

Submission on the Inquiry into Supplementary Order Paper 59 on the Births Deaths Marriage Relationships Registration Bill

To the Government Administration Committee
13th September 2021

This is a submission from Gender Minorities Aotearoa.

Gender Minorities Aotearoa is a national organisation for transgender, intersex, and irawhiti takatāpui people in New Zealand. It operates on Te Pae Māhutonga kaupapa Māori public health framework, and The Ottawa Charter (1986).

We create practical human rights based resources for transgender people. Our guide to updating birth certificates is accessed 1,400 - 2,000 times each year. We also provide one to one peer support over 1,300 times each year, which includes a transgender Justice of the Peace service and assistance with applying to update identity documents.

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We support the intent of this Bill, as amended by Supplementary Order Paper 59. This SOP reflects the preferred option outlined in the Regulatory Impact Statement and its assessment of mana motuhake / Self- determination of sex.

However, as it stands, we believe the SOP does not fully meet its intended aims in making accurate birth certificates accessible for transgender and intersex populations. We recommend the following six amendments.

We would like to make an oral submission.

1) Permanent residents who were born overseas

Clause 27A of the current Act specifies that anyone who is entitled to be in New Zealand indefinitely under the Immigration Act (2009) is eligible to use the Family Court process to gain legal recognition of their sex.

However removal of the Family Court process, while overall positive, will remove this sole option for permanent residents.

Permanent residents born overseas will no longer be able to go the Family Court to get a Declaration as to Sex, which has their correct sex recorded, based on their gender. This removes two existing rights:

- Permanent residents who were born in other countries that have a gender recognition law (e.g. the UK), used that Declaration as to Sex from the NZ Family Court as evidence to change their birth certificate overseas. They will no longer be able to do that.
- Permanent residents could use this Declaration as to Sex in NZ as proof of their correct sex / gender. This is especially important for people whose overseas passport has their old name and/or sex marker.

This is a backward step for permanent residents, including quota refugees (who arrive here as permanent residents).

Recommendation 01.

That the NZ government ensures permanent residents retain their right to legal gender recognition, through an administrative process based on self-determination (self-identification) so that it is consistent with the changes the Bill is making for other trans and intersex people in Aotearoa.

2) Transgender people on a temporary visa

(A) The Bill provides no options for asylum seekers and Convention refugees on temporary visas.

The current legal situation:

- Asylum seekers and Convention refugees on temporary visas cannot change their name in NZ or go to the Family Court to get a Declaration as to Sex.
- Once an asylum seeker is accepted as a Convention refugee, they have the right to live in Aotearoa indefinitely and cannot be deported. New Zealand is their home, and yet they cannot obtain an official document with their correct name and gender.
- The Bill / SOP explicitly excludes them because they were born overseas.

(B) The Bill provides no options for other migrants in NZ on temporary visas.

The current legal situation:

- The existing Family Court process and the Bill both exclude migrants living in New Zealand who are on temporary visas. Some may have lived in New Zealand for a long time.
- Trans people born overseas, particularly trans people of colour, are regularly asked to show their passport to prove their immigration status, including their ability to work or study here. They face significant challenges when they have no New Zealand documentation with a name and sex marker that matches their affirmed gender.

Recommendation 02.

(A) That the NZ government issues transgender and intersex asylum seekers and Convention refugees with an official identity document which shows their correct name and sex marker through a self-declaration process. For example, this could be through a certificate of identity issued by the Department of Internal Affairs and/or the Immigration New Zealand.

(B) That the NZ government explores options for migrants on temporary visas to be able to obtain an official document with their correct name and sex marker through a simple, administrative, self-declaration process.

3) Multiple amendments to sex marker

Clause 22B in the Bill that was referred back from Select Committee included significant restrictions on people's ability to amend the sex recorded on their birth certificate more than once. The SOP significantly improves the Bill by allowing for

multiple changes of a sex marker over time. However new clause 22B(1)(d) signals that additional requirements may be imposed in regulations. It says::

(1) An application by an eligible person for registration of the person's nominated sex must—

....

(d) if the Registrar-General has previously registered a nominated sex for the person under section 22D, meet any additional requirements set out in regulations;

The Select Committee's website notes that *"The SOP aims to provide better support for the needs of transgender, non-binary, and intersex communities"*. It is important that our communities are not only consulted but also resourced to participate fully in discussions about what, if any, additional requirements might be needed in regulations.

The Regulatory Impact Statement and Cabinet Paper suggest that the chief concern for the government as to why people should be restricted from changing their sex marker more than once was to prevent the likelihood of identity fraud. However, the Cabinet Paper makes it clear that a record of sex marker changes will be kept by DIA. Therefore, steps have been taken to mitigate the risk of identity fraud.

