

26 July 2017

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Births, Deaths, Marriages, and Relationships Registration Bill**

### **Purpose**

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1. We have considered whether the Births, Deaths, Marriages, and Relationships Registration Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 19(1) (freedom from discrimination), and s 21 (unreasonable search and seizure). Our analysis is set out below.

### **Summary**

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3. This Bill amends and re-enacts the Births, Deaths, Marriages, and Relationships Registration Act 1995 ('the 1995 Act').
4. The Bill limits the freedom from discrimination affirmed in s 19(1) of the Bill of Rights Act, for apparent discrimination on the basis of sex. We have also considered possible limitations on s 14, s 19(1) (on the basis of age), and s 21 of the Bill of Rights Act.
5. We conclude that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the importance of a person's birth certificate as a cornerstone of their official identity, as well as the Family Court's interpretation of s 28 of the 1995 Act.

### **The Bill**

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6. The Bill proposes a number of amendments to improve the operation of the Births, Deaths, and Marriages registers. These amendments support the development of new digital and online access channels, including amendments which allow historical register images to be viewed online.
7. The Bill also includes a number of amendments designed to tidy up and improve the operation of the legislative framework. This includes re-enacting the 1995 Act to ensure all provisions are presented in an up to-date and accessible form. Accordingly, we have also considered the consistency of those existing provisions in the 1995 Act that are re-enacted by the Bill.

## Consistency of the Bill with the Bill of Rights Act

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### Section 14 – Freedom of expression

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>
9. The Bill includes two types of provisions that engage the freedom of expression:
  - a. compelled expression – requiring an individual to provide information, and
  - b. censorship – preventing an individual from expressing themselves.
10. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:<sup>2</sup>
  - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. if so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?

### *Naming children and changing names*

11. The Bill provides limits on what a person's name can be when their birth is registered or when they are applying to change their name. Clause 17 provides that a person's name must not be "undesirable in the public interest", which means that it:
  - a. might cause offence to a reasonable person
  - b. is unreasonably long, or
  - c. is, includes, or resembles an official title or rank (without adequate justification).
12. By granting the Registrar-General a right to decline to register a name in certain circumstances, the Bill constitutes a *prima facie* limit on freedom of expression.
13. The three limits on what a person's name can be have three separate purposes. The first limit aims to protect the public (including the individual) from harm; the second aims to mitigate any administrative burden that an overly long name may pose; and the third aims to avoid any misrepresentation or confusion caused by a name that resembles an official title or rank. We consider that these purposes are sufficiently important to justify the limits on freedom of expression.

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<sup>1</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>2</sup> *Hansen v R* [2007] NZSC 7 [123].

14. We consider that the limits are rationally connected with the objective, impair freedom of expression no more than is reasonably necessary, and are in due proportion to the importance of the objective. The limits are small and tightly constrained, and an individual can, under cl 30, appeal a decision to not register a name to the Family Court within 28 working days after the decision was made and the affected party notified.
15. We therefore conclude that the limits on what a person's name can be are justified for the purposes of s 5 of the Bill of Rights Act.

#### *Compelling expression*

16. There are a number of provisions in the Bill which limit freedom of expression by compelling individuals to provide information to a Registrar. For example, cl 12 requires both parents of a child to jointly notify a Registrar of the birth as soon as is reasonably practicable after the birth. Similarly, a Registrar must be notified of any death that occurs in New Zealand under cl 38, and a marriage solemnised in New Zealand must be notified to a Registrar under cl 50.
17. The overarching purpose of the provisions that require individuals to inform the Registrar about certain events is to ensure the register is accurate and up-to-date. This is a sufficiently important purpose to justify a limitation on freedom of expression. To the extent that these provisions limit this right, we consider they are justified. We consider that the limits are rationally connected with the objective, impair a person's freedom of expression no more than is reasonably necessary, and are in due proportion to the importance of the objective.

#### *Limits on the publication of information obtained by searching the register*

18. The Bill allows the Registrar-General to make some registered information about births, deaths and marriages and civil unions available on a searchable register. Clause 87 however limits persons from publishing certain information that has been obtained by searching this register. That clause provides that a person cannot publish such information unless:
  - a. the information is in a form that could not reasonably be expected to identify any particular person
  - b. the person who makes the information available is the subject of the information, or
  - c. the information is historical.
19. We consider that restricting the publication of information obtained by searching the register is justified. The provision appropriately balances an individual's privacy interests with another individual's desire to search the register and comment on the same. Such an individual is only prohibited from publishing information about another person that may reasonably allow that person to be identified (unless they have written authority or power of attorney from the other person).

