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Tēnā koe Tim

**Births, Death, Marriages and Relationship Registration Bill 2017 (296–2):
Self-identification of sex
Our Ref: ATT114/2011**

1. On 10 August 2018 the Governance and Administration Committee recommended the Births, Deaths, Marriages, and Relationships Registration Bill 2017 (**Bill**) be passed with amendments.¹ The Bill now awaits a second reading in the House of Representatives.
2. The Bill would repeal and replace the current Births, Deaths, Marriages, and Relationships Registration Act 1995 (**Act**). The recommended amendments include clauses 22A–22J. These would replace the current judicial process for changing the sex recorded on a person's birth certificate,² with a simpler, more accessible administrative process based on self-identification.
3. You have asked us to analyse the implications of cll 22A–22J, and identify any legal issues that may benefit from further policy consideration before the Bill proceeds.

Clauses 22A–22J

4. It is unnecessary for present purposes to recount the machinery by which cll 22A–22J would facilitate a person to change their registered sex. However it may be noted that a successful application would result in a change to the applicant's birth record,³ and an applicant would then be able to request to be provided with a birth certificate reflecting their newly-registered sex.⁴

¹ (296–2).

² Act, pt 5.

³ A 'birth record' is all information in the Government's Registry of Births, Deaths and Relationships about the person: Bill, cll 4 (definition of "birth record") and 126.

⁴ Clauses 78 and 84(2)(a).

Reliance upon birth certificates

5. Birth certificates are used as identity documents in a wide range of official and community settings. They can be important for an individual to access a variety of entitlements, facilities, services, roles and opportunities.
6. Further, s 71 of the current Act provides:⁵

71 Certificates to be prima facie evidence

A birth ... certificate shall in any proceedings be received as prima facie evidence of the truth of the information it contains.

7. However we are aware of only one legal consequence that flows automatically from the sex recorded on a person's birth certificate. That is, if a prisoner supplies their birth certificate to the Chief Executive of the Department of Corrections, the Chief Executive **must** place the prisoner in that part of the prison estate which accords with the recorded sex.⁶
8. Government agencies rely upon birth certificates when issuing other identity documents — including documents that record the holder's sex. The two most common examples are travel documents (including passports) and citizenship certificates.⁷ However the Department of Internal Affairs (**DIA**) will issue a travel document or citizenship certificate that reflects a person's preferred sex, even if this does not align with the sex recorded on their birth certificate. As such there is no necessary **legal** connection between the sex recorded on a birth certificate, and the sex recorded on these other identity documents. However we readily accept that a person would prefer to have their sex recorded consistently across their birth certificate, travel documents and/or citizenship certificate.

Determination of sex or gender in other contexts

9. A number of entitlements, facilities, services, roles and opportunities are reserved exclusively or predominantly for persons of a particular sex or gender. These include single-sex schools; women's refuges, counselling and health services; men's and women's prisons; religious orders and sporting competitions.
10. Further, the law sometimes confers rights or imposes obligations by reference to a person's sex or gender. For example, a single adult male may not adopt a female child of which he is not the father, unless a court is satisfied there are special

⁵ Section 71 of the current Act would be replicated by cl 80 of the Bill:

80 Certificates as evidence

A certificate issued under this Act is admissible as evidence in any legal proceedings, and the information contained in it is presumed to be true in the absence of evidence to the contrary.

⁶ Corrections Regulations 2005, rr 65(1)–(3).

⁷ While applicants for drivers and firearms licences are required to declare their sex or gender on their application (see, eg, Land Transport (Diver Licensing) Rule 1999, r 10(e)), their declared sex or gender is not displayed upon the licence itself (r 63).

circumstances.⁸ And only a man can commit the criminal offence of ‘male assaults female’.⁹

11. It may be thought that the effect of s 71 of the current Act would be that a birth certificate would be *prima facie* evidence of sex, for the purposes of determining a person’s eligibility to access such reserved entitlements, facilities, services, roles or opportunities, and their rights and obligations under the law. However s 33 of the current Act also provides:

33 New information not to affect general law

Notwithstanding this Part^[10], the sex of every person shall continue to be determined by reference to the general law of New Zealand.

12. The effect of s 33 was explained by the Judge Fitzgerald of the Family Court in ‘*Michael*’ v Registrar-General of Births, Deaths and Marriages.¹¹

[98] ... the registration of information that the person is of the nominated sex does not itself determine the person’s sex in the eyes of the law in all respects.

