

Ref: 204806, 204879 & 204880

Thursday 8 October 2020

K Issac

By email to fyi-request-13803-bce969da@requests.fyi.org.nz

Tēnā koe K,

Response to your request for Official Information

On 14 September 2020, you requested the following information from the Human Rights Commission ("the Commission"):

1. *What is the HRCs definition of "sex"*
2. *What is the HRCs definition of "gender" If your definition includes the word identifies (or a variation of) please also include your definition of that.*
3. *What is the HRCs definition of "gender identity or expression" If your definition includes the word identifies (or a variation of) please also include your definition of that.*
4. *What is the HRC's definition of "transgender"? If your definition includes the word identifies (or a variation of) please also include your definition of that.*
5. *On what basis has the HRC determined/interpreted that the prohibited grounds of discrimination under Section 21(1)(a) on the basis of "sex, which includes pregnancy and childbirth" (as stated in the Act) also includes gender identity and expression?*
6. *What (if any) New Zealand case law supports this interpretation?*
7. *Any consideration, advice, correspondence (of all forms, internal or external) etc on the inclusion of gender identity and/or expression as a separate classification of prohibited discrimination under Section 21 of the Human Rights Act.*
8. *On what basis does the HRC state that "The Yogyakarta Principles set out the international human rights standards that all countries must meet to uphold the human rights of sexual and gender minorities" (references <https://www.hrc.co.nz/your-rights/our-work/> and <https://www.hrc.co.nz/your-rights/your-rights6/>) given that these principles:*
 - a. *Are NOT recognized in international human rights law*
 - b. *Have no legal status (either in New Zealand or internationally)*

c. *Have never been accepted or ratified by the United Nations*

The Commission's definition of "sex" under s 21 of the Human Rights Act

In response to questions 1-4 above, that information is publicly available on the Commission's webpage [Trans people: facts & information](#) particularly the [Terminology](#) resource.

In response to question 5, since 2005, the Commission has interpreted sex under s21(1)(a) of the Human Rights Act 1993 to include an individual's gender identity, gender expression and sex characteristics. I have **attached** the Human Rights Commission 2005 Policy on the Application of the Act to transgender people.

In response to question 6, while this matter is yet to be determined by the New Zealand Courts, this interpretation was supported by a 2006 Crown Law opinion by the Acting Solicitor General.¹

In response to question 7, we have found no information relating to the inclusion of gender identity and/or expression as a *separate* classification of prohibited discrimination under Section 21 of the Human Rights Act. However, the Commission has recommended the government give consideration to the broader issue of whether the New Zealand framework should expressly define and recognise the right to gender identity,² and update relevant laws and policies to enable transgender people to realise their right to self-identity in accordance with international human rights obligations.³ Recommendations to amend the Human Rights Act to specifically include gender identity under s21 have been made to the New Zealand Government in the latest Universal Periodic Review⁴ and by the Committee on the Elimination of Discrimination against Women.⁵

For further information, please see the Commission's publicly available report [PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expressions, and Sex Characteristics in Aotearoa New Zealand](#).

The Yogyakarta Principles

The information you requested is publicly available in [PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expressions, and Sex Characteristics in Aotearoa New Zealand](#).

¹ Publicly available on the beehive website, Crown Law [Human Rights \(Gender Identity\) Amendment Bill](#), accessed 30 September 2020.

² See Human Rights Commission, *Submission on Births, Deaths, Marriages, and Relationships Registration Bill*, March 2019, publicly available [here](#).

³ See *Submission of the New Zealand Human Rights Commission to New Zealand's Third Universal Periodic Review*, July 2018, publicly available [here](#).

⁴ 4 Human Rights Council Working Group on the Universal Periodic Review [Report of the Working Group on the Universal Periodic Review: New Zealand](#) UN Doc A/HRC/41/4 (1 April 2019) at [122.51] and [122.52].

⁵ Committee on the Elimination of Discrimination against Women [Concluding observations on the eighth periodic report of New Zealand](#) UN Doc CEDAW/C/NZL/CO/8 (25 July 2018) at [12(a)].

We refer you specifically to page 9 provided below (**emphasis added**):⁶

International human rights law applies to all people, including SOGIESC-diverse people, without exception. While there is no explicit covenant or convention that has as its stated purpose the elimination of discrimination against people with a diverse sexual orientation, gender identity and expression, or sex characteristics, the rights of SOGIESC diverse people are firmly anchored in existing and binding human rights treaties. The Yogyakarta Principles, adopted in 2007, apply existing international human rights law to sexual orientation, gender identity and expression, and sex characteristics. They address a broad range of human rights and emphasise that SOGIESC-diverse people have the rights to universal enjoyment of all human rights, including non-discrimination and recognition before the law.⁷ **While not themselves legally binding, the Principles affirm existing legal standards that States have agreed to be bound by. They are not a wish list of aspirational goals; every statement and recommendation in the document is grounded in existing obligations under international human rights law and binding human rights treaties.**⁸ **The Yogyakarta Principles have been well tested as sources of interpretation, having been cited hundreds of times at the United Nations Human Rights Council; in bills, legislation, and executive policy; and court decisions.**

In 2017, a supplementary paper to the original Principles was published: the Yogyakarta Principles plus 10.⁹ These additional Principles articulate the following ten years' progressive understandings of existing human rights relevant to SOGIESC; such as the right to legal recognition, the right to sanitation, and the right to protection from poverty.

Alternative avenues

If you are unhappy with this response, under the Official Information Act you are entitled to complain to the Ombudsman's Office. Information about how to make a complaint is available at www.ombudsman.parliament.nz or on freephone 0800 802 602.

If you have any further queries about this response, please feel free to contact me directly.

Nāku noa, nā

Jaimee Paenga
Legal Adviser

⁶ Please note the footnote numbering is different in this document than in the report itself, however the content remains as published.

⁷ [The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity](#) (Geneva, 2007).

⁸ Gwyneth Williams [Jurisprudential annotations to the Yogyakarta Principles](#) (University of Nottingham Human Rights Law Centre, 2007).

⁹ [The Yogyakarta Principles plus ten: Additional principles and state obligations on the the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles](#) (Geneva, 2017).