

18 October 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Supplementary advice on the Births, Deaths, Marriages, and Relationships Registration Bill

1. We have considered whether the Births, Deaths, Marriages, and Relationships Registration Bill ('the Bill'), as reported back by the Government and Administration Committee ('the Committee'), is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. The Bill was introduced on 10 August 2017. Our advice of 26 July 2017 concluded that the Bill appeared to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.
3. In reaching that conclusion, we 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). The advice focussed principally on clauses 22 and 23 of the Bill, which established a process whereby an eligible adult can change the sex registered on their birth certificate through an application to the Family Court.
4. We considered the apparent requirement for medical treatment in order for an eligible person (or child) to change their birth certificate to their nominated sex could constitute intra-ground discrimination on the basis of sex.¹
5. Specifically, the requirement draws an intra-group distinction 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). However, we concluded the limit was justified under s 5 of the Bill of Rights Act.
6. The Bill was reported back by the Committee on 10 August 2018. The Committee recommended a series of amendments to the Bill, including to replace the Family Court process in cls 22 and 23 with an administrative process based on self-identification.
7. The Minister of Internal Affairs wrote to you requesting advice on the consistency of these proposed changes with the Bill of Rights Act.
8. The proposed amendments recommend removing all references to "medical treatment", "medical evidence", "physical conformation", "sexual assignment", and "sexual reassignment" from the Bill. As such, the Bill no longer appears to create the potential for intra-ground discrimination outlined above.
9. Furthermore, the administrative process appears to make the process for individuals to request a change to their registered sex simpler than in the Bill as introduced. In addition,

¹ See, for discussion of intra-ground discrimination, *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* at [HR 21.07].

the inclusion of “intersex” and “X (unspecified)” as registrable options ensures recognition of non-binary sexual and gender identities.

10. In our view, these provisions do not appear to limit the right to be free from discrimination on the grounds of sex. We therefore conclude that the Bill appears to be consistent the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel