



12 September 2021

S21.23

Submission to the Governance and Administration Committee on the Inquiry into Supplementary Order Paper 59 on the Births, Death, Marriages and Relationships Bill

Introduction

1. The National Council of Women of New Zealand, Te Kaunihera Wahine o Aotearoa (NCWNZ) is an umbrella group representing over 200 organisations affiliated at either national level or to one of our 14 branches. In addition, about 450 people are individual members. Collectively our reach is over 450,000 with many of our membership organisations representing all genders. NCWNZ's vision is a gender equal New Zealand and research shows we will be better off socially and economically if we are gender equal. Through research, discussion and action, NCWNZ in partnership with others, seeks to realise its vision of gender equality because it is a basic human right.
2. This submission has been prepared by Rosemary Du Plessis and Judith Sutherland, Former Convenors of the NCWNZ Public Issues Standing Committee, and the Parliamentary Watch Committee after wider consultation with the membership of NCWNZ.

Summary of submission

3. NCWNZ considers that it is important to simplify the processes involved in changing the sex recorded on people's birth certificates. It is therefore broadly in support of the amendments to the Birth, Deaths, Marriages and Relationships Bill included in Supplementary Order Paper 59.
4. Trans women, trans men, intersex people and those who identify as non-binary need to access official recognition of their self-identified sex. It is already possible for people to have their nominated sex or their status as intersex, non-binary or X officially recorded on their driver license and on their passports. This can be achieved by statutory declaration. Access to a birth certificate that officially records their nominated sex or

records their non-binary status by statutory declaration extends the scope of existing regulatory processes with respect to legal personal identities. Currently changing the nominated sex on a birth certificate can take many years and expensive, painful and demanding surgery has been required before this document is available. The changes set out in Supplementary Order Paper 59 provide a much more straightforward set of processes to achieve change in the nominated sex on birth certificates.

5. This submission draws on NCWNZ policy with respect to the rights of transgender, intersex and nonbinary people, and in particular Remit 18.10.4 passed at its national conference in 2019¹:

That NCWNZ acknowledges the rights of people of all genders, including those who identify as female, male or non-binary and further, NCWNZ recognises trans women as women, and trans men as men. 2019².

6. The submission is also informed by previous NCWNZ submissions including:

S18.05 Submission to the Governance and Administration Committee on the Births, Deaths, Marriages, and Relationships Bill. 2018. ³

7. That submission, based on consultation with NCWNZ members nationally in 2018, questioned the requirement that changes to sex on birth certificates should be processed through the Family Court and entail evidence of medical treatment before changes could be made to the sex registered on people's birth certificates. The submission stated (p. 5) that:

It might be worthwhile for the Select Committee to consider whether these court processes [the requirement to involve the Family Court when requests are made to change the sex recorded on a birth certificate] are necessary. There is precedent in New Zealand and overseas for gender to be recognised in legal documents based on self-determination alone. For example, in order to change gender on a New Zealand passport, an applicant simply provides a statutory declaration indicating the identity they want displayed on their passport. This approach does not require medical information or assessment, nor costly and lengthy legal proceedings. It would be worth considering whether this approach might be applied to birth certificates as well.

¹ NCWNZ. 2021. Appendix "D": Resolutions of National Meetings 2011-2020. 18.10.4.

https://d3n8a8pro7vhmx.cloudfront.net/ncwnz/pages/1025/attachments/original/1622428501/Appendix_D_Resolutions_2011-2020.pdf?1622428501

² Sources of information that were consulted in the preparation of Remit 18.10.4:

- Desmarais F. 2018. Non-binary finery: The Kiwis whose gender doesn't fit in a 'neat little box'. <https://www.stuff.co.nz/lifestyle/life/108178948/nonbinary-finery-the-kiwis-whose-gender-doesnt-fit-in-a-neat-little-box>
- Gender Minorities website: <https://genderminorities.com/>
- Gender Equal website: <https://genderequal.nz/>
- Human Rights Commission Inquiry into discrimination experienced by transgender people: <https://www.hrc.co.nz/our-work/sexual-orientation-and-gender-identity/inquirydiscrimination-experienced-transgender-people/>

³ NCWNZ. 2018. Submission to the Governance and Administration Committee on the Births, Deaths, Marriages, and Relationships Bill. <https://ncwnz.org.nz/wp-content/uploads/2018/03/S18.05-Births-Deaths-Marriages-and-Relationships-Registration-Bill.pdf>

8. In 2018 NCWNZ anticipated a number of the amendments to the Births, Deaths, Marriages and Relationships Bill that are set out in Supplementary Order Paper 59. The current submission overall is consistent with NCWNZ's submission to The Governance and Administration Committee in 2018 and supported by the majority of NCWNZ members who responded to a draft submission.

