Identity Information Confirmation Bill

26 July 2010

ATTORNEY-GENERAL

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
IDENTITY INFORMATION CONFIRMATION BILL

1. We have considered whether the Identity Information Confirmation Bill (PCO 14374/6.3) (“the Bill”) is consistent with the New Zealand Bill of Rights Act 1990 (“Bill of Rights Act”). We understand that the Bill will be considered by the Cabinet Legislation Committee on Thursday, 29 July 2010.

2. We have concluded that the Bill is consistent with the Bill of Rights Act. In reaching this conclusion, we have considered a potential inconsistency with the right to freedom from discrimination in s 19 of the Bill of Rights Act. Our analysis of this issue is set out below.

PURPOSE OF THE BILL

3. The Bill establishes an electronic service that allows agencies to confirm identity information about individuals. The purpose of the Bill is to contribute to the prevention of crime, particularly crimes involving fraud or a false identity and to ensure that agencies can use and if necessary record confirmed identity information.

4. The confirmation service will be a consent-based service that will allow both private and public sector agencies to check information about individuals against information held on government databases and registers of passports, other travel documents, citizenship, births, deaths, marriages, and civil unions. In order to use the service, an agency will need to have entered into an agreement with the chief executive of the Department of Internal Affairs or the Registrar General of Births, Deaths and Marriages, or both. The service is designed to protect the privacy of personal information.

CONSISTENCY WITH SECTION 19(1) OF THE BILL OF RIGHTS ACT

5. We have considered the potential impact of the Bill on the transgender community. This community encompasses a diverse range of people with different backgrounds. For the purposes of this advice, we are concerned with those people whose gender identity is different from the gender assigned to them at birth.

6. The Human Rights Commission Report of the Inquiry into Discrimination Experienced by Transgender People, To be Who I Am: Kia noho au ki toku ano ao, expresses concern about the particular difficulties transgender individuals face in obtaining official documents that provide consistent and accurate information about their gender identity, and the possibility of discrimination when such documents are not congruent with physical appearances.
7. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993. The grounds of discrimination under the Human Rights Act include discrimination based on sex. [1]

8. Drawing on the New Zealand case law on discrimination, we consider that the key questions in assessing whether there is a limit on the right to freedom from discrimination are: [2]

   a. does the legislation draw a distinction based on one of the prohibited grounds of discrimination; and if so
   b. does the distinction involve disadvantage to one or more classes of individuals?

9. In determining if a distinction arises, consideration is given to whether the legislation proposes that two comparable groups of people be treated differently on one or more of the prohibited grounds of discrimination. [3] The distinction analysis takes a purposive and untechnical approach to avoid artificially ruling out discrimination. [4] Once a distinction on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination. [5]

10. The identity information check process is not discriminatory on its face as anyone can have consistent records if they register any new changes. In this sense, a transgender person who needs to register a change to their gender on their birth certificate could be compared with a person needing to register a change to their name or country of citizenship.

11. However, whereas non transgender people may at some stage require a change to their official records, all transgender people who wish to have their official records match their gender identity must actively seek a change. As a result, the check process is likely to have a disproportionate impact on transgender individuals, especially when you consider the stigma attached to gender identity issues. This demonstrates a possible case of indirect or effects based discrimination.

   **Is there a disadvantage?**

12. A declaration under s 28 of the Births, Deaths, Marriages, and Relationships Registration Act 1995 allows the Family Court to change the sex on the applicant’s birth certificate to the nominated sex. Transgender individuals with s 28 declarations will be able to change their official record to match their gender identity so that any check of their records will yield “Consistent” results.

13. For transgender individuals who have not been able to obtain a s 28 declaration, the information search results will come back as “Not Consistent” unless the individual discloses their gender details to the agency before the check.

14. The Family Court decision in “Michael” v Registrar-General Births, Deaths and Marriages [6] addresses the threshold required for a court to amend a birth record and confirms that courts will take a “case-by-case” approach to applying the criteria for a s 28 declaration. This case arose because of the concerns of trans people who believed and/or had been informed that full gender reassignment surgery is required before the court will issue an order to have a birth record amended. In that case, the Family Court was satisfied that, although the applicant continued to have female
internal reproductive organs, the applicant’s ongoing hormone treatment would satisfy the requirements of s28(3)(c)(i)(B) & (C) of the Births, Deaths, and Marriages Registration Act 1995 (as it was then known).

15. Given that it is now more likely that transgender individuals will seek s 28 declarations, we consider that any disadvantage created by the Bill is minimal.

*Is any potential discrimination justified in a free and democratic society?*

16. Regardless of whether there is a potential argument for discrimination (and in our view we consider that this is unlikely), for completeness we have examined whether any disadvantageous distinction would be justified in terms of s 5 of the Bill of Rights Act. We consider that such a justification is available due to the requirements that:

- agencies must obtain the consent of the person using the service (cl 9)
- agencies must have alternative processes in place in cases where a person does not consent or withdraws consent (cl 11(3)(f))
- before an agency can take adverse action against an individual as a result of using the confirmation service, the individual must be given a reasonable opportunity to make submissions or to be heard.

**CONCLUSION**

We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed by the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

Jeff Orr  
Chief Legal Counsel  
Office of Legal Counsel

Footnotes:


5. See for example *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [179]; and *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

6. *FC FAM-2006-004-02325*

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