[99] Following alteration of the birth record, Michael will be legally recognised as a male only to the extent that the general law provides for a birth certificate to be determinative or that he otherwise qualifies. He will not necessarily be a male for all legal purposes.

13. Clause 22I of the Bill would carry forward a similar provision:

22I New information not to affect general law

Despite sections 22B to 22G and section 23, the sex of every person must continue to be determined by reference to the general law of New Zealand.

14. However both s 33 and cl 22I beg the question: how does the general law of New Zealand determine a person’s sex, if not by reference to the sex recorded on their birth certificate (or travel document, or citizenship certificate)?

‘The general law of New Zealand’

15. From our research there is limited New Zealand case law on the point. The most significant judgment is that of Ellis J in a 1994 High Court case, *Attorney-General v Ōtāhuhu Family Court*. In that case a declaration was sought¹²

⁸ Adoption Act 1955, s 4(2).

⁹ Crimes Act 1961, s 194(b).

¹⁰ That is pt 5, which establishes a judicial process for changing the sex recorded on a person’s birth certificate.

¹¹ (2008) 27 FRNZ 58 (FC) (*Michael*).

¹² [1995] 1 NZLR 603 at 604 (*Ōtāhuhu Family Court*). This question was significant in 1994, as only persons of opposite sexes could marry. The question would not be significant in 2019, following enactment of the Marriage (Definition of Marriage) Amendment Act 2013.

as to whether two persons of the same sex genetically determined may enter into a valid marriage, where one of the parties to the proposed marriage has adopted the sex opposite to that of the proposed marriage partner through sexual reassignment by means of surgery or hormone administration or both or by any other medical means.

16. Before stating his own conclusions, Ellis J reviewed a 1970 English case: *Corbett v Corbett (otherwise Ashley)*.¹³ In *Corbett* it had been suggested by experts that sex could be determined by reference to:¹⁴

- chromosomal factors;
- gonadal factors (that is, the presence of testes or ovaries);
- genital factors (including internal sex organs);
- psychological factors; and/or
- hormonal factors or secondary sexual characteristics (such as the distribution of hair, breast development, physique and voice).

17. The English Court held that, at least in the context of marriage, sex should be determined by reference to chromosomal, gonadal and genital factors. If all three were congruent, sex could be determined accordingly, irrespective of any surgical intervention. But if the three factors were not congruent, greater weight should (probably) be given to genital factors.¹⁵

18. In *Ōtāhuhu Family Court* the New Zealand High Court was considering a similar issue to that before the English court in *Corbett* — ie determining sex for the purposes of marriage. Twenty-four years later, Ellis J agreed with criticisms of *Corbett* — in particular, that it focused too narrowly on sexual intercourse and procreation as ‘essential’ to marriage. Ellis J’s view was that by 1994:¹⁶

the law of New Zealand has changed to recognise a shift away from sexual activity and more emphasis being placed on the psychological and social aspects of sex, sometimes referred to as gender issues.

19. We are not aware of a case in which a New Zealand court has explored how sex is to be determined according to the general law in a context other than marriage, or clarified the precise nature of the ‘psychological and social aspects of sex’. However in *Secretary, Department of Social Security v SRA* (decided the year prior to *Ōtāhuhu Family Court*), a majority of the Full Federal Court of Australia elaborated that psychological factors went to an individual’s self-perception, whereas social factors went to how society perceives the individual.¹⁷

¹³ [1971] P 83.

¹⁴ At 100.

¹⁵ At 106.

¹⁶ *Ōtāhuhu Family Court*, above n 12, at 606. This view was endorsed in relation to the common law of Australia by the Full Family Court in *Attorney-General (Cth) v Kevin* [2003] FamCA 94, (2003) 172 FLR 300 at [285].

¹⁷ (1993) 43 FCR 299 at 325; quoted with approval by the High Court of Australia in *AB v Western Australia* [2011] HCA 42, (2011) 244 CLR 390 (*AB*) at [2].

20. Accordingly, in our view, it is likely that a court asked in 2019 to determine sex by reference to the general law of New Zealand for the purposes of a person's access to reserved entitlements, facilities, services, roles or opportunities, or their rights and obligations under the law, would apply a multi-factor assessment. The factors identified in *Corbett* (including psychological factors — how the individual perceives themselves) would likely still be relevant. However the court would also likely take into account social factors — how society perceives the individual. These factors may no doubt be informed by the sex recorded on the person's birth certificate and other identity documents (as evidence that the person perceives themselves to be of particular sex or gender, and that at least some of the institutions of government recognise them in that sex or gender).