Clause 2 Commencement

9. NCWNZ approves the amendment to provide that the Bill comes into force 18 months after Royal Assent or earlier by Order in Council, rather than the day after Royal Assent. These changes are significant, and details of the new processes and regulations will have to be developed and communicated publicly if the changes in the legislation are to work effectively for those who will use them.

Registration of a nominated sex

Clause 22A (1)(2) – Eligibility to apply for registration of nominated sex

10. NCWNZ considers that the eligibility criteria identified – that the person's birth is registered under the Act and that they are 16 years or older – are appropriate eligibility criteria. It also considers it very important that any guardian applying for registration of a child's nominated sex (other than the sex on their original birth certificate) should have the consent of the child.
11. NCWNZ does, however, consider that there should be careful examination of any application for registration of a nominated sex when people are under 16 years of age. Clause 22B(b)(iii) specifies that the eligible person should understand the consequences of the application. If a guardian applies for registration of a nominated sex on a birth certificate, they may understand the consequences for a child under 16, but will there be any inquiry into whether a child of 10 or 11 understands the consequences of their consent to this application?

Clause 22B(1a)(1b) – Application by eligible person for registration of their nominated sex

12. NCWNZ considers that it is appropriate that the application for registration of a nominated sex should specify male, female or any other sex or gender (including for example intersex, X or non-binary) and provide a statutory declaration that the applicant identifies as a person of the nominated sex, intends to live as a person of the nominated sex, and understands the consequences of the application. It welcomes the use of the statutory declaration as a way of changing the sex designated on the earlier birth certificate.
13. NCWNZ welcomes the opportunity for people to specify not only the categories male and female, but also other sex or gender designations such as intersex or non-binary. Human bodies are diverse with respect to their reproductive physiology, but traditionally in Western societies, people have been categorised using mutually

exclusive binary categories. In the 21st century, many people are questioning those dualistic categories and crafting identities for which the terms male or female are not appropriate. Recognising the human rights of those who do not self-identify as either male or female requires providing the option for them to indicate their nominated identity on core official documents.

14. Members thought it was important that sex or genders that people could nominate on their birth certificates should include takatāpui, fa'afafine, or fakaleitī, and other terms used by different cultural groups in Aotearoa New Zealand. Some members were concerned that terms other than male or female were not identified in Supplementary Order Paper 59.

Clauses 22B(2) and 22C(2)

15. Clauses 22B(2) and 22C(2) provide that an application for a person who has previously had a nominated sex registered does not need to meet any additional requirements prescribed for second or subsequent applications, if the nominated sex specified in the application is the same as the sex registered in the person's original birth record.
16. NCWNZ considers it appropriate that no additional requirements need to be met if a person applies for a change to the nominated sex registered on their birth certificate, if that involves reverting to the sex that was originally recorded on their birth certificate. Regulations need to allow for the possibility that people can rethink the changes they have made to the nominated sex on their birth certificate, especially if it is possible for them to make decisions about changes when they are under 18 years old, as proposed in SOP 59.
17. It is important that individuals who change the sex recorded on their original birth certificate can apply in the future to change the nominated sex on their birth certificate (referred to in the Supplementary Order Paper as 'multiple changes of a sex marker over time'). If the provision identified in the regulations discussed above is to apply, then it is important that there is a private record of these changes which is only accessible to the individual concerned and the Registrar General, or those to whom they delegate the right to review this information.
18. Some members were concerned that a person who changed the sex on their birth certificate might have in their possession two birth certificates, the original birth certificate, and a later birth certificate with their different nominated sex. They considered that when the nominated sex was changed and a new birth certificate was issued, the original certificate should be surrendered or stamped cancelled. This would be similar to the way old passports are stamped 'expired'.

