

Supplementary Departmental Disclosure Statement

Births, Deaths, Marriages, and Relationships Registration Bill
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A supplementary departmental disclosure statement for a Bill the government is proposing to amend seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill in amended form.

It highlights material changes to previous disclosures relating to:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

The original disclosure statement for the Births, Deaths, Marriages, and Relationships Registration Bill, dated 26 July 2017, can be found at this link:

<http://disclosure.legislation.govt.nz/bill/government/2017/296>.

This supplementary disclosure statement was prepared by the Department of Internal Affairs.

The Department of Internal Affairs certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

30 July 2021

Contents

Contents.....2

The Main Areas of Change to the Original Disclosure.....3

Part One: General Policy Statement.....5

Part Two: Background Material and Policy Information.....7

Part Three: Testing Legislative Content.....10

Part Four: Significant Legislative Features.....13

The Main Areas of Change to the Original Disclosures

This is a supplementary disclosure statement for the Births, Deaths, Marriages, and Relationships Registration Bill (the Bill).

A supplementary disclosure statement supplements the original disclosure statement for the Bill by reporting the additions and changes proposed by the SOP.

Where the Bill now also incorporates changes made by a select committee of the House, the supplementary disclosure statement will note these if relevant but will not explain them further because these changes do not relate to this SOP.

The main areas of change to the original disclosure statement include:

In 2018, the Select Committee considering the Bill made the following discrete amendments:

- Clarified that the terms 'parent', 'father', and 'mother' are status choices on a birth certificate;
- eligible 16 or 17 year olds are allowed to apply for a name change with consent from their guardian; and
- the Registrar-General can withdraw a non-disclosure direction that has been obtained through fraud or misrepresentation, which is now an offence under the Births, Deaths, Marriages, and Relationships Registration Act 1995.

The Select Committee also recommended a new process for amending registered sex:

- the requirements to obtain a Family Court declaration and to present medical evidence are removed;
- a self-identification process based on a statutory declaration is introduced where people apply directly to the Registrar-General of Births, Deaths and Marriages to amend their registered sex;
- the self-identification process is made available to children and young people (under 18 years of age);
- applications for children and young people 15 years of age and under must be made on behalf of the child or young person, by their guardian; and be accompanied by a recommendation by a health professional;
- applications from young people aged 16 and 17 years of age can be made on their own behalf and must be accompanied by written consent from their guardian, and a recommendation by a health professional;
- provisions clarify that the Registrar-General can give effect to Family Court decisions under the Care of Children Act 2004 relating to guardians refusing consent to a 16 or 17 year old amending their registered sex;
- similarly, the provisions clarify that the Registrar-General can give effect to Family Court decisions under the Care of Children Act 2004 where there are disputes between guardians to a child or young person changing their registered sex;
- excluding anyone whose birth cannot be registered in New Zealand from the definition of eligible person;

- two new sex markers 'intersex' and 'X-unspecified' are introduced as further options to the 'male' and 'female' sex markers; and
- a provision requiring a statutory review of some of the self-identification provisions five years after commencement has been included.

The SOP amends the Select Committee's provisions for amending registered sex:

- Allowing 16 and 17 year olds to apply on their own behalf with either consent from a guardian or a letter of support from a 'suitably qualified third party';
- replacing 'health professional' with 'suitably qualified third party' to ensure both accessibility of service and avoiding a return to the medicalisation of the process (the term 'suitably qualified third party' will be defined in regulations);
- requiring guardians applying on behalf of 15 years old and under to have the children or young person's consent and provide a letter of support from a suitably qualified third party (to be prescribed in regulations);
- allowing people to amend registered sex multiple times, but with additional requirements set in regulations to ensure the application is genuine and to mitigate the risk of identity fraud – the additional requirements would not apply if the person is reverting to the sex registered at birth;
- removing 'intersex' as a nominated sex marker, with nominated sex markers other than male and female to be prescribed in regulations; and
- including an 18-month delayed commencement of the Bill to ensure the technical infrastructure and regulatory framework are in place to give effect to the changes.
- Enabling the range of nominated sex markers besides 'male' and 'female' to be set in regulations

Part One: General Policy Statement

This SOP amends the Births, Deaths, Marriages, and Relationships Registration Bill.

The Bill would provide a self-identification process to make it easier for transgender, non-binary and intersex people whose birth is registered in New Zealand, to have their nominated sex recorded on their birth certificate. The new process is intended to remove potential discrimination and involuntary 'outing' when accessing services that require the provision of a birth certificate (such as setting up a bank account or enrolling a child in school).

