
Protocol for the Family Court Process to Amend Gender Information on Birth Certificates



Principal Family Court Judge Jacquelyn Moran
30 July 2021

What is the concern?

There are an increasing number of applications being filed under Part 5 of the Births, Deaths, Marriages and Relationships Registration Act 1995 (“the Act”). These are applications to amend the gender reference on birth certificates.

Currently there is no bespoke process in place to progress and determine these applications. There is some confusion by applicants, counsel, registries and judges.

It is desirable to have an identifiable process in place which is clear and consistent, and respectful of the privacy and dignity of the applicants and their families, particularly as a significant number of applicants represent themselves.

What is the current process?

The general provisions of the Family Court Rules 2002 (“the rules”) govern these applications.¹ There are no special rules like those in place for other individual pieces of legislation, eg the Adoption Act 1955, the Care of Children Act 2004, and the Protection of Personal and Property Rights Act 1988.² Therefore, these applications must be brought and dealt with under Parts 1 to 4, and Part 6 of the rules.

¹ Rules 5 and 7(1)

² Rules 6 and 21

Judges are able to give directions to regulate the court's business, in order to ensure consistency.³

These applications don't fall easily under the general provisions, as there is no clear other party.

A copy of an application must be served on the Registrar-General of the Births, Deaths, Relationships and Marriages and any other person who, in the court's opinion, is interested in, or might be affected by, the granting of the declaration.⁴

However, in no known cases has the Registrar-General has sought to respond to an application other than to formally record a willingness to abide.

In no known cases has a direction been made for service on another person when the applicant is an adult.

An application must be filed in the proper office of the court, usually nearest to where the applicant resides.⁵ This is inconsistent with the requirement for appeals and applications under s15A(2), 17(2) and 18(5), and s85 of the Act which must be filed in Wellington.⁶

It may be that some applicants don't want to file an application to change their gender in the court closest to them for privacy reasons. The application must be presented for filing at the court office, which can require applicants to wait in long queues with criminal defendants and other court users.⁷

There is no prescribed form or information readily available on what evidence is required to be filed to satisfy the court that the applicant has assumed the gender of the nominated sex, has undergone such medical treatment as is usually regarded by medical experts as desirable, and will maintain the gender identity of the nominated sex.⁸ In some cases, the court appoints

³ Rules 16 and 13

⁴ s 28(2)(a)-(b) and s 29(2)(a)-(b), Births, Deaths, Marriages and Relationships Registration Act 1995.

⁵ Rule 28(1)(a)

⁶ These relate to appeals against the Registrar's decision to register or decline to register a person as a child's parent, marriages and civil unions, and birth names.

⁷ Rule 76(1)

⁸ s 28(3)(c)(i).

Counsel to Assist to address this issue. Some applicants feel this is a further invasion of their privacy whilst others appear to be grateful for the guidance provided by counsel.

For applications under s29, namely where the gender of a child is in issue, the Act contains no provisions for the appointment of a lawyer to represent the child or requirement for the child's views to be ascertained, despite the application clearly being about a matter which clearly affects them in a very fundamental way. To not have a process which enables the child to have an opportunity to express their views and which requires those views to be taken into account, is inconsistent with our international obligations under the United Nations Convention on the Rights of the Child ("UNCROC").⁹

The treatment of young children has become increasingly controversial in other jurisdictions. It would be beneficial to have a process in place for the appointment of separate representation in anticipation of this likely trend.

What can we do to help?

We propose to implement a temporary process immediately to provide clarity and consistency to these applications. We will create a streamlined registry process and use specific judges to oversee this work. The applications can be dealt with in a court of the applicant's choosing, on the papers, or remotely.

We will embark on a consultative process with the medical and legal professions, to create a permanent process, using medical forms (similar to those used in PPPR applications) and standard Counsel to Assist/Lawyer for child briefs where required (similar to those used in Care of Children Act Lawyer for child appointments).¹⁰

How will this be implemented?

Applicants will be able to apply to amend their birth certificate by filing the following:

⁹ In particular, Article 12 of UNCROC "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

¹⁰ This will be subject to any legislative change, noting there is a bill at select committee stage which may remove the Court's role from the gender change process. Furthermore, it will depend on whether the Ministry of Justice and Department of Internal Affairs proceeds with implementing the recommendations of the Final Report of the Working Group for reducing barriers to changing registered sex.

1. Application form (Form G5)
2. Information sheet (Form G7)
3. Affidavit of Applicant annexing birth certificate (and if relevant any other documents where the gender marker has already been changed eg driver's licence and passport).
4. Affidavit of expert medical treatment to date together with opinion as to permanent effect of the medical steps undertaken. Alternatively, a medical report can be attached as an exhibit to the Applicant's affidavit.

Review

This protocol will only be in place until the permanent process has been finalised. It will be reviewed in 12 months to monitor.

Steps needed to implement

1. Three registries and three Family Court Judges to case manage and determine all s28 and s29 BDMRA application hearings from 1 August 2021. These are:
 - a. Auckland Registry, Judge von Keisenberg - for applications from Northern and Central regions.
 - b. Wellington Registry, Judge Doyle - for applications from Lower North
 - c. Christchurch Registry, Judge Duggan - for applications from Southern
2. All applications to be filed directly with one of those court registries, with a cover letter to advise if the applicant elects:
 - 2.1 For a decision on the papers, or
 - 2.2 A remote hearing (VMR or AVL), or
 - 2.3. A hearing in a court of their choosing, and if so, which court.
3. If any application is filed elsewhere, the registrar is to immediately transfer to either Auckland, Wellington or Christchurch courts for case management.
4. The registry shall protect the applicant's identity by using their initials only on the court file and not including details of the application on the daily list of the court.

5. Registrar to notify the Registrar-General of Births, Deaths, Relationships and Marriages, s28(2)(a), s29(2)(a) with a request to respond within 14 days. Any response from the Registrar is to be referred to the Judge for further direction.
6. Registrar to refer application immediately to Judge to consider whether any other person is required to be given notice of the application, to review the application and evidence filed and to make directions as to how the application is to progress (Rules 16, 14(1)(b), 30(3)(b), 53(1), 54, 174, 175, 181(1)(c), 197 FCR). Such directions may include:
 - (i) a direction the application is to be accepted for filing in a court other than that closest to where the applicant resides;
 - (ii) the application may be determined on the papers;
 - (iii) directing the provision of additional information if for example the evidence does not adequately address the requirements of the section or the medical evidence is not sufficient;
 - (iv) directing a teleconference or remote hearing;
 - (v) appointing counsel to assist the court
 - (vi) a direction to preserve some confidentially.
7. Priority 30-minute hearing to be scheduled at a time directed by the judge before either Judge von Keisenberg, Judge Doyle or Judge Duggan, or local judge if a hearing is sought in a local court. This should not be in a normal list day to ensure privacy and minimum stress to the applicant. Hearings should be scheduled within 12 weeks of filing.
8. Protocol to be sent to all Family Court managers to ensure understanding and compliance.
9. Schedulers for Auckland, Christchurch and Wellington to be notified of requirement for priority hearings.

10. The wording of the sealed order shall be consistent. Proposed wording is:

Upon application to it, the Court orders that:

A declaration is made that the sex on [legal name of applicant]'s birth certificate be changed to Male/Female, pursuant to Section 28 Births, Deaths and Marriages and Relationships Registration Act 1955.

11. Post hearing process: MOJ to provide information sheet to advise post hearing process with Births Deaths Marriages registry for new issuing of new birth certificate.