Coversheet

Submission from the Aotearoa New Zealand's Sexual Orientation, Gender Identity and Intersex (SOGII) UPR Coalition 2013

This submission was developed following an April 2013 video-conference in three cities in New Zealand (Auckland, Christchurch and Wellington) that focused on sexual orientation, gender identity and intersex / body diversity (SOGII) human rights issues.

Our communities are diverse. Some common identities in New Zealand include trans, transgender, transsexual, genderqueer, whakawahine, tangata ira tane, fa'afafine, fakaleiti, vakasalewalewa, mahu, palopa, and many sexualities. In Aotearoa / NZ an indigenous term for all our identities is takataapui. We do not claim to represent all of these voices, or all of the diverse voices in Aotearoa. Our intention is to provide a snap-shot of the real and enduring issues which arose at the April meeting and which were explored further by a *Facebook* page devoted to this UPR submission. We believe that this is the first time a coalition of individuals and groups has come together, on these issues, to write a submission to any United Nations reporting mechanism. We have used the term SOGII throughout the submission to capture, but not reduce, our complex diversity.

There are no New Zealand organisations from our communities that have ECOSOC status. The signatories below include key, long-established national and regional organisations working on human rights issues for intersex people (Intersex Trust Aotearoa- http://www.ianz.org.nz), trans and gender diverse people (GenderBridge – www.genderbridge.org and Agender Christhcurch - http://chch.agender.org.nz/), youth (Rainbow Youth - http://www.rainbowyouth.org.nz/ and Queer Straight Alliance Network Aotearoa - http://www.qsanetwork.org.nz) as well as those focused on our communities' right to health (the NZ AIDS Foundation - http://www.nzaf.org.nz/ and Women's Health Action - http://www.womens-health.org.nz/) and right to work (Out@Work - http://union.org.nz/outatwork).

The submission contains four annexes:

Annex 1: The 3 page summary of this submission
Annex 2: Full list of our recommendations.
Annex 3: Definition of Terms
Annex 4 Standards for a Depathologised Approach to Trans Health Services

Signatories:

- **Rainbow Youth Aotearoa**
- **Intersex Trust Aotearoa**
- **Queer Straight Alliance Network Aotearoa**
- **Women's Health Action Trust**
- **GenderBridge**
- **Agender Christchurch**
- **Nautilus Creative Trust**
- **New Zealand AIDS Foundation**
- **New Zealand Council of Trade Unions' Out@Work Council**
- **Legalise Love Aotearoa**
- **TransAdvocates**

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RIGHTS TO UNIVERSAL ENJOYMENT OF HUMAN RIGHTS, NON-DISCRIMINATION AND RECOGNITION BEFORE THE LAW

Statistics

1. New Zealand does not collect population-based data on self-identified sex, sexual or gender diversity through our major mechanism, the New Zealand census. Only male and female options are available for sex/gender and there is no sexual orientation question in the census or in the NZ Health Survey. The Human Rights Commission highlighted this data gap as a priority area for action in its December 2010 assessment of human rights issues for sexual and gender minorities.[1]
2. The lack of population based data compounds the invisibility of sexuality, sex and gender diverse people and/or the discrimination we experience, often based on ignorance or fear (including homophobia, biphobia, transphobia). These experiences remain anecdotal, which creates difficulties in building effective responses.
3. Other New Zealand state institutions take their lead from Statistics New Zealand, and rarely collect sexual orientation or gender identity data or enable people to self-identity their sex as other than *male* or *female*.
4. While we know our social and health outcomes are often worse than others (including self-harm, bullying, violence, suicidality, unwanted sexual experiences, intimate partner violence) these experiences are under-reported to and/or poorly recorded by state organisations such as New Zealand Police and the education and health sectors. This becomes a self-perpetuating cycle as absence of data makes it difficult to develop effective policies to address the discrimination, marginalisation and disadvantage experienced by our communities.
5. The limited data that does exist raises significant alarm bells for our communities. The Youth 2001 and 2007 surveys showed same-sex and both-sex attracted youth faced significant health disparities compared to heterosexual young people. As a 2009 report notes, these include elevated levels of mental ill-health, self-harm, suicide attempts, alcohol and drug use, sexually transmitted infections and mental ill-health.[2]
6. The report referenced above was only possible because community organisations paid for the data to be analysed. A follow-up survey was conducted in 2012. It is imperative that specific analysis of this survey data, and collection and analysis of other data on outcomes for our communities, is funded by government agencies as those who are charged with meeting the health and educational needs of all young people.

We recommend that the New Zealand Government be directed to:

a) require Statistics New Zealand to collect data on the self-identities of sex, gender and sexually diverse people, in consultation with those communities and the Human Rights Commission, including in the next census, NZ Health Survey and other key surveys
b) ensure this information is used to inform state responses including, but not restricted to, diversity training for professionals in the education, health and justice sectors and the development and funding of resources and services for our communities
c) standardise these categories for collection of information by government agencies (including public hospitals and schools) about the experiences of sex, gender and sexually diverse people
d) prioritise improving data collection about sex, gender and sexually diverse people's use of health services and their health outcomes

Legal Recognition

7. The April 2013 passage of the Marriage (Definition of Marriage) Amendment Act has effectively resulted in formal legal equality for sexual minorities in New Zealand. However legal equality is yet to be realised for intersex and trans people who continue to face significant barriers when attempting to obtain consistent official documentation that reflects their sex and/or gender identity.
8. This is in breach of the Yogyakarta Principles (YP) requirement that governments "*take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity*".[3]

