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Family First New Zealand
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School Policies and Transgender Students

You have asked us to provide our opinion on whether schools (both state and integrated) must allow students who identify as being of the opposite gender to their biological sex¹ to participate in sports teams and have access to shared toilets, showers and changing rooms that do not match their biological sex.

1. Summary

- 1.1 Although discrimination on grounds of sex is, as a general principle, prohibited under the Human Rights Act 1993, it is commonplace in New Zealand (and many other countries) to limit access to shared toilets, showers and changing rooms on the basis of sex, and to limit participation in sports teams on the basis of sex.
- 1.2 Schools are required by the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 to recognise the right to freedom from discrimination on the basis of sex.
- 1.3 Schools can adopt policies for participation in sports teams and use of shared toilets, showers and changing rooms that impose reasonable limitations on freedom from discrimination if those limitations can be demonstrably justified in a free and democratic society.
- 1.4 In setting such policies, schools should consider the following questions:
 - (a) What are the purposes of the policy?
 - (b) Does the policy discriminate between students on the basis of sex?
 - (c) If so:
 - (i) Do the purposes of the policy justify that discrimination?
 - (ii) Is the extent of the discrimination rational and proportionate having regard to the purposes of the policy?
 - (iii) Does the policy discriminate no more than is reasonably necessary to achieve its purposes?
- 1.5 As long as questions (i) to (iii) above can be answered yes, schools have a level of freedom in establishing their particular policies. Courts and tribunals should not intervene if a school's policy falls within a range of reasonable alternatives. The burden of proof as to reasonableness lies with the school.

¹ Referred to in this opinion as transgender students.



- 1.6 Avoiding unfair competitive advantage is one example of a valid purpose which can justify limiting participation by transgender students in sports teams that do not match their biological sex.
- 1.7 Schools are not legally compelled to allow transgender students to have access to shared toilets, showers and changing rooms that do not match their biological sex provided they cater for transgender students in a reasonable manner.
- 1.8 In setting policies for use of shared toilets, showers and changing rooms, one relevant consideration will be the requirement under NAG 5 to provide a safe physical and emotional environment for all students.

2. Legal Background - Education Act 1989

- 2.1 Broadly speaking, subject to compliance with the Education Act 1989 and the general law of New Zealand law, each school's Board of Trustees ("BoT") has complete discretion to control the management of its school²:

Except to the extent that any enactment or the general law of New Zealand provides otherwise, a school's board has complete discretion to control the management of the school as it thinks fit. (s 75(2), Education Act)

- 2.2 Section 61 of the Education Act requires BoTs to prepare and maintain a charter to give effect to the Government's national education guidelines and the BoT's priorities. The charter is an undertaking by the Board to take all reasonable steps not inconsistent with any enactment, or the general law of New Zealand to ensure that:

- (a) the school is managed, organised, conducted, and administered for the purposes set out in the charter; and
- (b) the school, and its students and community, achieve the aims and objectives set out in the charter.³

- 2.3 National education guidelines which the Ministry of Education has indicated it considers relevant to the issues of sex and gender identity include:⁴

National Education Goal ("NEG") 1: *The highest standards of achievement, through programmes which enable all students to realise their full potential as individuals, and to develop the values needed to become full members of New Zealand's society.*

NEG 2: *Equality of educational opportunity for all New Zealanders, by identifying and removing barriers to achievement.*

NEG 7: *Success in their learning for those with special needs by ensuring that they are identified and receive appropriate support.*

National Administration Guideline ("NAG") 5: *Each board of trustees is also required to:*

- a. *provide a safe physical and emotional environment for students; ...*
- c. *comply in full with any legislation currently in force or that may be developed to ensure the safety of students and employees.*

² Day to day administration is delegated to the Principal per section 76 of the Education Act.

³ Section 63 of the Education Act 1989.

⁴ See *Sexuality Education: A guide for principals, boards of trustees, and teachers*, 2015, Ministry of Education, pg 30.

3. New Zealand Bill of Rights Act in the Context of Schools

- 3.1 The New Zealand Bill of Rights Act 1990 (“NZBORA”) applies to acts done by the government or by persons performing public functions conferred by law. The actions of a school can (but do not always) be a public function conferred by law.⁵
- 3.2 Where a school is performing a public statutory function, it is required to recognise the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993 (“HRA”).⁶
- 3.3 These prohibited grounds of discrimination include “*sex, which includes pregnancy and childbirth*”.⁷
- 3.4 Schools are not permitted to perform public functions in a way that discriminates based on any of the prohibited grounds of discrimination unless such discrimination is authorised by legislation or is demonstrably justified in a free and democratic society.⁸
- 3.5 Where schools perform non-public functions or act as employers,⁹ NZBORA is not directly relevant, but the HRA still applies and discrimination on the prohibited grounds of discrimination is unlawful unless authorised or required by enactment or law.¹⁰
- 3.6 The scenarios you have asked us to consider relate to policies for participation in school sports teams and use of shared toilets, showers and changing rooms.
- 3.7 Use of facilities is a necessary ancillary to performance of the school’s core functions, so should be considered a public statutory function. Participation in school sports teams probably also forms part of the provision of free education, so again should probably be considered a public statutory function.
- 3.8 We are unaware of any legislation or regulations that specifically prescribe how schools are to set policies for the issues you have asked us to consider.¹¹ Accordingly, it is unlikely that a school will be able to point to express legislation that authorises it to adopt a policy that discriminates between students on grounds of sex.
- 3.9 For this reason, the key considerations in setting policies for participation in sports teams and use of toilets, showers and changing rooms, are likely to be:
 - (a) Is the policy discriminatory in any sense?
 - (b) If so, is the discrimination based on one of the prohibited grounds of discrimination?
 - (c) If so, is the discrimination demonstrably justified in a free and democratic society, within the meaning of section 5 of NZBORA?

⁵ The High Court in *McGuinn v Board of Trustees of Palmerston North Boys' High School* [1997] 2 NZLR 60 said provision of free education is a public statutory function, but provision of boarding facilities is not.

⁶ Section 19 of NZBORA.

⁷ Section 21 of the HRA.

⁸ See sections 4 & 5 of NZBORA. For actions authorised by legislation, the school’s actions are permissible, but complainants can seek a declaration that the authorising legislation is inconsistent with section 19 of NZBORA.

⁹ And in certain other cases specified in the HRA.

¹⁰ Section 21B, HRA.

¹¹ In integrated schools, the school’s proprietor have a statutory role in protecting the special character of the education at the school. This will have an impact on how integrated schools set their policies.

4. Differential Treatment Based on Sex

- 4.1 The Court of Appeal in *Ministry of Health v Atkinson* [2012] 3 NZLR 456 set out a two stage test for assessing whether any given law or government action is discriminatory:

[55] It is agreed that the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

- 4.2 That case involved an argument that family members were discriminated against by the Ministry of Health's policies regarding payment for provision of disability support services. In relation to the first step, the Court held that the appropriate comparator was "those persons who are able and willing to provide disability support services to the Ministry". Family members were a subset of this group. The Court found that there was differential treatment.
- 4.3 In the case of school policies for students, the comparison group for assessing differential treatment would likely be students of the school generally.
- 4.4 If a school's policies split sports teams on the basis of biological sex, there would be differential treatment between students with regard to sex, since biological males could not participate on girls' teams, and vice versa. A similar analysis can be made of a policy limiting access to shared toilets, showers and changing rooms.
- 4.5 Since sex is a prohibited ground of discrimination, the first stage of the *Atkinson* test would be satisfied.

5. Discriminatory Impact of Differential Treatment

- 5.1 The Court in *Atkinson* held that differential treatment would be discriminatory if it imposed a material disadvantage on the person or group differentiated against:

[109] ... we consider that differential treatment on a prohibited ground of a person or group in comparable circumstances will be discriminatory if, when viewed in context, it imposes a material disadvantage on the person or group differentiated against.

