



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Births, Deaths, Marriages, and Relationships Registration Bill 2017

02/03/2018

Submission on the Births, Deaths, Marriages, and Relationships Registration Bill 2017

1 Introduction

- 1.1 The New Zealand Law Society welcomes the opportunity to comment on the Births, Deaths, Marriages, and Relationships Registration Bill 2017 (Bill).
- 1.2 The Bill amends and largely re-enacts the Births, Deaths, Marriages, and Relationships Registration Act 1995 (the 1995 Act). The Law Society's submission focuses on two aspects of the Bill that warrant further consideration. They are:
 - (a) Whether the Bill gives due recognition to the rights of transgender people seeking to change their recorded sex and whether the limitations the Bill imposes on that right are demonstrably justified.
 - (b) Potential privacy issues relating to non-disclosure directions.
- 1.3 The Law Society does not seek to be heard, but is available to discuss this submission with the Committee or officials if that would be of assistance.

2 Subpart 7 of the Bill: applications to change the sex recorded on a birth certificate

Clauses 67 – 70: Changing the sex recorded on a birth certificate

- 2.1 As in the 1995 Act,¹ the Bill would require a person seeking to change the sex recorded on their birth certificate to apply to the Family Court. In summary, an applicant must satisfy the Court that:²
 - a. the sex on the applicant's birth certificate differs from their nominated sex (cl 68(a));
 - b. the applicant identifies as the nominated sex and wishes the birth certificate to reflect the nominated sex (cl 68(b)); and
 - c. on the basis of expert medical advice:³
 - (i) the applicant identifies as the nominated sex (cl 68(c)(i)(A));
 - (ii) "has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons [of that birth sex] to acquire a physical conformation that accords with a person of the nominated sex" (cl 68(c)(i)(B)); and
 - (iii) will continue to identify as that sex as a result of the medical treatment (cl 68(c)(i)(C)).

¹ Births, Deaths, Marriages, and Relationships Registration Act 1995, ss 28-29.

² Clause 68. Clause 70 provides similar requirements in respect of guardians seeking to change the sex of eligible children.

³ Alternatively, a person may show that their nominated sex has been recognised in accordance with the laws of another country: cl 68(c)(ii).

- 2.2 The state has a legitimate interest in ensuring the integrity of government records, including the sex recorded on birth certificates. How official documents record sex is also of personal significance to individuals for a variety of reasons.
- 2.3 Where the balance is struck in the Bill between these considerations is a policy choice, but one that must be made having due regard to the requirements of the New Zealand Bill of Rights Act 1990 (NZBORA).
- 2.4 The Ministry of Justice’s advice on the Bill’s consistency with the NZBORA concludes that the Bill does impair the right to be free from discrimination under section 19 of NZBORA on the ground of sex.⁴ That is, by requiring “medical treatment” as a prerequisite for changing the sex recorded on a birth certificate, the Bill discriminates on the ground of sex.⁵
- 2.5 The Family Court has found that “medical treatment” does not require sexual reassignment surgery in all instances. A case-by-case approach is required, but it is likely “some degree of permanent physical change as a result of the treatment (including psychological treatment)”⁶ would be required. At a minimum, it appears that a successful applicant will have undertaken counselling and hormonal therapy.⁷
- 2.6 Section 5 of NZBORA requires that “... 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”. The Ministry’s advice concludes that the impairment is demonstrably justified as required by section 5.⁸
- 2.7 The Ministry states that:⁹
- “One of the purposes of the 1995 Act is to ensure certainty and the integrity of a cornerstone of official identity: a birth certificate, and the corresponding entry on the register. For most people born in New Zealand, their registered birth record is a source that confirms their citizenship and the right to access a wide range of entitlements, including health services, welfare entitlements and education. As core identity information, a birth certificate is often required for other official documents, including passports and drivers licenses.”*
- 2.8 The Ministry concludes that the process established in the Bill is rationally connected with this purpose.¹⁰ However, the advice contains no analysis of why the entitlements that depend substantially on the “cornerstone” source confirming citizenship (health services, welfare and education) require the sex of the person at birth to be as it was at birth, rather

⁴ *Consistency with the New Zealand Bill of Rights Act 1990: Births, Deaths, Marriages, and Relationships Registration Bill*, Ministry of Justice, 26 July 2017 at [27] – [30].

