

Births, Deaths, Marriages, and Relationships Registration Amendment Bill - Previous

17 November 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

BIRTHS, DEATHS, MARRIAGES, AND RELATIONSHIPS REGISTRATION AMENDMENT BILL

1. We have assessed whether the Births, Deaths, Marriages, and Relationships Registration Amendment Bill (PCO 5516/29) is consistent with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that this Bill will be considered by the Cabinet Legislation Committee on 23 November 2006.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act.
3. In reaching this conclusion, we have analysed potential issues of inconsistency with sections 19 and 21 of the Bill of Rights Act. Our analysis of these potential issues is set out below.

PURPOSE OF THE BILL

4. The Bill proposes to amend the Births, Deaths, and Marriages Registration Act 1995 (the BDMR Act) to:
 - Improve the ability of the Registrar-General to collect and verify information for the purposes of the Act;
 - Regulate access to that information (incorporating appropriate privacy safeguards and recognising that there are a range of legitimate reasons why people want to access the information);
 - Modernise the Act to take account of technological and social developments; and
 - Establish a new register to record name changes for overseas born people living in New Zealand.

ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT

Section 19: Freedom from Discrimination

5. Section 19(1) of the Bill of Rights Act protects the right to freedom from discrimination on the grounds of discrimination set out in section 21 of the Human Rights Act 1993. These grounds include age and marital status.

6. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:
 - Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
 - Does the distinction involve disadvantage to one or more classes of individuals?
7. If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue under section 19(1) of the Bill of Rights Act.
8. Where a provision is found to be *prima facie* inconsistent with 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 section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.^[1]

Eligibility to make applications for changes to names, adoptive information, and sex

9. Clause 13 of the Bill provides that the following persons may apply for registration of a name change:
 - an entitled person who is 18 years of age or older
 - an entitled person who is younger than 18 years of age but who is or has been married, in a civil union, or in a de facto relationship
 - the guardian of an entitled person.
10. Clause 14 provides that the Registrar-General of Births, Deaths and Marriages must include additional information in the birth information of an adopted person on the application of:
 - The adopted person if he or she is 18 years of age or older; or
 - The adopted person if he or she is younger than 18 years of age, but is or has been married, in a civil union or a de facto relationship; or
 - The adoptive parent/s, if the adopted person is younger than 18 years of age and has not earlier married, entered into a civil union, or been in a de facto relationship.
11. The additional information is notice of whether the words ‘adoptive parent’ or ‘adoptive parents’ should appear on birth certificates relating to the adopted person, and other information relating to the birth.

12. Clause 15 provides that only persons who are aged 18 years or over or who have earlier been married, entered into a civil union, or been in a de facto relationship may apply for a declaration from the Family Court as to the sex to be shown on a birth certificate.
13. These clauses draw a distinction between those aged 16 or 17 and those aged 18 years and above for the purpose of eligibility to apply for the registration of a name change, the inclusion of additional information in an adopted person's birth information or a Family Court declaration as to the sex to be shown a birth certificate. These clauses also draw a distinction between those aged 16 or 17 who have earlier married, entered into a civil union, or have been in a de facto relationship, and those that have not.
14. These clauses disadvantage 16 and 17 year olds who have not earlier married, entered into a civil union, or been in a de facto relationship, because they do not allow these persons the autonomy to decide whether they wish to change their name, record additional adoption information, or apply for a declaration of the Family Court as to the sex to be shown on their birth certificate. Accordingly, we consider these clauses to be *prima facie* inconsistent with section 19(1) of the Bill of Rights Act.

Are these justified limitations under section 5?

15. In a general sense, the provisions in the BDMR Act that will be amended by clauses 13, 14, and 15 of the Bill contribute to the overall objectives of the BDMR Act. Those objectives are to require the recording and verification of information relating to births, deaths, marriages, civil unions, name changes, adoptions and sexual assignments and reassignments so as to provide a source of demographic information and an official record of births, deaths, marriages, civil unions and name changes that can be used as evidence of those events and of a person's identity, among other personal details. We accept that these are significant and important objectives.
16. We have concluded that the distinctions in clauses 13, 14 and 15 of the Bill are justified in terms of section 5 of the Bill of Rights Act for the reasons set out below.