- 5.2 It seems unlikely that differential treatment on the basis of biological sex with regard to use of shared toilets, changing rooms and showers does impose any material disadvantage on male students or female students generally. Rather the differential treatment protects the privacy and safety of both male students and female students.
- 5.3 It could be argued that differential treatment on the basis of biological sex with regard to participation in sports teams can impose a material disadvantage on students of a particular sex particularly if a given sports is only provided as an option for one of the sexes.
- 5.4 With regard to transgender students specifically, it could be argued that they are materially disadvantaged in both cases because they cannot experience school as a person of the sex they identify with would experience it.
- 5.5 It is unclear, however, whether this constitutes discrimination on the grounds of sex under New Zealand law. Clearly, the term gender is used to refer to a concept other than biological sex. It could be argued that the differential treatment impacts on transgender students not because of their sex but because of a belief they hold about

their identity. It is unclear whether the HRA prohibits discrimination on grounds of gender identity as such. This issue has not yet been tested in the New Zealand courts.

- 5.6 There is no precise definition of sex in New Zealand law. Section 33 of the Births, Deaths and Marriages Registration Act 1995 states that the sex of every person (for the purposes of that legislation at least) is determined by reference to the general law of New Zealand. Section 28 of the Births, Deaths and Marriages Registration Act 1995 allows post-operative transgender persons to apply to the Family Court for a declaration changing the applicant's sex on their birth certificate. This suggests that the legal concept of sex in New Zealand encompasses gender identity if certain criteria are met.
- 5.7 However, section 2 of the Marriage Act 1955 now defines marriage as the union of 2 people, regardless of their sex, sexual orientation, or gender identity. This suggests that New Zealand law sees a distinction between sex and gender identity.
- 5.8 There is case law in the UK and Canada which has concluded that discrimination on the ground of gender identity is a form of sex discrimination. In 2006, the Crown Law Office gave an opinion at the request of the Attorney-General in which it concluded, in reliance on overseas case law, that discrimination on the ground of gender identity was a form of sex discrimination. However, the Human Rights Commission has expressed the view that the law on this point is unclear in New Zealand at present.¹²
- 5.9 Since the law is uncertain on the above issue, this opinion proceeds to consider the circumstances in which limitations on the right to freedom from discrimination are legally justifiable.

6. Justified Limitations

- 6.1 Section 5 of NZBORA permits some limitation of the rights and freedoms contained in NZBORA:

5 Justified limitations

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- 6.2 The Supreme Court in *R v Hansen* [2007] 3 NZLR 1 held that consideration of section 5 raises the following issues (per Tipping J at para 104):

(a) *does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?*

(b)

(i) *is the limiting measure rationally connected with its purpose?*

(ii) *does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?*

(iii) *is the limit in due proportion to the importance of the objective?*

¹² *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People*, 2008, Human Rights Commission, pg 88ff.

6.3 The need for schools to set policies with regard to participation in sports teams and access to shared toilets, showers and changing rooms, is prescribed by law in the sense that schools have a legal duty to, for example:

- (a) Enable all students to realise their full potential as individuals (NEG 1).
- (b) Achieve equality of educational opportunity for all New Zealanders, by identifying and removing barriers to achievement (NEG 2).
- (c) Provide a safe physical and emotional environment for students (NAG 5).

6.4 Applying the process outlined by the Supreme Court in *R v Hansen*, a school setting policies for participation by students in sports teams and access to shared toilets, showers and changing rooms must consider questions along the following lines:

- (a) Does a proposed policy limit the individual rights and freedoms of students?
- (b) If so:
 - (i) Does the limiting measure serve a purpose (or purposes) sufficiently important to justify curtailment of the right or freedom?
 - (ii) Is the limiting measure rationally connected with those purposes?
 - (iii) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
 - (iv) Is the limit in due proportion to the importance of the objective?

6.5 School policies that limit access to shared toilets, showers and changing rooms and participation in sports teams based on sex would, if discriminatory, limit the rights and freedoms of students. Therefore an assessment is required of whether such limitations are justified.

7. What ends or purposes need justifiably to be considered?

7.1 In setting policies for participation by students in sports teams and use by students of shared toilets, showers and changing rooms, schools must at least consider the purposes outlined in the national education guidelines, including those outlined in paragraph 6.1 above.

7.2 Limiting access to shared toilets, showers and changing rooms based on sex, has long been considered appropriate given the need to provide a safe physical and emotional environment for students.

7.3 Limiting participation in sports teams on the basis of sex and age has likely been motivated by the goals of enabling all students to realise their full potential as individuals, achieving equality of educational opportunity, and again providing a safe physical environment (particularly in the contexts of sports that involve physical contact and a physical contest of strength).