Legal recognition for gender diverse / trans people

9. In order for a trans person to amend the sex details on their birth certificate, New Zealand law requires them to undergo medical treatment resulting in "*physical confirmation that accords with the[ir] gender identity*".[4]
10. In the January 2008 final report of the NZ Human Rights Commission's *Transgender Inquiry*, the relevant government agency stated "*our understanding is that The Family Court has often interpreted this to mean that full gender reassignment surgery is required . . . [however] a court might determine that 'appropriate' [medical treatment] means that substantive, but not complete, surgery has taken place*".[5]
11. The Inquiry recommended that the legal threshold be simplified, based on a trans person having "*taken decisive steps to live fully and permanently*" in their chosen gender identity. To date, there has been no amendment to the law. A June 2008 Family Court decision, Re Michael, clarified that the Family Court does not always require full gender reassignment surgery.[6] However, subsequently, other Family Court judges have required such evidence.[7] Without a binding decision from a higher court, or a change to the underpinning legislation, there is no guarantee that individual trans people seeking to amend their birth certificate, will not be required to have surgical or medical procedures that result in sterilisation.
12. Since 2009, a number of domestic courts around the world have ruled that "*not only does enforced surgery result in permanent sterility and irreversible changes to the body, and interfere in family and reproductive life, it also amounts to a severe and irreversible intrusion into a person's physical integrity*".[8] Furthermore Principle 3 of the Yogyakarta Principles states, "*no-one should be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity*". New Zealand law in relation to amending sex details on a birth certificate is in breach of this requirement.
13. New Zealand law has not kept pace with developments in other jurisdictions, including the 2012 Argentinean Gender Identity Law, which enables sex details on a birth certificate and national identity card to be amended based solely on self-identification, with no medical or surgical treatment required. This same approach has now been proposed in Ireland's Gender Recognition Bill 2013. The Argentinean law also enables a child under the age of 18 to change the sex details on their birth certificate. Such applications must be made through the child's legal parent or guardian, with the child's explicit agreement and taking into account the evolving capacities and best interests of the child, as expressed in the United Nations Convention on the Rights of the Child.
14. In New Zealand, such a focus on self-identification underpins the November 2012 change to the Passports Office's policy for trans and intersex people.[9] In line with international best practice, such an approach should be extended to the process for obtaining a birth certificate and other

official documents. The new passport policy also applies to children under the age of 18, though explicitly requires a statutory declaration indicating the child has the support of a parent / legal guardian and a registered counsellor or other health professional.

15. In June 2013 the New Zealand Transport Agency announced it will adopt a similar statutory declaration process as the Passports Office, enabling people to choose the sex / gender details listed on their driver's license record. The minimum age for a learner license in New Zealand is 16.[10]

Legal recognition for intersex people

16. In New Zealand a person's sex can be recorded as indeterminate at the time of birth if it cannot be ascertained that the person is either male or female. However most intersex people are recorded on a birth certificate as either as male or female. Those who wish to change those details back to 'indeterminate' have to go through the Family Court, and prove they had an intersex condition at the time they were born and that the original record was an error. At least one such application has been successful.[11]
17. Intersex people assigned as male at birth who wish to be recorded as female (or vice versa) are required to follow the same process as trans people to amend the sex details on their birth certificate.

Adoption

18. There is widespread agreement that New Zealand's Adoption Act 1955 is outdated and needs revising.[12] The passage of the Marriage (Definition of Marriage) Amendment Act now enables same-sex couples to marry and therefore to jointly adopt. There is case law enabling de facto opposite sex couples to adopt,[13] but no equivalent case law for same-sex couples. to jointly adopt. (Re AMM [2010] NZFLR 629).

We recommend that the New Zealand Government be directed to:

e) remove any requirement to undergo or intend to undergo medical or surgical procedures, including those that may result in sterilisation, as a prerequisite for changing sex details on a birth certificate or other official document
f) enable adults with intersex conditions and trans and other gender diverse adults to change the sex details on any official documentation to male, female or indeterminate based solely on the individual's self-identification, without any requirement for medical treatment and without the need to resort to a court process
g) enable children and young people under the age of 16 who have intersex conditions or who are trans or gender diverse to access this same procedure, with the only additional requirement that they have the support of their legal guardian / parent, taking into account the evolving capacities and best interests of the child
h) review the Adoption Act 1955 with the aim of reflecting the legitimate diversity of New Zealand family and parenting arrangements.

RIGHTS TO HUMAN and PERSONAL SECURITY

19. Security and safety remain important issues for our communities. "*The use of violence against people based on their actual or perceived sexual orientation, gender identity or sex is frequently grounded in misogyny and what it means to be a 'real' man or woman.*"[14] This may in part explain why some in our communities remain reluctant to report such crimes to the Police.
20. New Zealand's repeal of the defence of provocation was welcomed in 2010. New Zealand does not have hate crimes legislation. However, the Sentencing Act 2002 enables a court to take into account

whether offending was motivated by a victim's sexual orientation or gender identity. However, unless these factors are recorded on an initial charge sheet, it is very unlikely they come to the attention of a Judge and therefore be taken into account when sentencing. Lack of data about the use of the Sentencing Act provisions continues to thwart the Act's effectiveness.

21. Other aggravating factors in the Sentencing Act include hostility based on a victim's race, colour, nationality, religion, age, or disability. The recommendations listed, in relation to the Act, are also likely to be useful for other groups vulnerable to hate crimes, including new migrants and ethnic minorities.

Bullying

22. Bullying and violence is a significant problem in New Zealand schools, especially for our young people. The 2009 report on data from the Youth 07 report found:

> *Twice as many same/both sex-attracted as opposite-sex-attracted students had been afraid that someone would hurt or bother them at school; nearly three times as many had stayed away from school within the previous month because they were afraid that someone would hurt or bother them; and about three times as many were bullied weekly at school. More than half (54%) of same/both-sex attracted students had been hit or physically harmed in the previous 12 months, compared with 42% of opposite-sex-attracted students.*[15]

23. In 2010 the Human Rights Commission identified the need for action on "*improving the safety of same-sex-attracted and both-sex attracted, trans and intersex children and young people in schools*". The head of the secondary school principals' association has recently criticised the Government for not doing enough to help combat bullying in schools.[16]

24. Our community groups have played a leadership role in pushing for greater attention to addressing bullying and violence in schools, to make schools safer for all students. This has included starting Pink Shirt Day in New Zealand and recently launching a campaign for schools to adopt the UK Anti-Bullying Quality Mark (ABQM).

