

Privacy Commissioner's Submission to the Governance and Administration Committee on the Inquiry into Supplementary Order Paper 59 on the Births, Deaths, Marriages and Relationships Registration Bill

Introduction

1. I am pleased to provide a submission on the Inquiry into Supplementary Order Paper 59 (SOP) on the Births, Deaths, Marriages and Relationships Registration Bill (the Bill).
2. I previously expressed support for the Bill when it was first considered by the Governance and Administration Committee in 2018. My Office has since been consulted on the draft SOP by the Department of Internal Affairs.
3. The inquiry is focused on the provisions in the SOP which would change the process by which people can self-identify their sex on their birth records. These changes are similar to the recommendations made by the Committee when it first examined the Bill in 2018. The changes made in the SOP also include:
 - An 18-month implementation period
 - A built-in statutory review of the self-identification provisions five years following commencement
 - A recommendation that young people aged 16 or 17 can apply on their own behalf and choose to accompany this with consent from a guardian or suitably qualified third party
 - Allowing for multiple changes of a sex marker over time
 - Enabling sex markers other than male and female to be made through regulations following consultation
 - That the self-identification provisions cannot be used to change the individual's birth records from another country.
4. The Privacy Act 2020 (the Privacy Act) is New Zealand's main privacy law. It governs the collection, use, storage and disclosure of personal information and provides a mandate for my Office to consider wider developments or actions that affect personal privacy. While the application of the Privacy Act does not extend to the judicial functions of a court or tribunal, one of my functions under the Privacy Act is to examine legislation before Parliament and to consider any matters affecting individuals' privacy.
5. I support the SOP and the proposal to introduce a self-identification process. I consider the introduction of a self-identification process to be privacy enhancing as it removes the requirement for people to provide sensitive health information to register their nominated sex and is more consistent with the processes to amend registered sex on other forms of identification. I have made some recommendations relating to the SOP I would like the Committee to consider. My comments relate to clauses 22A – 22E and 115.

New clauses 22A – 22E: New process to register nominated sex

6. The current process for amending registered sex on a birth certificate requires an individual to make an application to the Family Court for a declaration. An applicant is also required to provide sensitive medical evidence relating to treatment the person has received as part of their transition to support their application.
7. The SOP sets out a new self-identification process for an eligible person to register nominated sex based on a statutory declaration. The Registrar-General must register the nominated sex specified if satisfied the requirements of sections 22A(1) and 22B are met for an application made by an eligible person, or sections 22A(2) and 22C are met for an application made by the guardian of an eligible child.
8. I support the new self-identification process to register nominated sex. The self-identification process removes the requirement for a person wanting to register their nominated sex to provide unnecessary and sensitive medical information and brings the process for amending registered sex on a birth certificate in line with the self-identification processes required to amend more commonly used forms of identification in New Zealand, including driver licences and passports.
9. The self-identification process also helps to ensure that birth information retained by the Registrar-General is accurate, as required by Information Privacy Principle 8 of the Privacy Act, by removing obstacles to register nominated sex and introducing safeguards to ensure the process cannot be misused. For example, the SOP allows multiple amendments to registered sex but requires a person who makes subsequent amendments to meet additional requirements prescribed in regulations. This amendment acknowledges that gender is fluid and changes overtime, whilst putting in place measures to protect against fraud and ensure that applications are genuine.

New clauses 22E(2) – (3): Different treatment of name change information on birth certificate

10. The SOP clarifies that when a person amends their registered sex and name at the same time, or chooses to keep their current name, their previous names will not be listed on their birth certificate. I consider this clarification to be privacy protective as it helps to prevent a person from being 'outed' as transgender or intersex if people can see that the previous names on their birth certificate do not align with their registered sex.
11. However, the SOP also provides that previous names will now be listed on a birth certificate if the person changes their name after they have amended their registered sex. I understand this change is intended to help maintain a person's chain of identity and minimise the risk of fraud. If this change is implemented, I recommend guidance is developed to help applicants understand the different treatment of name changes, so they can make an informed decision about when to change their name and how this change will affect the content of their birth certificate.

Clause 115: Amendments relating to restricted information

12. We understand, according to publicly available advice from DIA to the Minister of Internal Affairs, the intent of clause 115(3) is that the Registrar General be able to share limited restricted information (previous registered sex and name information) on a “need to know” basis under an approved information sharing agreement (AISA) consistent with clause 110(4).
13. Clause 115(3) clarifies that clause 115 does not limit the sharing of information under clause 110(4). However, given the express limitation on sharing restricted information in clause 115(1)(a), we consider that if limited restricted information is intended to be eligible for inclusion in an AISA, that needs to be made clear.
14. We recommend amending clause 115 to make the intended policy clear by adding a new sub-clause:

(1A) Despite subsection (1), the Registrar-General may share the following information under an approved information sharing agreement with a public sector agency, but only for the restricted purpose of ensuring that a person does not have more than 1 identity where necessary for a lawful purpose connected with a function of that agency:

 - (a) The fact that a correction or change to a person’s birth information relating to sex has been registered; and*
 - (b) The person’s names at the time of the correction or change; and*
 - (c) Any new names later adopted by the person.*
15. This amendment incorporates the privacy safeguard that information sharing under an AISA is strictly limited to the purpose provided in clause 110(4) and cannot be expanded to allow additional information sharing purposes (as would otherwise usually be permitted under an AISA).

Conclusion

16. I trust my comments are of use to the Committee in its consideration of the Bill. I am happy to appear before the Committee if that would be of assistance.



John Edwards
Privacy Commissioner

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