Legal issues that may benefit from further policy consideration

21. A number of legal issues may benefit from further policy consideration before the Bill proceeds.

Scope of application

22. In its current form, cl 22I may be construed as applying to any person who needs to determine another person's sex, for any governmental or non-governmental purpose (eg conferring an entitlement, employment, providing goods or services, entry to a religious order, entry to a sporting competition). It is unclear to us whether it is the Government's policy intent to:

- 22.1 impose the obligation of determining sex by reference to the general law of New Zealand on all members of the community; or
- 22.2 leave individuals and organisations to develop their own policies and procedures as to how they determine a person's sex in their particular context.

Distinction between registered sex, and sex for other purposes

23. As Ellis J noted more than 25 years ago, the law on sex and 'gender issues' (as his Honour referred to this broad area) has changed over time.¹⁸ That is something of an understatement today. The fast-paced social recognition of a diversity of genders and of self-identification has outstripped the legal framework to accommodate it.
24. Save for the inclusion of cl 22I in the Bill (which reflects s 33 of the current Act), we are not entirely clear as to whether the Government's policy intent is to maintain or collapse a distinction between:
- a person's registered sex (and the sex recorded on identity documents); and
 - a person's sex for the purposes of accessing reserved entitlements, facilities, services, roles or opportunities, or rights and obligations under the law.

¹⁸ *Ōtāhuhu Family Court*, above n 12, at 605–7. See also *AB*, above n 17, at [1].

25. At this point we note that in *Michael*, Judge Fitzgerald highlighted:¹⁹

the potential social and policy implications arising from adoption of different thresholds for legal recognition in different aspects of the applicant's life may require further legislative consideration.

26. If it is the Government's intention to maintain a distinction, the Bill may benefit from being more explicit as to how the general law of New Zealand would determine a person's sex, if not by reference to their registered sex. The reference to 'the general law of New Zealand' is somewhat opaque. It may be beneficial to provide government and non-government actors with clearer statutory guidance as to the factors that ought be taken into account, so that a person's sex can be determined in a straightforward, consistent and — importantly — sensitive manner. These might include some of the factors listed in s 28(3) of the current Act, which the Family Court must consider when determining an application to change the sex recorded on a person's birth certificate. But one of the criticisms of the current regime is that the Family Court process is unnecessarily intrusive and outmoded. That appears to be accepted by the Government's policy in proposing to enact a self-identification model.
27. Statutory guidance would enhance the law's accessibility. The ambiguity inherent in a provision such as cl 22I means that persons who wish to understand their rights and obligations are more likely to require legal advice, or to bring matters before the courts in order to clarify their position.
28. Against this is the risk that by being overly prescriptive as to the factors that ought be taken into account when determining a person's sex, the law may be insufficiently flexible to respond to the wide variety of circumstances in which a person's sex may need to be determined, and the competing interests at stake.
29. Further, a policy project to identify all settings in which a person's sex may need to be determined, and to provide statutory guidance that is appropriate in those particular settings, may be a substantial undertaking.
30. However if it is not the Government's intention to maintain a distinction with different thresholds, this should be made clearer in the Bill. At a minimum, cl 22I ought be revisited.

Corrections Regulations 2005

31. As discussed at paragraph 7 above, any change to the sex recorded on a birth certificate has the potential consequence of determining a person's placement in the prison estate. The Corrections Regulations dealing with this issue were made in 2013, when the process for changing the sex recorded on a person's birth certificate was regulated by the Family Court. The Department of Corrections may wish to consider if any modifications to the Regulations are appropriate or desirable, in the event the process moves away from judicial oversight, to an administrative process based on self-identification.

¹⁹ Above n 11, at [107].

Conclusion

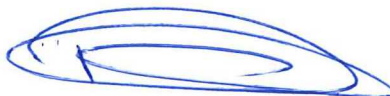
32. We would welcome the opportunity to work with you and other agencies to explore these issues. In particular we note that the Ministry of Justice (**MOJ**) is undertaking work to specifically acknowledge gender identity, in addition to sex, as a prohibited ground of discrimination in New Zealand law.²⁰ Any policy work undertaken by DIA on this issue may benefit from alignment with MOJ's work.

Nāku noa, nā

Te Tari Ture o te Karauna



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²⁰ Human Rights Act 1993, s 21(1).