#### *Conclusion on freedom of expression*

20. We consider that the Bill appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

## Section 19(1) – Freedom from discrimination

21. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the prohibited grounds set out in the Human Rights Act 1993 ('the Human Rights Act').
22. The key questions determining whether legislation limits the freedom from discrimination are:<sup>3</sup>
  - a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under the Human Rights Act?
  - b. if so, does the distinction involve disadvantage to one or more classes of individuals?
23. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.<sup>4</sup>

### *Discrimination on the grounds of sex*

24. Clauses 22 and 23 of the Bill establish a process whereby an eligible adult can change the sex registered on their birth certificate through an application to the Family Court. In order to use this process, the Family Court must be satisfied:
  - a. that the applicant is not a person of the nominated sex, but
    - i. has assumed and intends to maintain, or has always had and intends to maintain, the gender identity of a person of the nominated sex
    - ii. wishes the nominated sex to appear on birth certificates issued in respect of the applicant, and
  - b. on the basis of expert medical evidence, that the applicant:
    - i. has assumed (or has always had) the gender identity of the person of the nominated sex
    - ii. has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex, and
    - iii. will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex.
25. An equivalent process exists in cls 24 and 25 for eligible children, with some modifications. An eligible child is still required to undergo (or have undergone) medical treatment reasonably necessary to enable the child to assume and maintain the gender identity of a person of the nominated sex.

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<sup>3</sup> See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

<sup>4</sup> See, for example, *Child Poverty Action Group v Attorney-General* above n 2 at [179]; and *McAlister v Air New Zealand* above n 2 at [40] per Elias CJ, Blanchard and Wilson JJ.

26. If a person has had their nominated sex recorded on their birth certificate, but has not undergone the necessary medical treatment, cl 27 allows the Registrar-General to delete a person's nominated sex registered on their birth certificate. If this occurs, that person's birth certificate would revert to their birth sex. The Registrar-General is required to receive expert medical evidence to the effect that the person has not undergone medical treatment that the Family Court considered necessary when it made its order.

*Does this process draw a distinction on one of the prohibited grounds of discrimination under the Human Rights Act?*

27. Section 21(1)(a) prohibits discrimination on the basis of sex. We have interpreted this ground to include gender identity (or the social and cultural aspects of identification with a particular sex).
28. We consider that the process established in the Bill constitutes intra-ground discrimination on the ground of sex. Intra-ground discrimination refers to a situation where a distinction is made between different subgroups of people who are protected from discrimination. Although no New Zealand case has directly considered this interpretation, we have followed the Canadian Supreme Court's reasoning in *Granovsky v Canada (Minister of Employment and Immigration)* in finding that intra-ground discrimination can be a breach of the Canadian Charter of Human Rights.<sup>5</sup>
29. On a plain-text reading of the provisions in the Bill, it appears that medical treatment is a requirement for an eligible person (or child) to change their birth certificate to their nominated sex. We consider that this requirement draws an intra-group distinction on the grounds of sex between those who are willing and/or able to undergo the necessary medical treatment (the first subgroup) and those who are unwilling or unable to do so (the second subgroup). People in the second subgroup may be unwilling or unable to undergo the necessary medical treatment for a variety of reasons, including cost, medical, cultural, or other reasons such as not identifying with the other sex to the degree that medical treatment is desirable.
30. Accordingly, people in the second subgroup are unable to utilise the process established in the Bill and are therefore, as a consequence, materially disadvantaged. As a result, the provisions are a *prima facie* limit on the right to freedom from discrimination affirmed in s 19(1) of the Bill of Rights Act.

*Is the objective sufficiently important?*

31. The provisions in question carry over from the 1995 Act. 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.
32. The provisions in the Bill that establish the process for changing the sex recorded on a person's birth certificate therefore aim to strike a balance between the official recording

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<sup>5</sup> *Granovsky v Canada (Minister of Employment and Immigration)* [2000] 1 SCR 703. See further *Trevethick v Minister of Health* [2008] NZAR 454 (HC), *Brookers Human Rights Law*, above n 4, at [HR 21.07].

of a person's assigned sex at birth and the individual's desire to later register their self-identified sex. We consider that this purpose is sufficiently important to justify a limitation on the right to freedom from discrimination.

*Is there a rational connection between the limit and the objective?*

33. We consider that the process established in the Bill is rationally connected with its objective. The Family Court is established as decision-maker in the process, and is best placed to consider the evidence tendered in support of the application, as well as interpreting the requirements of the process in a rights-consistent manner. The Family Court is also able to balance the need for integrity and certainty in the births register with an individual's desire for self-identification.

*Is the impairment of the right greater than reasonably necessary?*

34. This question turns on the extent of the medical treatment required to satisfy the Family Court, i.e. the interpretation of "such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex."
35. On its face, it would appear that this requirement does not minimally impair the right to freedom from discrimination. A plain analysis of the issue could reasonably conclude that a lesser process would impair the right less than the process established in the Bill. For example, an alternative process might entail an eligible person being assessed by a registered medical professional and that medical professional then providing an affidavit in support of the eligible person's application, without a requirement for medical treatment.
36. The Family Court's judgment in *Re Michael* provided a degree of certainty over the extent of medical treatment required to satisfy the requirements in s 28 of the 1995 Act.<sup>6</sup> Fitzgerald J concluded that Parliament did not intend that all available surgical procedures, including genital surgery, were required to satisfy the test. He found:<sup>7</sup>

Although the framing of [s 28] is complex, I have found that, after analysis, it is intended to be applied in a manner that is capable of addressing the primary concerns raised. ... [T]here can be no standard threshold test because each case must be dealt with on its own merits by reference to the evidence of the particular applicant, and of the medical experts familiar with that person's situation.

