

25 August 2021

Terry Thomas
fyi-request-15937-400e2ea2@requests.fyi.org.nz

Our ref: OIA 89127

Dear Mr Thomas

Official Information Act request – Births, Deaths, Marriages and Relationships Registration Bill

Thank you for your request dated 30 June 2021, for copies of advice related to the Births, Deaths, Marriages and Relationships Registration Bill and the impact on the justice system. You asked for:

- *... all advice provided to the Ministry of Internal Affairs or any other ministry, agency or minister on the impact proposed changes to the Births Deaths Marriages and Relationships Registrations Act regarding self identification on birth certificates, and their impact on operations in prisons and the Corrections Regulations 2005.*
- *... advice similarly provided regarding any impact on the justice system, particularly any impact on the ability to track people's progress through the courts and justice system, or the ability to carry out background checks on people who might amend their birth certificates under the proposed changes.*

On 28 July 2021 the Ministry extended the timeframe for the response, to allow additional time for the consultations necessary to reach a decision. I am now in a position to respond in full. Your request has been considered in accordance with the Official Information Act 1982 (the Act). Four items have been identified in scope of the request:

1. Note to Ministers Faafoi and Sio: 'Response to the report of the Working Group for reducing barriers to changing registered sex' dated 10 December 2020
2. Letter from Minister Sio to Minister Tinetti 17 December 2020
3. Letter from Minister Faafoi to Minister Tinetti 20 January 2021
4. Officials' emails dated 8 and 9 July 2021.

Items (1), (2) and (3) are released in full with no redactions.

With regard to item (4), an official's contact details have been under section 9(2)(a) of the Act, to protect privacy. No other information has been withheld. I am satisfied that there are no public interest considerations that render it desirable to make available the information being withheld under section 9 of the Act.

The email exchange followed earlier emails the Ministry was copied into, between other agencies. I'm advised you have also made your request to the New Zealand Police and the Department of Corrections, and that the Department of Corrections will respond with respect to the earlier emails.

You have the right under section 28(3) of the Act to complain to the Ombudsman if you are not satisfied with my response. The Ombudsman may be contacted by writing to info@ombudsman.parliament.nz.

Yours sincerely

A handwritten signature in black ink, consisting of a looped 'S' followed by a long, sweeping horizontal line that tapers to the right.

Sam Kunowski
General Manager, Courts and Justice Services

Response to the report of the Working Group for reducing barriers to changing registered sex

Hon Kris Faafoi, Minister of Justice
Hon Aupito William Sio, Minister for Courts
10 December 2020

Purpose

1. Minister Tinetti has asked you for feedback on the Ministry of Justice response to relevant recommendations of the Working Group to improve the processes for changing sex registered on birth certificates. This note provides some context and attaches a draft response to Minister Tinetti.

Context

2. In February 2019, the Births, Deaths, Marriages, and Relationships Registration Bill was deferred because of significant changes made at Select Committee after submissions had closed. These changes replaced the current Family Court-based process of changing sex on a birth certificate with a statutory declaration based self-identification process.
3. The previous Minister of Internal Affairs acknowledged the barriers inherent in the Family Court process and set up a Working Group to provide advice on operational improvements that could be implemented under the current legislation, while the issues with the Bill are worked on.
4. The Ministry supported this group by being part of the Secretariat with the Department of Internal Affairs, facilitating technical input from the Ministry's operational support team, as well as organising a meeting with the Principal Family Court Judge.
5. The Working Group reported back in January 2020 and made 38 recommendations, seven of which involve responsibilities within the Justice and Courts portfolios.
6. In addition, there were seven recommendations addressed to the Judiciary. However, as the Judiciary is independent of the Executive these recommendations are not addressed as part of this Government Response. The office of the Principal Family Court Judge has been provided a copy of the Report and has acknowledged the recommendations

The recommendations

7. The Working Group found barriers in every step of the Family Court process and felt that many of these barriers could be mitigated through clear, consistent and accessible information about the requirements of each step. They found that other barriers require more commitment to work with transgender and intersex communities to provide consistent and transparent services.
8. The Ministry worked with the Department of Internal Affairs on the Government Response and fully considered each of the relevant recommendations. The Ministry specific recommendations and response are set out in Appendix A.