7.4 Such concerns are prescribed by the national educational guidelines and are legitimate concerns.

8. Is the limiting measure rationally connected with those purposes?

8.1 The scenarios you have asked us to consider involve some form of policy under which students are not permitted to participate in sports teams and access shared toilets, showers and changing rooms that do not match their biological sex.

8.2 We consider that such measures could be justified as rationally connected with the above purposes, depending on the overall form of the relevant policy.

9. Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

9.1 The Court of Appeal in *Ministry of Health v Atkinson* [2012] 3 NZLR 456, considered the “minimal impairment” principal in the context of Ministry of Health’s policies regarding payment for provision of disability support services. Citing *R v Hansen*, the Court held (at para 151) that this limb of the test “can be addressed by considering whether the Ministry’s approach fell within a range of reasonable alternatives.” The Court indicated (at para 154) that even if “there is an alternative option that will have less impact it does not follow that the Ministry’s option is outside the range of reasonable alternatives.”

9.2 In *R v Hansen*, Tipping J had said that when assessing legislation or Government action, the Courts do not substitute their own view for that of the relevant decision maker:

[123] ... The Court’s function is not immutably to substitute its own view for that of the legislature. If the Court agrees with the legislature that the limit is justified, no further issue arises. If the Court does not agree, it must nevertheless ask itself whether the legislature was entitled, to use Lord Hoffmann’s word, to come to the conclusion under challenge. It is only if Parliament was not so entitled that the Court should find the limit to be unjustified.

9.3 The Court in *Atkinson* did indicate (at para 163) that the burden of proof would sit with the relevant government body (in this case the school’s principal and BoT) to demonstrate that the policy was within the range of reasonable alternatives.

10. Is the limit in due proportion to the importance of the objective?

10.1 In the present scenario, given that the relevant objectives are stated in the national education guidelines, they are of considerable importance to the policies set by schools.

11. Guidance Publications from Ministry of Education and HRC

11.1 From time to time, the Ministry of Education publishes guides for BoTs on how it believes the National Education Guidelines should be applied. Such guides are not legally binding as such, but often give a clear indication on how the Ministry of Education interprets the Education Act and the National Education Guidelines.

11.2 An individual school can set a policy that is at odds with the Ministry of Education’s stated interpretation as long as the school’s decision is within the range of reasonable alternatives as discussed above.

11.3 In fact, there is limited commentary from the Ministry of Education on the issue of access to shared toilets, showers and changing rooms. The current version of the Sexuality Education guide - published in 2015 - does offer some brief comment, which is as follows:

4. Sexuality education in the wider school

... Leadership and school culture

Boards of trustees, principals, and senior and middle leaders all have a role to play in creating the cultural conditions in which sexuality education programmes are successfully implemented. Leaders set the tone of the school and contribute to building a positive and inclusive whole-school culture where diversity is valued and students feel supported, visible, and safe, regardless of their sexual and gender identity. This includes valuing the sexual and gender identities of school staff members and students, and valuing staff and student voices.

... Schools may also consider reviewing options around toilet facilities to ensure students have choices of safe spaces. Toilets can be unsafe environments for students who do not conform to gender norms. ...

- 11.4 The Ministry's comments, set out above, are of a general nature as to how schools should accommodate transgender students. This is appropriate given the discretion that is given to BoTs to set policies for their own schools.
- 11.5 The Human Rights Commission ("HRC") has also issued a publication entitled *Supporting trans students*, which considers policies that a school might adopt in relation to transgender students. The views expressed in the HRC publication are again not directly binding on a school, but give a clear indication of how the Human Rights Commission believes schools should address the rights of transgender students.
- 11.6 In respect of the issue of use of toilets and changing rooms, the HRC comments:

What toilets should trans students use?

Trans students should have the choice of using a toilet that matches their gender identify. This can be an important way to support a trans student's sense of identity and wellbeing. For example, fa'afafine, whakawāhine or male-to-female (MtF) trans girls identifying as female should be able to use the female toilets, if that is their preference.

A unisex or disability toilet can be a good alternative for a trans student. Other options include using toilets in a sick bay/health centre or the staff toilets.