A self-identification process for amending registered sex on a birth certificate was introduced by the Governance and Administration Committee in 2018. The SOP contains further amendments that build on these provisions to better support transgender, intersex, and non-binary New Zealanders.

The policy rationales for the proposed amendments are:

Requiring the child's consent

- Requiring a child's consent puts children at the centre of the application process and ensures the application is based on their own decision about their gender. The amendments are important to protect the child or young person from undue influence (e.g, from guardians) and support their autonomy over how their gender is recognised.

Providing 16 and 17 year olds options to either provide guardian consent or a letter of support from a suitably qualified third party

- Recognising that 16 and 17 year olds are more able to provide consent is consistent with the process for changing a young person's name under the Births, Deaths, Marriages, and Relationships Registration Act 1995. It is also consistent with other legislation in New Zealand, for example, 16 is the age at which you can apply for a learner driver licence, and consent to general medical procedures.

De-medicalising the role of the 'suitably qualified third party'

Centring the process on what the child wants by requiring the third party to verify the child wants to make the amendment and understands the consequences of doing this. This is instead of a requirement for the third-party to verify that they think it is in the child's best interests to amend their registered sex.

Introducing of a greater range of nominated sex markers

- Allowing different nominated sex markers to be recognised beyond "male" and "female" and the Select Committee's addition of "intersex" and "X (unspecified)". Limiting the range of nominated sex markers to the binary would exclude people who identify as "non-binary" or as a culturally specific gender (such as takatāpui (Māori), fa'afafine (Samoan), or fakaleitī (Tongan)). The options for registering sex at birth would only include "male" and "female".
- Removing the "intersex" option from the Bill as it categorises intersex people as a third sex and does not respect their diversity or right to self-determination.

Enabling multiple amendments to registered sex

- Allowing multiple amendments to registered sex to reflect that a person's gender can change over time. Allowing only one amendment would be out of step with a true self-identification model. If a person's gender changes and they cannot

amend their registered sex to reflect this, they no longer have control of how their gender is officially recognised.

- Providing additional requirements for a person who makes subsequent amendments to their registered sex in addition to the statutory declaration. This is intended to help ensure these applications are genuine and to mitigate risks of identity fraud.

Enabling regulation making powers

- The SOP enables regulations that prescribe:
 - the nominated sex marker options other than the binary;
 - the additional requirements where a person amends their registered sex more than once; and
 - the third parties who can provide a letter of support for applications for children and young people.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>A petition from Allyson Hamblett requested that the Minister of Internal Affairs introduce a process for amending registered sex based on self-identification. The Governance and Administration Committee considered the petition and suggested the Government review the relevant provisions in the Births, Deaths, Marriages and Relationships Registration Act 1995:</p> <ul style="list-style-type: none">Petition 2014/0086 of Allyson Hamblett (25 October 2016) and the Report of the Government Administration Committee (11 August 2017) – https://www.parliament.nz/en/pb/petitions/document/51DBHOH_PET71439_1/petition-of-allyson-hamblett-that-the-house-note-that <p>In response to the above Governance and Administration Committee report, the Government noted that the upcoming Select Committee process for the Births, Deaths, Marriages, and Relationships Registration Bill would be a timely opportunity to review policy settings for amending registered sex:</p> <ul style="list-style-type: none">Government Response to Report of Government Administration Committee on Petition 2014/86 of Allyson Hamblett (15 February 2018) – https://www.parliament.nz/en/pb/papers-presented/current-papers/document/PAP_76346/government-response-to-report-of-the-government-administration <p>The Governance and Administration Committee reported on the Births, Deaths, Marriages and Relationships Registration Bill in 2018. The Committee recommended including provisions to introduce a self-identification process (10 August 2018) - https://www.parliament.nz/en/pb/sc/reports/document/SCR_79010/births-deaths-marriages-and-relationships-registration.</p> <p>Please also refer to the original departmental disclosure statement for the Bill.</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>A Regulatory Impact Statement: <i>Introducing a self-identification process to recognise gender on birth certificates</i> (3 May 2021) was published on 25 June 2021 and is available in the link below:</p> <p>https://www.treasury.govt.nz/publications/risa/regulatory-impact-assessment-introducing-self-identification-process-recognise-gender-birth-certificates</p> <p>Please also refer to the original departmental disclosure statement for the Bill which lists the Regulatory Impact Statement <i>Births, Deaths, Marriages, and Relationships Registration Amendment Bill</i> (15 February 2017).</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The Regulatory Impact Statement did not meet the threshold for the Treasury RIA Team assessment. The Department of Internal Affairs' Regulatory Impact Analysis panel reviewed the Regulatory Impact Statement and concluded that the information and analysis partially met the criteria set out in the quality assurance guidance.</p> <p>The Treasury did not assess the Regulatory Impact Statement <i>Births, Deaths, Marriages, and Relationships Registration Bill</i> (15 February 2017).</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>The known costs and benefits are outlined on pages 25-26 of the Regulatory Impact Statement, available at https://www.treasury.govt.nz/publications/risa/regulatory-impact-assessment-introducing-self-identification-process-recognise-gender-birth-certificates.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be affected by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