9. Of the seven recommendations, the Ministry considers that it can proceed with three:
- Recommendation A: align website content with the Department of Internal Affairs.
 - Recommendation D: align call centre scripts with the Department of Internal Affairs
 - Recommendation N: provide plain-English guides alongside forms or a letter from the Court that explains what that document means for the applicant.
10. The Ministry teams responsible for these areas will place these on work programmes and progress as priorities allow.
11. One of the recommendations can be implemented through other means. Recommendation L is about moving proceedings to another location, due to privacy or safety concerns. Under the Family Court Rules 2002, applicants have the choice of the hearing being held at the court nearest to where they live or Wellington (where the Registrar-General is located). Applicants do not have the free choice that was recommended, as this would require a change to the rules and is outside the scope of the Working Group's mandate.
12. Given the parameters of the Working Group's mandate, three of the recommendations cannot be implemented under current settings.
- Recommendation E: sought free legal representation be made available to people seeking to change the sex recorded on their birth certificate. Legal aid is available to people of insufficient means in general and making an exception for a particular group requires legislative change.
 - Recommendation F: sought funding for lawyer for child, for those children going through the process in the Family Court. Again, this requires legislative amendment. We note that a judge can appoint a counsel to assist the court if required.
 - Recommendation H: recommended the creation of a template for health professionals to provide expert medical evidence. The Ministry cannot suggest to the Judiciary what sort of evidence is sufficient in any proceeding.

Ministry of Justice specific recommendations as part of the Government Response to the report of the Working Group

	To make the process of changing the sex recorded on a birth certificate accessible to all transgender and intersex people, the Working Group recommends:	
A	<p>Government agencies develop guidance which clearly lays out the process for changing the sex recorded on a birth certificate in easy to understand language and guides a person who wants to apply through each step of the process. This should include:</p> <ul style="list-style-type: none"> • templates for medical evidence; • examples of the sort of information needed in the affidavit; • a booklet that explains the process end to end; and • guidance about filling in all the documents the Family Court require. 	<p>The Department of Internal Affairs has developed new guidance for their website which includes:</p> <ul style="list-style-type: none"> • new content showing how and why each agency is responsible for which part of the process; • clear information about who can change the sex recorded on their birth certificate; • a description of the end-to-end process including timeframes • links to the Ministry of Health's webpage 'Transgender New Zealanders' which provides information on gender affirming healthcare and links to supporting organisations. • a link to the Ministry of Justice website; and • contact information including a dedicated email address. <p>To allow equitable access for those unable to engage with the material digitally, the Department of Internal Affairs will work to develop printable material and investigate how best to provide this to the community.</p> <p>The Ministry of Justice will work to align their website content with the Department of Internal Affairs and will develop plain English guidance as priorities allow. This is addressed under Recommendation N.</p> <p>Medical guidance is addressed under Recommendation H.</p>
D	<p>The Ministry of Justice or the Department of Internal Affairs should provide a free face to face or call centre service to guide people through each step of the process. This is needed in combination with written guidance to make the process accessible to more people including those who don't have English as a first language or those with disabilities which impair access.</p>	<p>The Department of Internal Affairs has created a direct email channel for people seeking help understanding the information and resources on their website. Contact centre scripts have been updated so that clear, consistent information can be provided on the call, calls can be transferred to someone with expertise, or a call back can be arranged if necessary.</p> <p>The Ministry of Justice will align its call centre scripts with the Department of Internal Affairs and update their content as priorities allow</p>