25. These initiatives have not been met with any government-funding for community programmes, often youth-led, to build an inclusive school environment where the human rights of all students, including those who are sex, gender or sexuality diverse are respected, protected and promoted. This is despite the United Nations Committee on the Rights of the Child identifying the particular vulnerability of children and young people and their families from our communities.

26. Queer Straight Alliances (QSA) Network Aotearoa and other diversity groups are also working to make our schools safer, combating homophobic and transphobic bullying and spreading awareness of community issues. The Network is a youth-led organisation connecting school-based QSAs to each other and community resources through peer support, leadership development, and training. QSA Network supports young people in starting, strengthening, and sustaining QSAs and builds the capacity of QSAs to:

    - create a space where students can socialise in a safe environment
    - provide support for students who might be facing issues such as bullying, and
    - spread awareness about homophobia, biphobia, transphobia, gender identity and sexual orientation issues within the school.

Trans Prisoners

27. It is difficult to quantify the number of trans people in prison in New Zealand. During the Human Rights Commission's Transgender Inquiry, the Department of Corrections said that at any one time there might be 10 to 20 inmates who were identified as transgender. Recent anecdotal evidence suggests the number may be closer to double this amount.[17]

28. In 2012 the Office of the Ombudsman investigated the provision, access and availability of health services for prisoners. Its report included three pages on issues for transgender prisoners.[18] The Office stated "*the Department does not keep records regarding the number of transgender prisoners in New Zealand prisons*". As a community we stress that, it is vital that trans prisoners are identified in order to monitor and ensure their safety, care and access to appropriate health and rehabilitation services while in prison.
29. The Office of the Ombudsman reiterated the Transgender Inquiry's concerns that trans prison inmates are particularly vulnerable to abuse and/or sexual assault. Partly this is because, unless they have "completed gender reassignment surgery", they are housed according to their biological sex.[19] The vast majority, if not all, of the current trans prison population are trans women who are held in men's prisons. A Health Centre manager told the Ombudsman's Office that "*abuse of trans prisoners "goes unreported in male prisons*", while a prisoner said this was due to fear of retaliation. Voluntary segregation is one safety option but can reduce trans prisoners' access to prison activities including rehabilitation programmes.[20]
30. The Department of Corrections is funded to provide a primary health service to prisoners "*reasonably equivalent to that available in the community*" and District Health Boards are required to provide prisoners with secondary and tertiary level health services on the same eligibility criteria as any other members of the public.[21] Yet, under the current Department of Corrections' policy, transgender prisoners are being denied such access to health services.
31. While incarcerated, prisoners can "*continue, at their own cost, any medical or hormonal treatment commenced prior to imprisonment*".[22] This policy does not allow continued access to hormones if they have not been prescribed by a health specialist, even if a trans person has been using those hormones for years. Stopping hormone treatment in this way has potentially serious impacts on a trans person's physical and mental health. It also fails to utilise the opportunity to transfer trans people who have been self-medicating hormones onto the public health system where any health impacts can be monitored.
32. The Correction's policy explicitly states that "*sexual reassignment surgery is not to be considered during a term of imprisonment*". There are a range of such surgeries that have a significant impact on the health and wellbeing of trans people. Trans prisoners are being denied any assessment of these health needs.
33. In 2008 and 2012 respectively, New Zealand's Human Rights Commission and the Office of the Ombudsmen have recommended that the Department of Correction's review its policy for trans prisoners. In each case the Department has said such a review is unnecessary. Recent case law and policy developments reinforce the need for change.
34. Firstly, it is increasingly difficult to equate legal recognition of a trans person's sex with the requirement to have had full gender reassignment surgeries. As a result of the 2008 *Re Michael* Family Court decision, it is now possible that a trans woman housed in a men's prison may have a female birth certificate. Secondly, there is emerging good practice in comparable countries that New Zealand could adopt. For example, the 2011 United Kingdom provisions note "*recent legislative changes and court judgments have had implications for how we care for and manage transsexual prisoners*".[23] Increasingly such policies allow greater levels of flexibility around prisoner placement, with a focus on ensuring the safety of all prisoners and equitable access to healthcare and prison rehabilitation services. They also outline practical issues such as dress codes and name change policies for trans prisoners.

We recommend that the New Zealand Government be directed to:

i) explore options for Police and our communities to work together on practical solutions that will:

- *increase reporting of offences committed partly or wholly because of hostility based on someone's sexual orientation, sex or gender identity*
- *improve the effectiveness of the current Sentencing Act provisions and identify whether further legislative or policy provisions are needed to protect sexuality, sex and gender diverse people's right to safety*

j) support and fund school-based initiatives that promote inclusive school communities and address bullying and marginalisation of SOGII students

k) update the Department of Correction's Transgender Prisoner policy to reflect international best practice about placement, care and management of trans prisoners to ensure their right to safety, and access to health services and rehabilitation on an equal basis as others