⁵ Note 4, at [29] – [30].

⁶ *“Michael” v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 (FC) at [50].

⁷ *H v Registrar-General of Births, Deaths and Marriages* FC Wellington FAM-2009-090-002000, 21 September 2010; *MMT v Registrar-General of Births, Deaths and Marriages* [2012] NZFC 3533; *DAC v Registrar General Births, Deaths & Marriages* [2013] NZFC 1998; *B v Registrar General* [2013] NZFC 3562; and *PvH v Registrar-General of Births, Deaths and Marriages* [2015] NZFC 10609.

⁸ Note 4, at [31] – [41].

⁹ At [31].

¹⁰ At [33].

than the person's subsequently self-identified sex/gender. Certainly, welfare and education entitlements are not usually determined based on an individual's sex.

2.9 The questions whether the requirement to undergo medical treatment, the absence of an option to identify otherwise than as male or female, and the cost and burden of having to make a Family Court application raise important Bill of Rights issues that are not addressed in the Ministry of Justice's advice:

(a) Medical treatment:

The requirement to undergo medical treatment as a precondition of the state's recognition of a person's gender identity is out of step with the increasing recognition in other jurisdictions of the seriousness of such measures.¹¹

(b) The absence of an option to identify otherwise than as male or female:

The German Federal Constitutional Court has recently ruled that existing law dictating binary gender options (male or female only) is unconstitutional, because it interfered with the rights of intersex people. The Court noted that the law interfered with the basic rights of an individual to be able to develop and maintain their identity in a self-determined manner.¹²

(c) The requirement for an application to the Family Court:

Although applications are free of charge, applicants typically seek legal representation at their own expense¹³ and/or counsel is appointed to assist the Court.¹⁴ For many people, the prospect of engaging in a formal court process is stressful and intimidating. Other important life events (such as the notification of a birth, marriage or civil union, or the request for a name change) are notified to the Registrar-General in the first instance. In 2017 the Government Administration Committee agreed that a streamlined administrative process was preferable to the Family Court procedure.¹⁵

2.10 The factors that demonstrably justify discrimination, as required by section 5 of NZBORA, need to be carefully articulated. The Ministry of Justice's advice does not explain why these aspects of the Bill are necessary "to ensure certainty and the integrity of a cornerstone of official identity: a birth certificate, and the corresponding entry on the register". The Law Society recommends that the Committee give careful consideration to whether the section 5 test has been met in this context.

¹¹ As noted in the Appendix attached to this submission.

¹² Bundesverfassungsgericht [German Constitutional Court], 1 BvR 2019/16, 10 October 2017.

¹³ As in *"Michael" v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 (FC); *B v Registrar-General* [2013] NZFC 3562.

¹⁴ As in *"Michael"*; *H v Registrar-General of Births, Deaths and Marriages* FC Wellington FAM-2009-090-002000, 21 September 2010; *MMT v Registrar-General of Births, Deaths and Marriages* [2012] NZFC 3533; and *PvH v Registrar-General of Births, Deaths and Marriages* [2015] NZFC 10609.

¹⁵ Government Administration Committee *Petition 2014/86 of Allyson Hamblett: Report of the Government Administration Committee* (2017).

3 Privacy Considerations

- 3.1 It is acknowledged that the Bill has been drafted with input from the Privacy Commissioner.
- 3.2 However, the Law Society has identified the following privacy issues which warrant further consideration by the Committee:
- (a) the workability of requests under clause 97; and
 - (b) the workability and scope of clauses 98 and 99.

Workability of requests under clause 97

- 3.3 Clause 97 sets out circumstances when a non-disclosure direction will not apply. Whereas subclauses 97(d) and (e) provide for a person to satisfy the Registrar-General that access is required, subclauses 97(a), (b) and (c) do not provide for how, or to whom, a person would establish the purpose of the request for information. Presumably the person would need to satisfy the Registrar-General of the existence of a legal proceeding, that the person is adopted, or that the person is an executor, administrator of an estate or trust. This is an issue that warrants clarification.