<p>To ensure all transgender and intersex people seeking advice on how to submit an application to the Family Court are able to access legal advice, the Working Group recommends:</p>		
E	<p>Free legal representation is made available for people seeking to change the sex recorded on their birth certificate.</p>	<p>The mechanism the government has for funding legal representation is legal aid, which is required to be repaid. The government also provides funding to Community Law Centres. These are already available for people seeking support taking an application to the family court.</p>
F	<p>A lawyer for the child is funded for applications under Section 29, independent of the legal advice to a guardian or any counsel to assist the court.</p>	<p>Automatically appointing a lawyer for the child would require changes to legislation. For example, under the Oranga Tamariki - Children's and Young People's Well-being Act 1989 a lawyer for the child must be appointed for care and protection cases. There is no equivalent requirement in the BDMRR Act 1995.</p> <p>A judge can choose to appoint a counsel to assist the court. A counsel to assist can aid the judge in determining whether the application is in the best interests of the child.</p>
<p>To guide applicants, medical professionals and members of the judiciary towards a consistent understanding of the evidentiary requirements which recognises the expertise of those delivering gender-affirming care in New Zealand, the Working Group recommends:</p>		
H	<p>The Ministry of Justice creates a simple template for health professionals to provide expert medical evidence that reflects the evidential requirements in recent successful applications, acknowledging that judges may request additional evidence as they consider necessary.</p>	<p>It is up to the Judiciary to determine the form and content of evidence required for any particular case or proceeding.</p> <p>The FAQs on the Ministry of Justice website, described in the response to recommendation A, can include a plain-English explanation of the medical evidence requirements of Sections 28 and 29 of the BDMRR Act.</p> <p>If medical practitioners require guidance about how to present evidence requested by patients applying under Sections 28 or 29, such guidance would be best provided by their colleagues or an organisation such as the Professional Association for Transgender Health New Zealand (PATHA).</p> <p>If an organisation such as PATHA were to provide a template on their website, the Department of Internal Affairs could include a link to this alongside the other information and guidance about the process.</p>

<p>To improve the privacy and safety of transgender people and families with transgender children submitting an application to a Family Court, the Working Group recommends:</p>		
L	<p>The Ministry of Justice develop a template cover letter for people to submit with their application if they are not submitting to their closest Family Court because they are concerned about privacy or safety.</p>	<p>A letter would contravene the Family Court Rules 2002 which state that (unless specified elsewhere in the Rules) an application must be made at the court:</p> <ul style="list-style-type: none"> • nearest to where the applicant lives; or • nearest to an interested party. <p>However, there are ways someone can apply to a different Family Court. The Rules above allow an application to be made to the court nearest the applicant or the applicant's lawyer, or to the Family Court in Wellington as the closest court to the Registrar-General.</p>
<p>To make the Family Court a less intimidating place and to help applicants understand correspondence from the court, the Working Group recommends:</p>		
N	<p>The Ministry of Justice should provide a plain-English guide alongside a form or a letter that explains what it means for the applicant.</p>	<p>The Ministry of Justice will add this to their work programme. It will be subject to the usual prioritisation and funding considerations. Common questions could be addressed through the FAQs on the Ministry of Justice and Department of Internal Affairs websites described in the response to recommendation A.</p>

Released under the Official Information Act (1982)

Hon Aupito William Sio

MP for Māngere

Minister for Pacific Peoples

Minister for Courts

Associate Minister of Foreign Affairs

Associate Minister of Education (Pacific Peoples)

Associate Minister of Justice

Associate Minister of Health (Pacific Peoples)



17 DEC 2020

Hon Jan Tinetti
Minister of Internal Affairs
Parliament Buildings

Dear Jan

Thank you for forwarding the proposed Government Response to the report of the Working Group for reducing the barriers to changing registered sex.

The report of the Working Group is very comprehensive. I understand it found barriers in every step of the family court process and identified many mitigations that would likely be useful for all those who enter the court system.

Turning to the recommendations relevant to the Courts portfolio, the Ministry considers that it can proceed with three:

- Recommendation A: align website content with the Department of Internal Affairs.
- Recommendation D: align call centre scripts with the Department of Internal Affairs
- Recommendation N: provide plain-English guides alongside forms or a letter from the Court that explains what that document means for the applicant.