Age

17. The Department of Internal Affairs advises that the reason for the age limitations in clauses 13, 14 and 15 is because guardianship responsibilities under the Care of Children Act 2004 end once the child reaches 18 years or marries, or enters into civil union or a de facto relationship. Guardianship responsibilities include, inter alia:
 - decisions about the child's name (and any changes to it)
 - decisions affecting the child's culture and language
 - determining the gender identity of a child.

18. However, in recognition of the right of a person aged 16 or 17 to be involved in a decision about their name, clause 13 requires a guardian to obtain the written consent of a child who is aged 16 years or older before making an application for registration of a name change.
19. We are also advised that an important reason for the age limitation in clause 14 is that the decision about whether to add information to a birth certificate (such as denoting parents as 'adoptive') requires a significant level of emotional maturity and responsibility, because the decision will affect the family identity of both the adopted person and others.
20. Age limits necessarily involve a degree of generalisation, without regard for the particular abilities, maturity or other qualities of individuals within that age group. In these clauses, age is being used as a proxy measure of the maturity and capacity of an individual to act responsibly, which is necessary in this situation.
21. It is reasonable for Parliament to set an age limit reflecting its assessment of when most persons will have sufficient maturity to ensure responsible decisions are made in these particular contexts. The alternative would be for the Registrar-General to assess each individual aged 16 or 17 years to determine whether they have sufficient capacity to make the decision and this does not appear to be a workable solution. Clause 14 of the Bill requires adoptive parents to obtain the written consent of an adopted person aged 16 or 17 before applying to add birth information. It therefore provides a statutory process by which 16 and 17 year olds are consulted with and participate in the decision made on their behalf.

Marital status

22. All three clauses make a further distinction by permitting individuals aged 16 and 17 years, who have earlier been married, entered into a civil union or been in a de facto relationship, to make an application on the same basis as someone aged 18 or over. Our assessment is that the difference in treatment between persons aged 16 and 17 years who are single and those who have earlier been married, entered into a civil union or been in a de facto relationship is rational and proportionate.
23. Individuals aged 16 or 17 need the consent of a parent or guardian or a Family Court Judge to marry, or enter into a civil union or a de facto relationship. The consent signals the parent, guardian or Judge believes the individual has the appropriate level of maturity and responsibility to undertake such an important decision. In other words, by way of parental consent, the individual has been given authority to act in ways which may have a significant impact on their marital and/or family status.
24. Accordingly, these provisions recognise that young persons who have married or entered into a civil union or de facto relationship have the maturity and capability to make other decisions which may impact on their identity or that of their family.

Section 21: the right to be secure from unreasonable search and seizure

25. Several clauses in the Bill raise issues of consistency with section 21 of the Bill of Rights Act (the right to be secure from unreasonable search and seizure) where they require the provision of certain information. The requirement to produce documents and information under statutory authority constitutes a search for the purposes of section 21 of the Bill of Rights Act. [2]

26. Clauses 9, 10, 12, 33 and schedule 3 require individuals to provide:

- doctor's certificates, statutory declarations or a coroner's authorisation upon the death and the transfer and disposal of bodies;
- notification of the birth of a child and the child's names; and
- information relating to a registrable event.

27. We consider that the powers to require the provision of certain information in the Bill are reasonable as they are necessary for the Registrar-General to carry out his or her duties under the Act. Those duties relate to one of the main purposes of the Act, which is to require the recording and verification of information relating to births, deaths, marriages, civil unions, name changes, adoptions and sexual assignments and reassignments so as to provide:

- a source of demographic information, and information about health, mortality, and other matters important for government; and
- an official record of births, deaths, marriages, civil unions, and name changes that can be used as evidence of those events and of age, identity, descent, whakapapa, and New Zealand citizenship.

28. We also note that the personal information that is collected is subject to the jurisdiction of the Privacy Act 1993.

29. We therefore conclude that these provisions do not constitute unreasonable searches in terms of section 21 of the Bill of Rights Act.

Conclusion

30. We have concluded that the Bill appears to be consistent with the Bill of Rights Act.

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Footnotes

1 In applying section 5, we have had regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 and Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4th).

2 *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC).

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