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Health

35. Treaty bodies and Special Procedures have repeatedly affirmed the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. In 2012 CEDAW recommended that New Zealand "*improve access and quality of health services for lesbian women and transgendered persons"*.
36. Our communities have very few specific health services and access to general health services continues to be a problem as a result of discrimination, and unwelcoming, inappropriate, unsupportive, and unresponsive care. [24]
37. A 2012 report found that despite greater need, there are significant barriers to effective mental health services in this country, due to sexual orientation and gender identity issues not being identified, discussed and accepted.[25]
38. In sexual and reproductive health services, for example, funding, policy and structures reinforce sex and gender binaries by aligning services (smear tests, mammograms, fertility assistance, gynecological care, contraception, abortion) with normative sex, gender expression and an assumption of heterosexuality. Access to services is therefore distributed on the basis of meeting normative ideals (woman, man, heterosexual). This is a barrier to access which generates substantial disparities in access to health resources.
39. The following examples demonstrate how sex and gender boundaries, assumptions and expectations currently exclude people and create barriers to accessing services in New Zealand.
    - Gynecological care services (including prevention/screening, and in and outpatient treatment services) are designed and delivered as *Women's Health Services* and can be alienating to people who require these services but have a body that is not 'typically female' and/or identify as intersex, male or trans.
    - Assisted reproductive technology is another area where traditional sex and gender boundaries create multiple barriers to access. In September 2012, the Advisory Committee on Assisted Reproductive Technology (ACART) met with trans and intersex people after receiving submissions that its review of surrogacy and egg and sperm donation guidelines had rendered trans and intersex people invisible.[26] While the review had been prompted by the intention to extend access to gay male couples, its assumptions that all men have male bodies and all women have female bodies had meant the specific needs of trans and intersex parents were ignored.

40. Accessing information about the health of our communities is also problematic primarily because few New Zealand services request information and insufficient research has been undertaken on best practice to improve health outcomes. The development of appropriate programmes and policies and the training of healthcare professionals have been slow and studies have found significant gaps in health service provision.
41. Recently the U.S. Assistant Secretary for Global Health summarised the following health challenges for our communities internationally:

> *Data confirms that within the community there are higher rates of depression and substance abuse; lesbian and bisexual women are at a greater risk of obesity and breast cancer; gay men are at higher risk of HIV and other sexually transmitted infections; elderly LGBT individuals face additional barriers to health because of isolation; and transgender individuals have higher rates of alcohol and tobacco use, are at higher risk for heart disease and are less likely to have health insurance than heterosexual or LGB individuals.*[27]

42. In New Zealand there is no access to such data, let alone the disaggregated analysis needed to identify and address health outcomes for specific groups within our SOGII communities who face significant health disparities (particularly Māori and Pacific people) or have additional health needs (including disabled and older people).

Education

43. Sexuality education is taught as part of the Health curriculum in New Zealand schools. It is currently the only area of the curriculum where there is an opt out clause for parents who do not want their school age young people to be involved in the curriculum.[28]
44. New Zealand has also recently passed legislation which allows the establishment of partnership or charter schools. The schools have a lower level of government oversight than state schools. Of concern, is that there is no requirement for them to follow the national curriculum. This could mean that they can avoid having to teach any sexuality education to students.
45. In 2007, the Education Review Office produced a report noting that many schools did not give teachers the support required to deliver high quality sexuality education programmes. [29] It found that the majority of sexuality education programmes were not meeting students' learning needs effectively. The findings identified two areas of particular weakness across schools. They were: assessing learning in sexuality education; and meeting the needs of diverse groups of students (specifically including sex, gender and sexuality diverse students). Progress against the ERO's recommendations for improvement has not been assessed and there is little evidence to suggest that the situation in schools has profoundly changed.
46. We believe that comprehensive sexuality education, that respects sexual orientation, sex and gender diversity, is critical to reduce discrimination, stigma, marginalisation and the associated negative educational, health and well-being outcomes. We are concerned that access to quality, comprehensive sexuality education is under threat.

We recommend that the New Zealand Government be directed to:

l) develop practice standards to improve access to, and the standard of, health services delivery for our communities
m) require health providers to demonstrate steps taken to build health care professionals' responsiveness to the health needs of our communities
n) undertake research into the health and well-being need of those groups within SOGII communities who face significant health disparities (particularly Māori and Pacific people) or have additional health needs (including disabled and older people)

o) improve and extend the delivery of high quality, comprehensive sexuality education which encompasses sex, gender and sexuality diversity and moves beyond inaccurate binaries to all young people in schools, including partnership and charter schools

Intersex Rights Issues

The right to protection from medical abuse (Genital-normalising treatment)

47. A surgical approach to clinical management of infants and children presenting as "intersex" became standard practice in New Zealand as well as overseas in the 1970s. Genital-normalising treatment, involving both surgery and hormone therapy, is however often medically unnecessary, not always consistent with the person's gender identity, poses severe risks for sexual and reproductive health and is often performed without free and fully informed consent.
48. Intersex people in New Zealand report their condition was viewed "as a medical problem to be fixed" and that they are dissatisfied by their treatment and lack of current recourse to remedy for physical and emotional damage they have experienced.[30]
49. If it is not medically necessary to perform surgery while the person is an infant (for the child's physical well-being), any irreversible treatment should not occur until the person can give free and fully informed consent. Such surgery has recently been categorised as a violation of children's rights by the International NGO Council on Violence against Children (October 2012). In February 2013 the Special Rapporteur on torture (including ill-treatment in health care settings) called on all States to repeal any law allowing genital-normalising surgery, when "*enforced or administered without the free and informed consent of the person concerned*."
50. In accordance with the Yogyakarta Principles, the New Zealand Government should "*take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration*" (YP 18B).

The Right to Effective Remedies and Redress

51. In accordance with the Yogyakarta Principles, the New Zealand Government should "establish the necessary legal procedures, including through the revision of legislation and policies, to ensure that victims of human rights violations on the basis of sexual orientation or gender identity have access to full redress through restitution, compensation, rehabilitation, satisfaction, guarantee of non-repetition, and/or any other means as appropriate" (YP 28A).
52. The New Zealand Government should ensure that the human rights and freedoms of those people who have already been subject to unnecessary or non-consensual medical interventions because of an intersex condition are respected and upheld.

We recommend that the New Zealand Government be directed to:

p) statutorily prohibit surgical procedures, aimed solely at correcting genital ambiguity, on children who are not competent to consent for themselves
q) facilitate dialogue between intersex people, relevant government agencies, District Health Boards and medical practitioners in order to best inform policy and medical practice regarding intersex conditions
r) require compulsory training in relevant undergraduate and postgraduate courses on appropriate medical responses to intersex conditions

s) provide funding to enable optional reversal or alteration of previous surgical gender assignment procedures because of an intersex condition

t) require longer retention of medical records belonging to those who have undergone gender assignment procedures because of an intersex condition

u) officially recognise and apologise for the detrimental effects of previous medical policy and practice in the treatment of intersex conditions

Trans people's right to health / Depathologisation

53. Both the Human Rights Commission's Transgender Inquiry and its *Human Rights in NZ 2010* report found significant gaps in the availability, accessibility, acceptability and quality of medical services required by trans people seeking to transition.[31] While there has been some initial work on guidelines for providing gender reassignment health services, there has been no progress on the Inquiry's recommendation that public hospitals provide clear information on the services they provide for trans people who are medically transitioning.

54. Since introduced almost 10 years ago, the public funding for surgeries not available through public hospitals has remained fixed, enabling a maximum of 3 trans woman and 1 trans man every 2 years to have these procedures. A growing trans population, coupled with greater awareness of this funding, mean the waiting lists for surgery are very long.

55. New Zealand's health system is failing to respond to the needs of gender diverse populations. Gender diverse people have a right to the highest attainable standard of health (Yogyakarta Principle 17). Gender diversity is pathologised when a gender diverse person seeking medical support (which may or may not be specifically related to a gender transition) is treated as if their gender identity itself is a problem or pathology.

56. In most cases, in order to access healthcare or medical support, a person must be "diagnosed" with the clinical disorder most recently called "Gender Dysphoria" in the Diagnostic and Statistics Manual V (DSM V) or "Gender Identity Disorder" in the World Health Organisation's International Classification of Diseases.

57. This is incompatible with current international research and practice relating to gender diversity. For example, the World Professional Association of Transgender Health (WPATH) released a statement in May 2010 urging the de-psychopathologization of gender nonconformity worldwide.[32] It noted that "*the expression of gender characteristics, including identities that are not stereotypically associated with one's assigned sex at birth is a common and culturally diverse human phenomenon [that] should not be judged as inherently pathological or negative.*" The current Standards of Care produced by WPATH clearly state: "*being transsexual, transgender, or gender non-conforming is a matter of diversity, not pathology*".[33]

58. All medical professionals need to be trained and resourced to stop pathologising gender diverse people and start using an informed consent approach instead.

59. Yogyakarta Principle 17 specifically requires that "*all persons are informed and empowered to make their own decisions regarding medical treatment and care, on the basis of genuinely informed consent, without discrimination on the basis of sexual orientation or gender identity.*" This standard is not met in New Zealand currently. Utilising an informed consent model of healthcare, rather than a pathologising treatment path, would greatly increase access and quality of healthcare for gender diverse populations in New Zealand.

We recommend that the New Zealand Government be directed to:

v) require District Health Boards to ensure trans people's access to gender reassignment services available in NZ

w) provide sufficient funding to enable timely access to gender reassignment surgeries not provided through the NZ public health system

x) support the development of training and resources on an informed consent model of healthcare for trans people

y) guarantee access to health services for trans people without the requirement to have a mental health diagnosis (such as gender identity dysphoria or gender identity disorder)

z) support and facilitate the provision of training and resources for health professionals about gender diversity, and provide information and resources for communities and individuals about accessing healthcare as a gender diverse person

aa) request and support an update of the good practice guidelines "Gender Reassignment Health Services for Trans People Within New Zealand" [34] in consultation with trans people, to reflect an informed consent model that focuses on access, safety, wellbeing, respect and diversity

Employment Discrimination

60. Within our communities, workers face unique and difficult challenges in the workplace and dismissals or resignations because of sexual orientation or gender identity occur far too frequently. Four out of five submissions to the Transgender Inquiry[35] described experiences of discrimination. Employment discrimination was a common experience for trans people, with access to employment and job retention being key issues.

61. Changes in employment law in 2010 removed procedures enabling workers to take a personal grievance case in the first 90 days of employment in the event of unjustified dismissal. These personal grievance procedures are an important human rights protection when commencing a job.

62. In 2010 the New Zealand Council of Trade Unions' Out@Work Council made a submission to the Select Committee considering these employment law changes, outlining its concern about the removal of these rights and protections.[36] Provisions to ensure fair treatment and fair process are the basic protections and even more necessary when starting a new job. By removing the right to access personal grievance procedures, this employment law change has removed the right of workers to easily seek redress.

63. Workers will frequently choose to leave their employment rather than take a case of discrimination because of the requirement to go public about their sexual orientation or gender identity. Though discrimination on the basis of sexual orientation is unlawful under the Human Rights Act (HRA), and under section 105 of the Employment Relations Act 2000, this does not alter the fact that it occurs.

64. Gender identity is not explicitly protected as a ground of discrimination in the HRA. However, such complaints are taken under the ground of sex discrimination. Legal academics and the Human Rights Commission have recommended that gender identity should be explicitly protected under the Act.[37]

We recommend that the New Zealand Government be directed to:

bb) repeal amendments to the Employment Relations Act in 2010 which removed the right to personal grievance procedures within the first 90 days of employment

cc) amend the Human Rights Act 1993 to state explicitly that gender identity is a prohibited ground of discrimination

Annex 1: Submission Summary from the Aotearoa New Zealand's Sexual Orientation, Gender Identity and Intersex (SOGII) UPR Coalition 2013

This submission is from community groups representing intersex people and people of diverse sexual orientations and gender identities. Annexes include a glossary of terms.

Statistics, Data and Analysis:

Issue: The collection of population-based data through the NZ Census or the NZ Health Survey does not include self-identified sex, sexual orientation or gender identity data. It is crucial that this data is collected to identify and address significant health disparities for our communities, For example, previous research surveys showed same-sex and both-sex attracted youth face significantly higher mental and physical health risks.