The SOP also clarifies in new clause 22B(2) this this requirement *"does not apply if the nominated sex is the same as the information relating to sex registered in the person's original birth record"*.

This provision is useful for the small number of people who affirm a transgender identity, and later decide to affirm a cisgender identity again (sometimes called "retransition"). If there are no additional requirements for this group of people, then It is hard to see what rationale there is for developing regulations that require extra steps for other people making their second or subsequent application to amend their sex marker.

A study of 28,000 people showed that 8% of respondents experienced retransition. Of those who did, 62% said that they only did so temporarily, and the most common reason for retransition was pressure from a parent. There were also instances of being pressured to "go back into the closet" by parents, schools, therapists, or faith community leaders. [1]

There are many reasons why someone may wish to amend their sex marker. For some people this includes not feeling it is safe enough to maintain a transgender

identity. Regulations should not create unnecessary barriers for them to re-affirm their transgender identity when it is safe for them to do so.

Others may have wanted a non-binary option on their birth certificate, but the current law has not given them that choice. This means there are likely to be people who chose the second-best option of changing their sex marker from female to male or vice versa, who will now want to amend it to non-binary. They should not be required to meet any additional regulatory requirements simply because the law has finally provided a way for them to accurately self-identify their sex. [2]

Recommendation 03.

Ensure that trans, non-binary and intersex people are not required to meet unnecessary additional requirements when making subsequent changes to their sex marker by:

- removing new clause 22B(1)(d) unless there is a strong evidence-based rationale for making this distinction based on a person's gender identity, or
- consulting trans and intersex led organisations and individuals on any regulations developed in relation to this SOP, including by resourcing them to participate fully in those processes.

4) Youth access to correct identity documents

Youth aged 16 or 17

The introductory letter to Cabinet of the proposed changes, from the Office of the Minister of Internal Affairs, specified on page 9 that people aged 16 and 17 should be able to make their own application to amend their sex marker, with *either* the support of their guardian *or* a qualified third party.

This was also reflected in the Regulatory Impact Statement, which made the same recommendations. This is now reflected in new clause 22B(1)(c) and is a significant improvement on the Bill's previous requirement which required support from both a legal guardian and a qualified health professional.

This proposed amendment is particularly important for trans people who are rejected by and estranged from their family and recognises the diversity of qualified people that may be providing them with support.

However, as 16 is the age of consent, both for sexual intercourse and for consenting or refusing consent for particular medical procedures, it is difficult to understand why a 16 or 17 year old would need additional consent from either party for a simple administrative update.

Youth aged 15 or younger

Under the proposed SOP transgender children aged 15 or younger would be required to have an application filed on their behalf, with the support of *both* a legal guardian *and* a health professional.

It is very common for transgender children and youth to be in the care of guardians who are unsupportive. [3]

The child's right to an accurate birth certificate must be inclusive of children who are in the care of an unsupportive or discriminatory guardian.

Recommendation 04.

Remove 22B(1)(c), allowing a 16 or 17 year old to make this decision.

Amend new Clause 22C (1) (d), so that *either* a legal guardian *or* a health professional may make the application on behalf of a child aged 15 or under.

5) Sex categories

The cabinet papers recommended that a range of non-binary sex categories should be available, and that these categories should not be fixed in legislation. They also recommended a consultation process to determine what these categories should be.

The Supplementary Order Paper says:

New clause 22B(1)(a) and new clause 22C(1)(a) enable a person to specify male, female, or any other sex or gender specified in regulations as the person's nominated sex.

Recommendation 05.

Consult with transgender, non-binary, and intersex people and organisations on any regulations developed in relation to further sex or gender options for birth certificates, including by resourcing them to participate fully in those processes.

6) Birthing parents

Clause 11(2) and 11(3)(c), and 12 (3) refer to notice of birth. The language used presumes that a birthing parent is always a woman, when this is not the case.

Recommendation 06.

Amend Clause 11(2) and 11(3)(c), and 12 (3) references to *'the mother'* and *'the woman'*. Instead use legally accurate language such as *'the birthing parent'*.

Citations:

[1] [The Report of the 2015 U.S. Transgender Survey](#) - James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). Washington, DC: National Center for Transgender Equality (2015).

[2] [Counting Ourselves](#) National Transgender Health Report Aotearoa NZ – Veale J, Byrne J, Tan K, Guy S, Yee A, Nopera T, & Bentham R (2019).

[3] [The Youth19 Rangatahi Smart Survey \(Youth19\) Report](#) – Fleming, T., Peiris-John, R., Crengle, S., Archer, D., Sutcliffe, K., Lewycka, S., & Clark, T (2020).