

Opinion regarding the provision of single sex facilities

May 15 2023

In September 2022, Speak Up for Women (SUFW) was provided with a legal interpretation of the Births Deaths and Marriages Relationship Registration Act (BDMRRA), from this opinion we provide the following guidance.

Please note that in the interests of clarity and consistency, SUFW uses the term “trans-identifying male” to describe a male who claims to be a woman.

It is the view of SUFW that:

1. It is lawful for providers of sport and recreation services to maintain or provide separate facilities or services for each sex on the ground of public decency or public safety, and;
2. Trans-identifying males and other gender diverse males are not always women when “sex” is being determined (because section 79(2) of the Births, Deaths, Marriages, and Relationships Registration Act 2021 allows consideration of biology as relevant information for the purposes of ascertaining sex for a particular purpose).
3. Women-only facilities that exclude trans-identifying males would not be unlawfully discriminating against trans-identifying males on the basis of sex, and would not be in breach of the Human Rights Act.

The SUFW opinion is briefly stated, but note that we are familiar with the Crown Law Office opinion which suggests that “sex” in the Human Rights Act may include “gender”, and with the various cases which explore the issue of when a reference to a woman may include a trans-identifying male.

[Section 44 of the Human Rights Act](#) says that it “shall be unlawful for any person who supplies goods, facilities, or services to the public or to any section of the public— (a) to refuse or fail on demand to provide any other person with those goods, facilities, or services; or (b) to treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case,— by reason of any of the prohibited grounds of discrimination” – which include sex (s 21(1)(a)).

[Section 46](#) says that “*Section 44 shall not apply to the maintenance or provision of separate facilities or services for each sex on the ground of public decency or public safety.*”

The repeated response we have received from service providers is that providing certain areas exclusively for women would be discriminatory because “[b]y law, we cannot discriminate, and trans women and gender diverse people who identify as women are women”.

[Section 79](#) of the Births, Deaths, Marriages, and Relationships Registration Act 2021 says:

(1) A certificate issued under this Act is admissible as evidence in any legal proceedings and is presumed, in the absence of evidence to the contrary, to be an accurate record of the information recorded in the registry as at the date of issue.

(2) Any individual, private sector agency, or public sector agency authorised or required to ascertain an individual’s sex or gender for a particular purpose may take into account either or both of the following:

(a) the information contained in a certificate issued under this Act:

(b) any other relevant information.

Section 79(2)(b) is a clear indication of three things:

Firstly, that the BDMRRA recognises a distinction between sex and gender because it uses both words, rather than only one.

Secondly, it is anticipated that sex or gender may need to be determined for particular purposes.

Thirdly, that sex can (not must) be ascertained by reference only to relevant information excluding a person’s birth certificate.

Putting section 79 of the BDMRRA together with the Human Rights Act provisions, the exception in section 46 of the HRA allows discrimination for the stated purpose, on the basis of sex, and sex, at least in the section 46 context, is capable of being different to gender. Sex can be determined on the basis of relevant information that is not a person’s birth certificate, and for present purposes, that information will almost always be the biological indicators that include human females, and exclude human males.

Conclusion

Therefore, our conclusion is that the service providers are incorrect when they assert that “*people who identify as women are women for the purposes of s 46 of the HRA*”.

Service providers are entitled to positively discriminate by sex in favour of women, and to determine sex for that purpose by reference to biological indicators which cannot be changed

or identified out of. It is a matter for each service provider whether they choose to do this, but a refusal to consider doing it, made on the basis that doing it would be unlawfully discriminatory, is an error of law.

We have seen occasions where the service provider has cited the positions taken by the Human Rights Commission and the Ministry for Women, which include that “trans women are women.” These are policy positions, not required by the relevant law.

SUFW believes that these positions are harmful to the needs and rights of women and girls for spaces and services that, in some instances, are separate to those which meet the needs of men and boys.

MORE INFORMATION ON SEX SELF-ID CAN BE FOUND AT:

www.speakupforwomen.nz/self-id