The self-identification provisions establish a requirement to submit a statutory declaration. For adults and 16 and 17 year olds, the declaration verifies that the person identifies and intends to live as a person of the nominated sex specified in their application. Applications for children and young people aged 15 or under are completed by their guardian. The guardian must have the child's consent and fill out a statutory declaration that verifies that the child identifies and intends to live as a person of the nominated sex specified in their application. Some people may be motivated to make a false declaration to get access to a second birth certificate that is not linked to their current birth certificate. This would be in cases where they wish to use multiple identities to access services. However, it is not clear that people would use the self-identification process to commit fraud as there may be more effective ways to do so.

If people do not abide by their statutory declaration and use their birth certificate to commit identity fraud, there may potentially be additional costs for law enforcement, government services, and the Courts. Costs of identity fraud include providing services to an ineligible person, detecting and investigating fraud, and prosecuting people who have committed an offence.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The Department has consulted with the Ministry of Foreign Affairs and Trade on whether the self-identification provisions as amended by the SOP are consistent with the international agreements to which New Zealand is a party.

The self-identification provisions are broadly consistent with these agreements, including:

- the Convention for the Elimination of all Discrimination Against Women (CEDAW); and
- the United Nations Convention on the Rights of the Child (UNCROC).

The SOP requires the child to consent to an application ensuring their views are heard and central to the process. There will be an opportunity during implementation to develop mechanism(s) for verifying the child's consent.

Please also refer to the original departmental disclosure statement for the Bill.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Department has reviewed the Waitangi Tribunal guidance on the principles of the Treaty of Waitangi available at <https://waitangitribunal.govt.nz/treaty-of-waitangi/principles-of-the-treaty/>.

The SOP has been developed without targeted consultation, including with iwi, hapū, or other Māori stakeholders. This has been due to a restricted timeframe to develop the SOP following decisions to prioritise progressing the Bill in 2021. The Minister of Internal Affairs is inviting the Select Committee to consider the SOP under its inquiry powers and will request that the Select Committee call for public submissions – this will provide an opportunity for iwi, hapū or other Māori stakeholders to provide input on the SOP.

We think the SOP adheres to the Treaty Principles, given the limited scope of changes from what was recommended at Select Committee. However, ideally there would have been targeted consultation with iwi, hapū, or other Māori stakeholders to test their views on self-identification generally.

The SOP enables the terminology for nominated sex markers other than male and female to be set in regulations. The intention is to consult with stakeholders, including Māori, on determining which sex markers will be included. This will be an opportunity to consider te reo Māori terms, including 'takatāpui'.

Please also refer to the original departmental disclosure statement for the Bill.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

NO

There has not been advice provided to the Attorney-General on the SOP. Assessments for compliance with the New Zealand Bill of Rights Act 1990 (the NZBORA) are not required for SOPs.

However, advice was provided to the Attorney-General in October 2018 on whether the self-identification provisions recommended by Select Committee were consistent with the NZBORA. The assessment concluded that the self-identification provisions were consistent with the NZBORA. The assessment can be found at

<https://www.justice.govt.nz/assets/Documents/Publications/bora-supplementary-advice-on-the-births-deaths-marriages-and-relationships-registration-bill.pdf>.