37. Although *Re Michael* is not a binding decision, it has been highly persuasive on subsequent decisions of the Family Court. Several decisions have found that an eligible person has satisfied the requirements of s 28 in the 1995 Act without having undergone surgery.<sup>8</sup>
38. In the Family Court, applications are therefore currently considered on a case-by-case basis, and there is no minimum threshold for the medical treatment required to satisfy

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<sup>6</sup> "*Michael*" v Registrar-General of Births, Deaths and Marriages (2008) 27 FRNZ 58 [*Re Michael*]

<sup>7</sup> *Re Michael* at [113]

<sup>8</sup> *Re DAC* [2013] NZFC 1998, *Re H FC Waitakere* FAM-2009-090-002000, 21 September 2010; *B v Registrar-General* [2013] NZFC 3562; *Re Rose* [2014] NZFC 7034; *R v Registrar-General* [2015] NZFC 10609.

the requirements of s 28. Given that the Bill seeks to re-enact s 28 of the 1995 Act in full with no modifications, we consider that this approach would continue.

39. Accordingly, given the Family Court has established there is no minimum threshold for the medical treatment required, and given that each application is considered on a case-by-case basis, we conclude that the process impairs the right to freedom from discrimination no more than is reasonably necessary.

*Is the limit in due proportion to the importance of the objective?*

40. We consider that the process established in the Bill and recent case-law result in the limit being in due proportion to the importance of the objective.

*Conclusion on discrimination on the grounds of sex*

41. We conclude that the discrimination on the basis of sex provided by the process for a person to change their birth record to their nominated sex is justified for the purposes of s 5 of the Bill of Rights Act.

*Discrimination on the grounds of age*

42. Section 21(1)(i) of the Human Rights Act prohibits discrimination on the basis of age for persons over the age of 16. A number of provisions in the Bill vary certain processes for those under the age of 18 by requiring that person's parent or guardian to undertake the process on that person's behalf. The relevant processes are:

- a. changing birth information relating to sex (the guardian of an eligible child may apply on the child's behalf)
- b. applying to include additional information on the birth certificate of an adopted child's birth certificate (the adopted person's parent(s) may apply on the adopted person's behalf), and
- c. name changes (the guardian of an eligible child may apply on the child's behalf).

43. These provisions constitute *prima facie* discrimination on the basis of age in respect of those aged 16 or 17.

44. Age restrictions necessarily involve a degree of generalisation using age as a proxy measure of maturity and capacity to act responsibly. This avoids the administrative burden inherent in assessing each individual's maturity and responsibility on a case-by-case basis.

45. The limits in the Bill are consistent with other legislation which uses age a threshold for holding a position of responsibility. The age of 18 is often used as the age of competence. The age of 18 is also the default age of majority under the UN Convention on the Rights of the Child.

46. We also consider that the process variations for those aged under the age of 18 minimally impair the right and are in due proportion to the importance of the objective. The processes are not withheld from a person under the age of 18, but are simply handled differently until a person turns 18.

47. We therefore conclude that the discrimination on the basis of age is justified for the purpose of s 5 of the Bill of Rights Act.

*Conclusion on freedom from discrimination*

48. For the reasons above, we consider that the Bill appears to be consistent with the right to freedom from discrimination affirmed in s 19(1) of the Bill of Rights Act.

**Section 21 – Unreasonable search and seizure**

49. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.<sup>9</sup>
50. Ordinarily a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held an unreasonable search logically cannot be demonstrably justified and therefore the s 5 inquiry does not need to be undertaken.<sup>10</sup> In assessing whether the search and seizure powers in the Bill are reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective.
51. This Bill provides a search power to public sector agencies, who can request the Registrar-General to search for, or provide, information recorded under the Bill.
52. We consider that this power of search is not unreasonable for the purposes of s 21. The information contained in the register is basic identification information, and a request made under this power must specify the reasons for the request (including why it is necessary or desirable in the public interest), and the provision of the information is required for a purposes consistent with the Bill's purposes.
53. Furthermore, depending on the type of search being undertaken, the information may be subject to a non-disclosure direction. A non-disclosure direction is when a person requests that the Registrar-General direct that their birth, marriage, civil union, or name change information not be disclosed to the public.
54. However, a non-disclosure direction will not apply where the search is necessary to avoid prejudice to the maintenance of the law; the disclosure to that agency is authorised by another enactment; the agency is an intelligence or security agency and needs the information for the performance of its functions; or the search is by Police in order to notify next of kin about a death.
55. We therefore consider that the Bill appears to be consistent with the right to be secure against unreasonable search or seizure as affirmed in s 21 of the Bill of Rights Act.

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<sup>9</sup> See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J; see also *Williams v Attorney-General* [2007] NZCA 52.

<sup>10</sup> *Ibid* at [33]; *Hamed v R*, above n 4 at [162].

## **Conclusion**

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56. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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