Processes to apply for applications for children and young people

Clause 22B Application by eligible person for registration of their nominated sex

19. Clause 22B(1)(c) requires that applications by 16- and 17-year-olds who have never been married, in a civil union or de facto relationship, be accompanied by written consent from their guardian or a letter of support from another person of a type specified in the regulations.
20. It is appropriate that young people who are of an age to get married or enter into a civil union should be able to make decisions about the sex that they would like to have recorded on their birth certificate. It is hard to see why entering into a marriage, a civil union or a de facto relationship at 16 or 17 would make them more aware of the consequences of making this decision.
21. NCWNZ favours having the same processes for applications by 16- and 17-year-olds, regardless of their relationship with an intimate partner. There may be a case for requiring all applicants in this age group to have a supportive letter from a parent, guardian or a relevant third party who can attest to their having had a conversation with a supportive older adult about the consequences of the application.

Clause 22C Application by guardian of eligible child for registration of child's nominated sex

22. Clause 22C(1)(c) requires that applications by guardians of children under 16 be accompanied by a letter of support by a person of a type specified in regulations.
23. NCWNZ considers that there is some value in requiring a letter of support from a third party when parents/guardians are making an application for registering the nominated sex of a child under 16 years. There are likely to be very few such applications and parents are unlikely to make such applications unless they are very convinced that it is in the interests of their child. The child is also required to give consent. As indicated earlier, we have some concerns about what will count as evidence of consent from a young child that demonstrates an awareness of the consequences of such an application. If such applications are to be made, there is some value in requiring a letter of support from an informed third party.
24. Members of one NCWNZ branch argued that decisions made about an application to change a child's nominated sex should be made very carefully. They argued that there should be "a long lead in period with counselling" and there should be a strong focus on the person who is undergoing a change in their identity.
25. Another branch had discussions around the requirement that applicants aged 15 and younger require their guardian make the application and also require a letter of support. Those 16-17 years are able to make an application themselves and need either a guardian for support or a qualified third person. Some members argued that the requirement that guardians make the application on their behalf discriminates against

youth aged 15 and under with unsupportive or transphobic parents. These members believe there should be an alternative option to allow the person to demonstrate their awareness and ability to make an informed decision, with support from either a qualified third person, OR a guardian.

Clause 22D Registrar-General must register nominated sex if requirements met

26. It is vital that there be an Appeal Process as provided for under Clause 22D (3) – the right to appeal against the Registrar General's decision to decline an application.

Clause 22E Effect of registration of nominated sex

27. Clause 22E – Effect of registration of nominated sex – this specifies that the birth certificate should contain information consistent with what it would contain if the nominated sex had been the sex designated at birth.

28. The majority of NCWNZ members who had input into this submission considered that if it was to be useful in the lives of those who are making applications for nominated sex on their birth certificates, it is important that the birth certificates issued have these features. However, most of the members of one NCWNZ branch that commented on Supplementary Order Paper 59 considered that birth certificates are historic documents that record the sex assigned to a person at birth and that the sex assigned at birth should remain on the certificate. While they supported people's rights to legally change their nominated sex, they argued any changes should be added as amendments to the original document. Another NCWNZ branch raised questions about the possible impact in the future on sex-related health data if some of the people classified as male or female were genetically of a different sex.

Statutory review of self-identification provisions

Clause 147A Review of certain provisions relating to applications for registration of nominated sex

29. NCWNZ considers that it is very appropriate to review the self-identification provisions set out in Supplementary Order Paper 59 five years after the commencement of the operation of this legislation

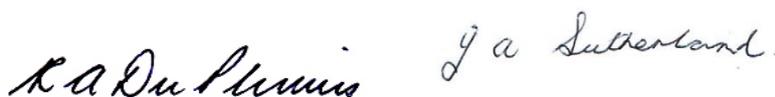
Conclusion

30. NCWNZ appreciates this opportunity to comment on Supplementary Order Paper 59. It regrets the time available for consultation with its members was very limited, given the short period between the availability of the Order Paper and the deadline for submissions. One of the branches that had input into this submission stated:

New Zealand is under a state of emergency and legislation that is not related to the emergency should be put aside until there is full time for consultation. We, as New Zealand citizens, all need time to make wise, informed and balanced decisions.



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