The SOP retains the Select Committee's recommendation to exclude overseas-born New Zealand citizens and permanent residents, which reflects the fact the Bill cannot act extra-territorially by compelling another jurisdiction to amend the birth certificate it issues. However, the removal of the Family Court process for New Zealand citizens and permanent residents born overseas, and the exclusion of people born overseas to the self-identification process, may constitute discrimination on the ground of nationality under section 19 of BORA. The Department recognises this and will give further consideration and advice to the Minister on this issue.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
<p>The SOP retains the requirement recommended by Select Committee that applications to register a nominated sex will be accompanied by a statutory declaration (see sections 22B(1)(b) and 22C(1)(b)). Falsifying a statutory declaration is an offence under section 111 of the Crimes Act 1961.</p> <p>The SOP retains the policy recommended by Select Committee to remove the requirement for a Family Court declaration to amend registered sex in the New Zealand birth register. It retains Select Committee's recommendation to empower the Registrar-General to determine if the criteria provided in the Bill are fulfilled before registering an applicant's nominated sex. The SOP also retains Select Committee's recommendation to enable people to appeal this decision to the Family Court.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>The SOP will remove the requirement for people to disclose evidence of medical treatment they have had to physically conform with the sex they want registered.</p> <p>The SOP amends the provisions so that previous names will now be listed on a birth certificate if a person changes their name after they have amended their registered sex. The SOP retains that previous names will not be listed on a birth certificate if the person applies to change their name at the same time or if they keep their current name. See section 84(5) of the SOP.</p> <p>Please also refer to the original Departmental Disclosure Statement of the Births, Deaths, Marriages, and Relationships Registration Bill.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
The Office of the Privacy Commissioner was provided with the opportunity to comment as part of the inter-departmental consultation on the SOP.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
The Human Rights Commission, the Office of the Children's Commissioner, and the Office of the Privacy Commissioner have reviewed Cabinet papers outlining the policy of the SOP and have reviewed the SOP.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
No further formal analysis has been undertaken. However, there has been ongoing consultation with the Department of Internal Affairs' Service Delivery and Operations branch to test whether the provisions in the SOP can be operationalised. This consultation has contributed to the decision to have an 18-month delayed commencement date to allow for the development of the technical infrastructure needed for the legislation change. Regulations will need to be developed and consulted on, which will provide further opportunities to test how the self-identification provisions can be implemented – for instance in determining which sex markers will be available.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
Please also refer to the original disclosure statement for the Births, Deaths, Marriages, and Relationships Registration Bill.	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
Penalties for making a false statutory declaration are provided in section 111 of the Crimes Act 1961 and section 141 of the SOP.	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Under the Family Court process the Registrar-General is required to register an applicant's nominated sex if the Family Court deposits a declaration and the applicant pays the prescribed fee. The self-identification provisions would remove the requirement for the Family Court to provide a declaration.</p> <p>Instead, section 22D of the SOP provides that the Registrar-General of Births, Deaths and Marriages must register the applicant's nominated sex if they consider the necessary criteria are fulfilled. The criteria provided in sections 22A(1), 22B, 22A(2) and 22C of the SOP are very prescriptive.</p> <p>Section 23 of the SOP provides recourse for people who are affected by the Registrar-General's decision to appeal to the Family Court.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>The SOP enables regulations to set any sex or gender other than 'male' or 'female' as a nominated sex. Gender theory and terminology evolves rapidly – what was appropriate five years ago may not be what is used today. Setting the nominated sex markers in regulations will mean they can be more easily reviewed and updated to ensure they meet the needs of transgender and intersex people. See section 147(1)(ba) of the SOP.</p> <p>The SOP also enables regulations that would define who is a 'suitably qualified third party' to provide a letter of support for applications to amend sex on a birth certificate for children and young people. This will enable flexibility to test how the right balance between prescribing third parties that can ensure a child and young person understands the decision and ensuring these third parties are widely accessible can be achieved. See section 147(1)(bc) of the SOP.</p> <p>Both sections 147(1)(ba) and 147(1)(bc) will be subject to a statutory review, five years after the commencement of the BDMRR Act. See section 147A(1)(a)(viii) of the SOP.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The SOP enables regulations to prescribe additional requirements for applications if the person has previously amended their registered sex. See section 147(1)(bb) of the SOP.</p> <p>Section 147(1)(bb) will be subject to a statutory review, five years after the commencement of the BDMRR Act. See section 147A(1)(a) of the SOP.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>The SOP delays the commencement of the Bill to 18 months after Royal Assent or beforehand by Order-in-Council. See section 2 of the SOP.</p> <p>Delaying commencement is necessary to make changes to the Department of Internal Affairs' IT systems and to develop regulations associated with the self-identification process.</p>	