Recommendation: require Statistics New Zealand and government agencies, in consultation with our communities, to collect consistent data on outcomes for sex, gender and sexually diverse people, including in the next census and NZ Health Survey.

Legal Recognition of Relationships and of Gender Identity

Issue: The Marriage (Definition of Marriage) Amendment Act 2013 improved legal recognition of partner relationships for sexual minorities. Intersex and trans people continue to face significant barriers to obtaining consistent official documentation that reflects their gender identity. Amendments to birth certificates of trans people require a Family Court process and evidence of medical gender reassignment treatment.

Recommendations: a) ensure trans and intersex people are not required to undertake medical procedures, some of which involve sterilisation, in order to gain recognition before the law. b) enable sex details on official documentation to be recorded as male, female or indeterminate / intersex based on self-identification.

Right to Human and Personal Security

Issue: New Zealand lacks hate crime legislation. SOGII people and other minorities are more at risk of being attacked based on hostility against our communities. The Sentencing Act 2002 enables a court to consider if a crime was motivated by a victim's sexual orientation or gender identity, but there are no procedures to ensure judges receive relevant information for sentencing, nor is use of Sentencing Act provisions monitored.

Recommendations: explore options for NZ Police and our communities to work together to a) increase reporting of offences based on hostility against someone's sexual orientation, sex or gender identity and to b) improve the effectiveness of the current Sentencing Act provisions and identify whether further legislative or policy provisions are needed.

Right to security and right to education

Issue: Bullying and violence are significant problems for young people in NZ schools, particularly. There are voluntary anti-bullying campaigns in schools but these lack adequate government support to ensure the human rights of students who are sex, gender or sexually diverse are respected.

Recommendation: support and fund school-based initiatives that promote inclusive school communities and address bullying and marginalisation of SOGII students

Rights to security and health – Trans Prisoners

Issue: There is no data on the number of trans prisoners. The Human Rights Commission, Ombudsman's Office and lawyers have raised concerns about trans prisoners' right to health (including access to hormone treatment) and the safety of trans women in male prisons.

Recommendation: review the Department of Corrections' policy for transgender prisoners to ensure transgender and transsexual prisoners' safety and dignity and their access to appropriate health and rehabilitation services within prison.

SOGII Health

Issue: People of diverse sexual orientations and gender identities face greater barriers to effective mental health services in New Zealand, due to exclusion, stigma, and ignorance. Physical health services usually operate separate male and female services, which do not adequately meet the needs of trans and intersex people. There continue to be major gaps in the availability, accessibility, acceptability and quality of medical services required by trans people seeking to transition.

Recommendations: a) develop practice standards and require health providers to demonstrate steps taken to improve access to, and the standard of, health services' delivery for our communities and b) undertake research into the health and well-being need of those groups within SOGII communities who face significant health disparities (particularly Māori, and Pacific people, and disabled and older people)

Education

Issue: Sexuality education is taught as an optional part of the Health curriculum in New Zealand schools. The Education Review Office found gaps in meeting the needs of students of diverse sexes, genders and sexualities. Appropriate sexuality education is critical to reduce discrimination, stigma, marginalisation and the associated negative educational, health and well-being outcomes for these students.

Recommendation: improve and extend the delivery of high quality, comprehensive sexuality education which encompasses sex, gender and sexuality diversity, including in government-funded partnership and charter schools

Right to health and freedom from torture - Intersex human rights issues

Issue: NZ infants born with an intersex condition are still operated on to make their bodies more typically 'male' or 'female'. Genital-normalising treatment, including surgery poses severe risks for sexual and reproductive health, is not always consistent with the person's gender identity, and is often performed without consent.

Recommendations: a) statutorily prohibit surgical procedures, aimed solely at correcting genital ambiguity, on children who are not competent to consent for themselves and b) facilitate dialogue between intersex people, relevant government agencies and health professionals in order to best inform policy and medical practice regarding intersex conditions and c) provide funding to enable optional reversal or alteration of previous surgical gender assignment procedures because of an intersex condition.

Right to health - Trans and Gender Diverse Health Rights and Depathologisation

Issue: Usually a trans person must be "diagnosed" with a clinical disorder called 'Gender Dysphoria' or 'Gender Identity Disorder" to access healthcare or medical support to transition, and then pay for the diagnosis themself. A diagnosis that defines gender diversity itself as a medical problem is at odds with current international guidelines and practice and has negative impacts on trans and gender diverse people's health and wellbeing.

Recommendations: that the government a) requires District Health Boards to ensure trans people's access to gender reassignment services available in NZ and b) provides sufficient funding to enable timely access to gender reassignment surgeries not provided through the NZ public health system and c) ensures medical professionals are trained in using an informed consent approach with trans people instead of one that pathologises gender diversity.

Right to work - Employment Discrimination

Issue: SOGII workers, especially trans workers, face higher levels of employment discrimination. Stronger legal provisions are needed to protect their rights to decent work and freedom from discrimination.