Recommendation

Clarify whether the Registrar-General must be satisfied of the purpose of the request under subclauses 97(a), (b) and (c).

Workability and scope of clauses 98 and 99

- 3.4 Clauses 98 and 99 provide for situations in which non-disclosure directions that otherwise apply to births, deaths, and marriages information will not apply to searches by public sector agencies.
- 3.5 There may be legitimate situations where a non-disclosure direction will need to be overridden. However, there is a distinction between clauses 98 and 99: requests under clause 98 do not provide for a means of assessing whether the purpose of the request is sufficient to override the non-disclosure direction, whereas requests under clause 99 are subject to the Registrar-General being satisfied that (in general terms) the purpose of the request is necessary or desirable in the public interest. It is not clear why the same protection is not provided for in clause 98.
- 3.6 It is also important to ensure there are appropriate protections for this information once it is in the hands of the receiving agency. The Law Society recommends that, when births, deaths, and marriages information is released in reliance on these sections, it would be appropriate to:
- (a) require the Registrar-General to tell the receiving agency that the information would otherwise have been subject to a non-disclosure direction, but for the application of these sections, and
 - (b) place a duty on the receiving agency to protect the information that would otherwise have been subject to a non-disclosure direction from further disclosure, unless protecting the information would be incompatible with the purpose for which access to the information was granted.

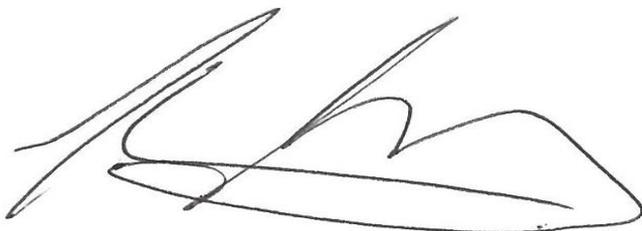
Recommendation

That clauses 98 and 99 be amended to (a) require the Registrar-General to tell the receiving agency that the information would otherwise have been subject to a non-disclosure direction, but for the application of these sections, and (b) place a duty on the receiving agency to protect the information that would otherwise have been subject to a non-disclosure direction from further disclosure, unless protecting the information would be incompatible with the purpose for which access to the information was granted.

- 3.7 Finally, clause 98(1)(a) provides that a non-disclosure direction does not apply to a request by a public sector agency that requires the information to avoid prejudice to the maintenance of the law. It is assumed that what amounts to “maintenance of the law” will mirror the case law that has developed around this phrase in relation to Information Privacy Principles (IPPs) 10 and 11 of the Privacy Act. If so, under the IPPs personal information may only be used or disclosed if “necessary” to avoid prejudice to the maintenance of the law.
- 3.8 The Law Society recommends that clause 98(1)(a) be amended, to make clear the standard for avoiding prejudice to the maintenance of the law to override a non-disclosure direction is that it is “necessary”. This would also be consistent with clause 102 which relates to requests for copies of entries made in the access register.

Recommendation

*Amend clause 98(1)(a) to state “a public sector agency ~~that requires~~ **where** the information is **necessary** to avoid prejudice to the maintenance of the law (including for the prevention, detection, investigation, prosecution, and punishment of offences):”*



Kathryn Beck
President
2 March 2018

Appendix: international principles

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In 2006 a group of international experts developed the Yogyakarta Principles,¹⁶ which include as Principle 3:

The Right to recognition before the law

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.

...

States shall:

...

- (c) 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

Other countries are moving away from requiring surgery or medical treatment in order to change the sex on a birth certificate. The Canadian provinces and territories formerly required surgery but that has been or is being removed following the decision of the Human Rights Tribunal of Ontario in *XY v Ontario (Government and Consumer Services)*.¹⁷

¹⁶ Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity: <https://yogyakartaprinciples.org/>.

¹⁷ *XY v Ontario (Government and Consumer Services)* 2012 HRTO 726.