructed by the Commission itself. A best-practice process to researching and writing the report was followed, using a consultative approach with affected communities. Extensive citations and footnotes are included throughout the publication; many from the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

As noted in the Executive Summary and Conclusion, Prism did not seek to be exhaustive nor detailed. Instead, it sought to provide an introduction to these six issues in the New Zealand context and assist in providing a baseline understanding for future discussion and collaboration. For example, the report does not cover housing, religion, adoption, conversion practices, insurance, blood donation, justice and police, sport, and others.

The six issues explored in Prism are all linked to either the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, or International Covenant on Economic, Social and Cultural Rights. The long title to the Human Rights Act states that it is “An Act... to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights.” Human rights in Aotearoa New Zealand must also be grounded on Te Tiriti o Waitangi and must be contextualised to reflect Te Ao Māori values. This includes the pre-existing rights and mana motuhake of Māori as tangata whenua, the guarantee of tino rangatiratanga and the right to self-determination. The report endeavours to honour this approach.

You have provided feedback on the definitions used in the Prism report. Human rights law in New Zealand is also recognised as a “constantly evolving process.”<sup>5</sup> The meaning of law must be ascertained from its text and in the light of its purpose, including indications provided in the enactment (such as preambles and headings), and other relevant considerations.<sup>6</sup> In short, interpreting the words and provisions of the Human Rights Act broadly and generously, taking into account international human rights law and jurisprudence (including work such as the *Yogyakarta Principles*), Te Ao Māori values, and the purpose of the legislation, is an appropriate valid approach.

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<sup>2</sup> <https://www.facebook.com/events/2406807599545558/>

<sup>3</sup> <https://www.facebook.com/events/181113329308853>

<sup>4</sup> <https://www.facebook.com/events/1509054135815738/>

<sup>5</sup> Ministry of Justice Discussion Paper: Re-Evaluation of the Human Rights Protections in New Zealand (Ministry of Justice, Wellington, October 2000) at [4].

<sup>6</sup> Interpretation Act 1999, section 5.

Accordingly, the Commission has interpreted the Human Rights Act to include gender identity since at least 2005. In 2006, the acting Solicitor-General wrote a legal opinion concluding that transgender people were covered by the Human Rights Act.<sup>7</sup> More specifically, the opinion found that the prohibition of discrimination on the ground of sex in the Act includes prohibition on the ground of gender identity, even without its express inclusion.

While drafting the report, we carefully considered international definitions and sources to inform our work. We affirmed the definitions from the *Yogyakarta Principles* as they are internationally respected, cited, and drawn upon in the SOGIESC human rights space, including by UN bodies and mechanisms. It is not a mischaracterisation to state that the Principles apply existing international human rights law to sexual orientation, gender identity and expression, and sex characteristics as you state in your submission; indeed, this is the long title to the document.<sup>8</sup>

As cited in footnote 20 of the Prism report, former member of the UN Human Rights Committee and current Director of the EU Agency for Fundamental Rights, Michael O’Flaherty, [drew together the jurisprudence](#) to go alongside the Principles.<sup>9</sup> The Statute of the International Court of Justice confirms that judicial teachings from the most highly qualified publicists of various nations may be applied as a subsidiary means for the determination of rules of law.<sup>10</sup>

I agree, the *Yogyakarta Principles* are not legally binding. But it is common practice for international non-binding norms to inform, deepen, and interpret legally binding commitments. There are numerous examples of this, such as the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1985), the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1987), as well as the *Yogyakarta Principles* (2007). This well-established normative and interpretive process is consistent with the ‘living instrument doctrine’ which has been applied by important human rights bodies, such as the European Court of Human Rights. The New Zealand Courts as well as the Human Rights Review Tribunal have similarly had regard to non-binding international human rights statements when interpreting New Zealand law.<sup>11</sup>

Our work in the Prism report was also informed by non-Western understandings of sex and gender, including Te Ao Māori. You have stated that a belief in an innate gender identity is a relatively new concept, and that we have conflated terms in the Human Rights Act with “new niche cultural concepts like gender diverse, non-binary, pangender, etc”. As we specified in the report, Indigenous peoples with diverse sexual orientations, gender identities and expressions, and sex characteristics have existed throughout history in innumerable cultures, populations and religions, including in the Pacific. Diverse identities, expressions and practices were accepted as a normal part of Te Ao Māori prior to the colonisation of Aotearoa. Gender diversity and gender expression beyond the binary is

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<sup>7</sup> Cheryl Gwyn “[Crown Law opinion on transgender discrimination](#)” (23 August 2006).