Recommendations: a) explicitly include gender identity as a ground of unlawful discrimination in the Human Rights Act 1993 and b) repeal amendments to the Employment Relations Act in 2010 which removed the right to personal grievance procedures within the first 90 days of employment

Annex 2: Full list of Recommendations:

We recommend that the New Zealand Government be directed to:

Statistics

a) *require Statistics New Zealand to collect data on the self-identities of sex, gender and sexually diverse people, in consultation with those communities and the Human Rights Commission, including in the next census, NZ Health Survey and other key surveys*
b) *ensure this information is used to inform state responses including, but not restricted to, diversity training for professionals in the education, health and justice sectors and the development and funding of resources and services for our communities*
c) *standardise these categories for collection of information by government agencies (including public hospitals and schools) about the experiences of sex, gender and sexually diverse people*
d) *prioritise improving data collection about sex, gender and sexually diverse people's use of health services and their health outcomes*

Legal Recognition

e) *remove any requirement to undergo or intend to undergo medical or surgical procedures, including those that may result in sterilisation, as a prerequisite for changing sex details on a birth certificate or other official document*
f) *enable adults with intersex conditions and trans and other gender diverse adults to change the sex details on any official documentation to male, female or indeterminate based solely on the individual's self-identification, without any requirement for medical treatment and without the need to resort to a court process*
g) *enable children and young people under the age of 18 who have intersex conditions or who are trans or gender diverse to access this same procedure, with only the additional requirement that they have the support of their legal guardian / parent, taking into account the evolving capacities and best interests of the child*
h) *review the Adoption Act 1955 with the aim of reflecting the legitimate diversity of New Zealand family and parenting arrangements*

Security

i) *explore options for Police and our communities to work together on practical solutions that will*
   - *increase reporting of offences committed partly or wholly because of hostility against based on someone's sexual orientation, sex or gender identity*
   - *improve the effectiveness of the current Sentencing Act provisions and identify whether further legislative or policy provisions are needed to protect sexuality, sex and gender diverse people's right to safety*

j) *support and fund school-based initiatives that promote inclusive school communities and address bullying and marginalisation of SOGII students*
k) *update the Department of Correction's Transgender Prisoner policy to reflect international best practice about placement, care and management of trans prisoners to ensure their right to safety, and access to health services and rehabilitation on an equal basis as others*

SOGII Health and Education

l) develop practice standards to improve access to, and the standard of, health services delivery for our communities
m) require health providers to demonstrate steps taken to build health care professionals' responsiveness to the health needs of our communities
n) undertake research into the health and well-being need of those groups within SOGII communities who face significant health disparities (particularly Māori and Pacific people) or have additional health needs (including disabled and older people)
o) improve and extend the delivery of high quality, comprehensive sexuality education which encompasses sex, gender and sexuality diversity and moves beyond inaccurate binaries to all young people in schools, including partnership and charter schools

Intersex Health Rights

p) statutorily prohibit surgical procedures, aimed solely at correcting genital ambiguity, on children who are not competent to consent for themselves
q) facilitate dialogue between intersex people, relevant government agencies, District Health Boards and medical practitioners in order to best inform policy and medical practice regarding intersex conditions
r) require compulsory training in relevant undergraduate and postgraduate courses on appropriate medical responses to intersex conditions
s) provide funding to enable optional reversal or alteration of previous surgical gender assignment procedures because of an intersex condition
t) require longer retention of medical records belonging to those who have undergone gender assignment procedures because of an intersex condition
u) officially recognise and apologise for the detrimental effects of previous medical policy and practice in the treatment of intersex conditions

Trans and Gender Diverse Health Rights

v) require District Health Boards to ensure trans people's access to gender reassignment services available in NZ
w) provide sufficient funding to enable timely access to gender reassignment surgeries not provided through the NZ public health system
x) support the development of training and resources on an informed consent model of healthcare for trans people
y) guarantee access to health services for trans people without the requirement to have a mental health diagnosis (such as gender identity dysphoria or gender identity disorder)
z) support and facilitate the provision of training and resources for health professionals about gender diversity, and provide information and resources for communities and individuals about accessing healthcare as a gender diverse person
aa) request and support an update of the good practice guidelines "Gender Reassignment Health Services for Trans People Within New Zealand" [38] in consultation with trans people, to reflect an informed consent model that focuses on access, safety, wellbeing, respect and diversity

Employment Discrimination

bb) repeal amendments to the Employment Relations Act in 2010 which removed the right to personal grievance procedures within the first 90 days of employment
cc) amend the Human Rights Act to state explicitly that gender identity is a prohibited ground of discrimination

Annex 3: Definitions:

Sex: A person's biological make-up (for example their body and chromosomes) including, but not restricted to, male, female, indeterminate or intersex.

Sexual orientation: An enduring sense of romantic and/or sexual attraction to people of the same-sex (homosexual, lesbian, or gay), the 'opposite' sex (heterosexual), 'both' or all sexes (bisexual or pansexual), or none (asexual).

Gender: The social and cultural construction of what it means to be a man and/or a woman, including roles, expectations and behaviour.

Gender identity: A person's internal, deeply felt sense of being a man or a woman (or something other or in between). A person's gender identity may or may not correspond with their sex. Includes, but is not restricted to, man, woman, transgender, transsexual, whakawahine, tangata ira tane, and genderqueer. In this submission the umbrella term 'trans' has been used to encompass this diversity.

Gender expression: How someone expresses their sense of masculinity and/or femininity externally

In Aotearoa the term queer is sometimes used to depict diverse sexualities, and at others times to also embrace diverse sexes and gender identities. As noted in this submission, the indigenous term takataapui is another such umbrella term that embraces all of the groups covered by this submission.

New Zealand has a significant Pacific population and there are many Pacific terms that are used to describe gender and/or sexual orientation diversity. These all need to be understood within their specific cultural context. They include include mahu (Tahiti and Hawaii), vakasalewalewa (Fiji), palopa (Papua New Guinea), fa'afafine, (Samoa, America Samoa and Tokelau) akava'ine (Cook Islands), fakaleiti or leiti (the Kingdom of Tonga) and fakafifine (Niue island). All typically refer to someone born biologically male. The Samoan terms fa'afatama and fa'atama refer to someone born biologically female.

This comic resource *Born Free and Equal,* written and drawn by Sam Orchard for the New Zealand Human Rights Commission, usefully explains the terms sexual orientation, sex and gender identity: http://www.hrc.co.nz/wp-content/uploads/2013/02/BornFreeEqual_for_Web.pdf

Annex 4: Standards for a Depathologised Approach to Trans Health Services

1. When healthcare is provided it is inconsistent, discriminatory, and often of a low quality with inflexible treatment pathways. Healthcare is not currently accessible to gender diverse people. When it is provided, it often does not meet international standards of care. Discrimination, in the forms of transphobia, homophobia, biphobia, and cisnormativity is common when accessing health services.

