www.youthlaw.co.nz 0800 UTHLAW (884 529)

16 July 2022

Te Tari Taiwhenua – Department of Internal Affairs
45 Pipitea Street
Thorndon
Wellington 6011

BY EMAIL: <bdmrr@dia.govt.nz>

Tēnā koe,

RE: Self-identification Regulations

We thank and acknowledge Te Tari Taiwhenua – Department of Internal Affairs for the opportunity to give feedback about the proposed self-identification regulations.

We have chosen to focus our submissions on "Issue Two - Who can be a suitably qualified third party to support applications for children and youth?"

YouthLaw Aotearoa

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are part of the nationwide network of twenty-four community law centres throughout Aotearoa / New Zealand. We are a national service providing free legal advice and advocacy specifically for children and young people under 25 years of age. We also develop legal information resources and deliver legal education to children and young people and those working with them.

YouthLaw Aotearoa's legal team advises and assists in a wide range of legal matters. We most commonly encounter issues relating to gender identification when young people, or those supporting them, approach us for advice about gender identification issues. Common issues that we encounter are:

- Young people in conflict with parents or caregivers about their gender identity.
- Young people in conflict with schools, clubs, or other social groups about their gender identity. Often, these conflicts result from the guardian and/or caregiver of the young person instructing the organisation that the young person is to be treated as their birth gender.

Usually, we advise young people that they must wait until they turn 18 to apply to the Family Court to have their gender identity acknowledged. This advice can be frustrating for our clients as they urgently want their gender identity to be recognised. We acknowledge and commend the new self-identification rules, as we believe that they will help young people, particularly those aged 16 -17.

Level 1, Westfield Shopping
Centre 5 Leyton Way,
Manukau City Centre,
Auckland 2104, New Zealand

Phone 0800 884 529
Email info@youthlaw.co.nz

Concerns about 15-years and younger persons dependence on guardians to make an application

The Births, Deaths, Marriages, and Relationships Registration Act 2021 ("BDMRR") provides that a young person, aged 15 years or under, must rely on a guardian to make an application to register their nominated sex.[1] The application must also be accompanied by a letter from a third party.[2] Whilst we understand that this requirement cannot be changed by regulations, we do have concerns about this age limit.

The law recognises that guardianship is a dwindling right and provides that at certain ages young people can recognise and understand consequences and make decisions for themselves. Legal ages in New Zealand often do not appear to make sense, for example:

- At 10 years old, a child can be held criminally responsible for murder/manslaughter.
- At 12 years old a young person can be held accountable for serious offending.
- At 14 years old, a person legally stops being a 'child' and becomes a 'young person' and can be held criminally responsible for breaking any law. A young person can also be left at home without parental supervision and babysit other children at this age.
- At 15 years old you are responsible for ensuring that you wear a seatbelt.
- At any age, you can get contraceptives or abortions, get a job, apply for a passport and travel overseas.

In the medico-legal sphere there is also a concept called 'Gillick competence', which recognises that patients under the age of 16 years may be able to consent to their own medical treatment if deemed competent. Article 12 of the United Nations Convention on the Rights of a Child provides that the opinions of children and young people should be considered when making decisions that involve them.

We are also concerned by section 25, as we are commonly contacted by young people whose nominated gender identity is being actively suppressed by their guardians. The guardians may tell schools and other organisations to not recognise the young person's nominated gender. These guardians will not apply to change the nominated gender on behalf of the young person.

Withholding a young person's right to make an application themselves until the age of 16 may be harmful. In relation to delayed transition, the Human Rights Campaign Foundation has observed that "not treating people is not a neutral act. It will do harm: there are a number of studies that report evidence of suicide and self-harm among trans people who are unable to access care." This care includes legal recognition of a young person's nominated sex.[3]

[1] Births, Deaths, Marriages, and Relationships Registration Act 2021, s 25.
[2] Section 25(1)(c).
[3] Human Rights Campaign Foundation, the American Academy of Pediatrics (AAP), and the American College of Osteopathic Pediatricians (ACOP) Supporting & Caring for Transgender Children < http://hrc.im/supportingtranschildren>, at 15.

Need for an expansive definition of 'suitably qualified third party'

Q - Which of these options do you prefer and why?

We support Option 4 as set out in the Discussion Document – "A 'suitably qualified third party' may be any adult who has known the child for 12 months or more, or a specified registered professional."

An approach with the least barriers for young people is best. An expansive definition allows young people to approach those who they feel most comfortable with. This is particularly important for applicants who face fears of discrimination or being 'outed.' Along with the criteria – assurance, inclusivity and accessibility, the safety of a young person should always be a forefront consideration. Expanding the scope for a "suitably qualified third party" ensures that a young person is less likely to feel forced to approach a third party that they fear may have an unknown or adverse reaction.

Option 4 also reduces barriers to accessing a suitably qualified third party, including cost, time, and physical location. For example, a young person without the ability to drive or access to a car, may have to walk, or pay for public transport to find a doctor, and then will face GP/counselling fees, or long waiting lists for publicly funded services.

Q - Under option three, do you agree that they need to have known the child or young person for at least 12 months? Please explain why.

We question the specific requirement for a 12-month minimum period of knowing the child. The required period should allow for a level of assurance, that the child is not subject to pressure from others, and that they understand the implications of the application. However, it should also be sufficiently expansive to give young people inclusive and accessible options. We question whether a strict 12-month period the best way to determine an 'enduring relationship' for the purpose of registration. We ask that the regulations allow for a case-by-case discretion to decide whether there is an "enduring relationship" rather than a mandatory time period of 12 months.

Q - Under option two, if registered professionals can act as a suitably qualified third party, do you think that the professions listed are the most suitable? - Do you think any other people in the community could fulfil the role of a suitably qualified third party?

The listed professions - doctors, nurses, psychologists, teachers, social workers, and counsellors are suitable registered professionals. We suggest other professionals such as lawyers, justice of the peace, speech-language therapists, and physiotherapists should also be included, especially where their services are engaged to aid in transition/gender affirmation.

We also strongly support the inclusion of non-registered professionals who may form a close relationship with a child, such as family members, family friends, teacher-aides, community mentors, coaches and tutors.

An expansive definition of suitably qualified third party also recognises and respects rights and obligations under Te Tiriti, including Article 2 "active protection" and Article 3 "equity". The expansive definition better provides for tikanga Māori, as it enables Māori youth to rely on kaumatua/kuia or wider whānau members to support their application. Limiting the definition to "registered professionals" would not reflect the status that kaumatua and kuia, or even Tuakana (mentors), hold in Māori communities.

Thank you for the opportunity to provide comment on these very important regulations. If you have any questions, please contact the writers.

Nāku noa, nā

Kimberley Gee / Sarah Butterfield / Neil Shaw
Law Reform Volunteer / Solicitor / General Manager

YouthLaw Aotearoa