The Ministry teams responsible for these areas will place these on work programmes and progress as priorities allow.

I understand one of the recommendations can be implemented through other means.

Recommendation L is about moving proceedings to another location, due to privacy or safety concerns. Under the Family Court Rules, applicants have the choice of the hearing being held at the court nearest to where they live or Wellington (where the Registrar-General is located). Applicants do not have the free choice that was recommended, this would require a regulatory change and is outside the scope of the Working Group's mandate.

Finally, given the parameters of the Working Group's mandate, three of the recommendations cannot be implemented under current settings.

- Recommendation E: sought free legal representation be made available to people seeking to change the sex recorded on their birth certificate. Legal aid is available to people of insufficient means in general and making an exception for a particular group requires legislative change.

- Recommendation F: sought funding for lawyer for child, for those children going through the process in the Family Court. Again, this requires legislative amendment. I note that a judge can appoint a counsel to assist the court if required.
- Recommendation H: recommended the creation of a template for health professionals to provide expert medical evidence. It is up to the Judiciary to decide what sort of evidence is sufficient in any proceeding.

I am comfortable as to where the Ministry has got to in considering the recommendations and support the proposed Response.

Yours sincerely,



Hon Aupito William Sio
Minister for Courts

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Hon Kris Faafoi

Minister of Justice
Minister for Broadcasting and Media
Minister of Immigration



20 January 2021

Hon Jan Tinetti
Minister of Internal Affairs
Parliament Buildings
WELLINGTON

[COPY]

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Yours sincerely,



Hon Kris Faafoi
Minister of Justice

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From: Frost, Kerry
Sent: Friday, 9 July 2021 2:30 pm
To: 'WOOD, Jesse (WELLHO)' <Jesse.Wood@corrections.govt.nz>; HOLDAWAY, Heather <Heather.Holdaway@police.govt.nz>
Cc: HORAN, Marian (WELLHO) <Marian.Horan@corrections.govt.nz>; Wheeler, Sally <Sally.Wheeler@justice.govt.nz>
Subject: RE: Heads-up: LEG paper and SOP for your review tomorrow

Kia ora Jesse,

Thanks for your email. I've checked in with our relevant policy teams and with our Operations & Service Delivery Group about the issue you raise below.

Our OSD Group has advised that the Court is not directly involved in placement of people in court cells (in terms of which cells they are placed in). This is determined by Corrections if they are people on remand in custody or Police if arrested and detained in cells or going into the cells to await signing of bail bonds. Based on that advice, it doesn't look like it will have an impact from our end.

Ngā mihi,
Kerry



Kerry Frost (she/her)
Senior Advisor | Access to Justice
Courts and Justice Services | Policy Group
Ministry of Justice | Tāhū o te Ture
9(2)(a)
www.justice.govt.nz

From: WOOD, Jesse (WELLHO) <Jesse.Wood@corrections.govt.nz>
Sent: Thursday, 8 July 2021 9:51 am
To: Frost, Kerry <Kerry.Frost@justice.govt.nz>; HOLDAWAY, Heather <Heather.Holdaway@police.govt.nz>
Cc: HORAN, Marian (WELLHO) <Marian.Horan@corrections.govt.nz>
Subject: RE: Heads-up: LEG paper and SOP for your review tomorrow

Kia ora both

I was wondering if you had some initial thoughts on this below question.

Is it known if the self-identification proposals impact how police/justice determine sex/gender for people being taken into custody / facing court cases? This is because any impacts here may subsequently impact Corrections as we often rely on their determinations of gender/sex to inform our initial prison placement.

Ngā mihi

Jesse Wood (he/him)

Policy Adviser | Corrections Policy

Ara Poutama Aotearoa, Department of Corrections

Wāhi mahi: National Office, Freyberg Building, 20 Aitken Street, Wellington 6011

Īmēra: Jesse.Wood@corrections.govt.nz