Some other students may initially be uncomfortable sharing toilets with a trans person. It can help to explain that privacy and safety are important for all students when using bathroom facilities, and that any form of harassment will not be tolerated. If these students are still uncomfortable about using the same toilet blocks as trans students, they could also be offered the use of a unisex or disability toilet.

What changing area should trans students use?

Trans students should have the choice of using the changing area that matches their gender identify.

Many trans students will feel vulnerable having to change clothes in front of other students. Creating a private area in the changing rooms can be very useful for trans students. This might involve adding a curtain or a cubicle door. Other options include allowing trans students to use a unisex, disability or staff toilet as a changing area.

11.7 HRC's comments go into more detail than the comments given by the Ministry of Education, but still leave for discretion as to the precise detail of the school's policy. More specifically, HRC's comments indicate that it considers that transgender students "should have the choice of using a toilet that matches their gender identity", and "For example, fa'afafine, whakawāhine or male-to-female (MtF) trans girls identifying as female should be able to use the female toilets."

11.8 The reference to "a toilet that matches their gender identity" appears to recognise (correctly) that there is scope for a reasonable range of policy approaches, although it could be intended to mean that transgender students should have the choice of using **shared** toilets that matches their gender identity. If that is the intended meaning of the statement, it would not be binding on schools as such. Schools have discretion as to the policies they adopt provided the policies fall within the range of reasonable alternatives.

12. Participation in Sports Teams

12.1 In respect of participation in sports teams, the Ministry's comments are brief and non-prescriptive but indicate that the Ministry believes participation of all students to be a key objective:

Sports procedures and policies should be inclusive and ensure that all students can participate regardless of sexual orientation or gender identity. ... All school extra-curricular activities should be inclusive of all students and encourage diverse participation.

12.2 The HRC's comments are, again, more specific:

If trans students want to play sport which team should they play for?

Where possible, a trans girl should be able to play in a girls' team and a trans boy in a boys' team, wearing the appropriate uniform. This applies for any sport before a child turns 12; non-competitive events; and those sports where strength, stamina or physique do not give someone a competitive advantage.

Can trans girls still play competitively in girls' teams after puberty?

Once a trans girl reaches puberty her body's natural hormones will give her an unfair competitive advantage over other girls. This advantage would disappear if she is on hormone blockers or female hormones, enabling her to play as a female. If a trans girl is not on female hormones or hormone blockers, one option would be playing mixed competitive sport as a female, but being counted as one of the 'male' team members.

Increasingly some sports bodies are aware of the needs of trans students and are finding ways to encourage their participation. In some cases this has included allowing trans girls to play competitive sport as females, whether or not they are on female hormones or hormone blockers. At higher level competitive sports events, sport bodies may be bound by regulations set by their sporting code.

Can a trans boy play in competitive boys' teams?

A trans boy is able to play competitively against other boys (though he may have a competitive disadvantage, especially if he is not on male hormones). If a trans boy has been on full dose male hormones for over a year it is likely he would have a competitive advantage against girls.

- 12.3 HRC's comments again recognise that there is a range of possible approaches to gender identity issues, and indicates that it considers that preventing giving any particular participant an unfair competitive advantage is a legitimate consideration in setting policies for participation in sports teams.
- 12.4 We agree that avoiding unfair competitive advantage is a legitimate consideration. This view is consistent with the emphasis in the national education guidelines on enabling all students to realise their full potential as individuals, achieving equality of educational opportunity. For this reason alone (and there may be others) it is not correct that schools must allow all transgender students to participate in sports teams that do not match their biological sex.
13. **Conclusion**
- 13.1 Schools have discretion as to the precise form of the policies that they adopt with regard to access to shared toilets, showers and changing rooms and participation in sports teams. They must have regard to the interplay of their obligations under the Education Act and the national education guidelines as well as their obligations under the NZBORA and the HRA.
- 13.2 It is overly simplistic and incorrect to say that schools are required by New Zealand law to give transgender students access to shared toilets, showers and changing rooms, or that they must allow all transgender students to participate in sports teams that do not match their biological sex.
- 13.3 If discrimination on grounds of gender identity is generally prohibited under the HRA, there is still a range of possible forms that school policies can take to address this issue. The precise form of any particular school's policy will be affected by the circumstances and community background of the particular school.

Yours faithfully

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