<sup>8</sup> [The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity](#) (Geneva, 2007)

<sup>9</sup> Professor O’Flaherty was previously Established Professor of Human Rights Law and Director of the Irish Centre for Human Rights at the National University of Ireland. He has served as Chief Commissioner of the Northern Ireland Human Rights Commission, Member of the UN Human Rights Committee, and head of a number of UN Human Rights Field Operations. He was also rapporteur for the development of the *Yogyakarta Principles*.

<sup>10</sup> [Statute of the International Court of Justice, Article 38\(1\)\(d\)](#).

<sup>11</sup> See, for example, *Wall v Fairfax* [2017] NZHRRT 17 at [140] and [147] or *R v Whatarangi Rawiri* (2002), High Court at Auckland, T014047, per Fisher J at [7].

not a new concept, nor is it a niche cultural concept; rather, it is reflected across a wide range of cultures and societies.

We have considered your feedback on the term “assigned at birth.” In our view, this term reflects the process by which a baby’s sex is recorded on their birth certificate at or soon after birth. Although some mothers and pregnant people may get information about their baby’s sex before birth (usually through an ultrasound visual identification), the sex is not and cannot be formally recorded until the baby is born and a birth certificate is issued.

Much of your original submission details your concerns about women in sport. As noted above, sporting rights are not addressed substantively in the Prism report. The report mentions the gendered and binary organisation of some sports, and the overt homophobia, biphobia, and transphobia pervasive in those spaces. This statement was made with reference to an international study on the prevalence of homophobia in sporting codes.<sup>12</sup>

You have commented that the Prism report is “at odds” with section 49 of the Human Rights Act. Section 49(1) permits the exclusion of people of one sex from participating in a competitive sporting activity in which the strength, stamina, or physique of competitors is relevant. The exception permits *but does not require* excluding competitors from sporting activity. Indeed, the onus is on those wanting to exclude trans women from women’s sport to make the case for doing so. This exception does not apply to non-competitive sport or recreation, or to competitive sport where a player’s strength, stamina or physique does not give them a competitive advantage.

The application of section 49 needs to be determined on a case by case basis. Transgender people, like all people, have the right to be free from discrimination on the basis of their gender identity and expression. A restriction on a human right (for example the right not to be discriminated against) can only be justified to the extent that it is necessary and proportionate. If the Commission received an individual complaint of sex or gender discrimination in sport, we would work with the individual and the organisation to discuss the perceived discrimination and whether it is reasonable for the organisation to apply section 49 in that particular situation. This is the case for all ‘positive discrimination’ provisions contained within the Act.

The Human Rights Commission deplores violence against lesbian, gay, bisexual, transgender, and intersex people based on their sexual orientation, gender identity or expression, and sex characteristics. We appreciate you raising the concerns regarding the placement of transgender prisoners. We work with the Department of Corrections to ensure that the rights of trans prisoners are equally upheld; all people deserve the right to safety in prison. We have carefully studied your sources from the UK and elsewhere, but consider that these sources do not support the need for trans prisoners to be segregated from others as a general rule. We strongly object to generically characterising trans women as a safety risk to cisgender women.

Thank you very much for contacting us with your feedback. The Commission is immensely proud of the Prism report. We remain steadfast in our support of trans people, and women, and trans women, and stand behind the work we produced through a best practice, consultative approach. We are currently considering a future work programme arising from the Prism report. If we develop

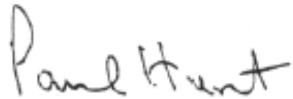
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<sup>12</sup> Erik Denison and Alistair Kitchen “[Out on the fields: The first international study on homophobia in sport](#)” (Australian Sports Commission, Canberra, 2015).

further reports or research, we will again engage with affected communities on a transparent and consultative basis. Of course, you would be more than welcome to provide your comments on any future work.

In the interests of full transparency, we respectfully invite you to share this correspondence on your website alongside your submission and subsequent email to us.

Ngā mihi,

A handwritten signature in black ink that reads "Paul Hunt". The signature is written in a cursive, slightly slanted style.

**Paul Hunt**

Chief Commissioner | Te Amokapua

New Zealand Human Rights Commission | Te Kāhui Tika Tangata