2. The pathologising of gender diversity relates to discrimination, specifically cisnormativity. Cisnormativity is the assumption that being cisgender(not transgender) is superior and that being gender diverse is abnormal or unnatural. It also relates to inflexible treatment paths, because treating gender diversity as a pathology reduces the complexity of lived experience and disempowers those accessing services.

3. Yogyakarta Principle 17 asserts that states shall "*facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support.*" New Zealand does not meet this standard.

4. There are no national guidelines about providing respectful and sensitive care for gender diverse people but there is the single resource developed by a Counties Manakau District Health Board (CMDHB) working group. This resource is due for revision in 2014. It is already inaccurate and misleading because it relies on a previous version of the WPATH Standards of Care that are now out of date, which reinforce the pathologising of gender diversity. This resource needs to be updated in order to reflect an informed consent approach to healthcare.

5. During the development of the CMDHB, trans community representatives sat on a Reference Advisory Group and undertook extensive consultation with their communities. Updating the CMDHB resource should reflect the community feedback that they collected and summarised in 2011 and was based on the following principles: Access, Safety, Wellbeing, Respect, and Diversity. 39They are outlined below in order to provide a clearer understanding of the issues relating to depathologising gender diversity in New Zealand.

Access

6. Trans and gender diverse people lack sufficient access to medical services. One of the dangers of providing a resource, when there has previously been no resources made in New Zealand, is that it will limit access by prescribing a set of rules or criteria that trans and gender diverse people must conform to.

7. We believe instead that this resource must expand the options for trans and gender diverse people. An example is the outdated requirement that people must have "real life experience" (living in their preferred gender for a certain amount of time without medical support) or a certain amount of therapy/counselling in order to access medical support like hormones or surgeries. Real Life Experience (RLE) is often dangerous for the person in question.

8. Also, in some cases, a medical professional may misunderstand their role in this situation and believe they need to "evaluate" or "assess" the person's gender presentation. This often results in sexist or inappropriate commentary on their appearance or behaviour. Requiring gender

diverse people to access counselling or therapy is problematic because while it may be desirable, it is not always available.

9. There are significant financial barriers for many people in trying to access mental health support like counselling or therapy. Using an informed consent model (with a central focus on access) means being flexible about these kinds of requirements, and empowering the person as much as possible to find good support systems without making this yet another barrier to healthcare. It also means that GPs need to be encouraged to take responsibility for facilitating access to other specialist services, because GPs are often the first point of contact.

Acceptability/Safety

10. The safety of trans and gender diverse people is of paramount importance and should be considered in relation to all aspects of this resource. So in regards to the example above, RLE (Real Life Experience) can be dangerous for a trans person because the public world is not trans-friendly and we face discrimination and violence when we adopt a gender presentation that people around us do not appreciate or understand. Because of this, in some cases RLE will be inappropriate.

11. On a similar level, because of general ignorance about trans or transgender identities, part of our safety involves confidentiality and respectful engagement. The option to change names and gender markers (without changing NHS number) is an example of best practice in this area.

Wellbeing

12. The wellbeing of trans and gender diverse people should be at the centre of this resource, and the focus of all medical interventions. This involves recognising that everyone is different and it is necessary to listen to each of us individually about what we need and how we identify our genders. Our wellbeing is important at every stage of life, and this resource should reflect the need for ongoing care as well as initial transition-related medical support.

13. Just as with other populations, trans and gender diverse people have everyday health needs, in addition to whatever particular needs we have because of our particular treatment path. A wellness model focuses on the wellbeing of the person, and the support that they have from people around them (medical professionals, family, friends, workmates, schoolmates, teachers, employers etc) instead of concentrating on requiring trans people to fulfil criteria for a diagnosis. This involves asking questions in a respectful manner, rather than making assumptions about our situation, sense of self, or medical needs.

Respect

14. The best authority on a person is the person themselves. A person should not feel that they are being asked to tell a certain story, fulfil certain criteria, or “succeed” as whatever gender they know that they are, when accessing medical support.

15. Respectful questions are welcome; keeping in mind that it is not the person’s responsibility to educate their medical service providers and that there is a lot of research that can be done (online or through networks of medical professionals) without requiring the gender diverse person to provide information as part of educating their health professionals. In some cases a

medical professional may need to tell the patient "I don't know enough about this, I'm going to do some research and get back to you next week."

16. Throughout the interactions between medical professionals and trans people, it should be clear that the best authority on what it means for this person to be who they are is the person themselves.

Diversity

17. There are many different ways of being gender diverse (some common identities in New Zealand include trans, transgender, transsexual, genderqueer, whakawahine, tangata ira tane, fa'afafine, fakaleiti, vakasalewalewa, mahu, palopa, and many others). This resource must attempt to provide multiple pathways of care for this diverse population, so that medical professionals are aware of the need for flexibility. The best approach will be determined on an individual basis through conversation and negotiation with the person in question.

18. Because there is a general lack of information in the public world about what it means to be gender diverse, it is important to remind medical professionals not to make assumptions about how a person will identify or what support they will need based on previous interactions with other gender diverse people.

19. Similarly, it is good to be clear that gender and sexuality, while somewhat overlapping and related, are distinct, and trans people can be straight, bisexual, lesbian, gay, queer, asexual, or any other category of sexuality. Being heterosexual must not be a requirement for accessing medical support.

20. On a related level, there are many gender identities that are not gender normative, such as genderqueer, and this resource needs to facilitate understanding between medical professionals and genderqueer people. Conversations about informed consent will involve ascertaining what kind of support this person requires and what the best treatment pathway will be for them.

Endnotes

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