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NEW ZEALAND

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Introduction

1. ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people.
2. This report stresses the urgent need for the government of New Zealand to prohibit prenatal sex selection in the country. Furthermore, it details the adverse implications of New Zealand's adoption of a self-identification process for amending one's registered sex on their birth certificates for the dignity, safety and rights of women and girls, including to non-discrimination on the basis of sex, as well as for the right of parents or, where applicable, legal guardians insofar as the law permits children aged 16 and above to engage in the gender-self-identification process without requisite parental consent.

(a) Prenatal Sex Selection

3. In March 2020, New Zealand adopted the Abortion Legislation Act (hereinafter, the "Act"),¹ which amended the previous legal framework for abortion established in the Contraception, Sterilisation and Abortion Act² and Crimes Act³. The Act eliminated numerous safeguards and modified both statutory and clinical requirements for abortions conducted before 20 weeks.
4. A commentary from the Abortion Legislation Committee reveals that during parliamentary debates, prenatal sex selection emerged as a pivotal issue.⁴ In particular, parliamentarians had indeed expressed significant apprehension in light of a report from the United Nations Population Fund estimating that 126 million women were missing around the world due to sex-selective practices, including most notably abortion.⁵
5. Nevertheless, the New Zealand Parliament ultimately failed to ban this practice. Section 21 of the Act, entitled "Abortion for the sole purpose of sex selection", merely states that the parliament "opposed the performance of abortions being sought solely because of a preference for the fetus to be of a particular sex". This provision lacks legal enforceability.
6. Since New Zealand's abortion law makes abortion available on demand without certification up to 20 weeks of gestation, this further opens the door to the possibility for sex-selective abortion. Within this framework, healthcare professionals are also unable to refuse such procedures.
7. The New Zealand Parliament's deliberate decision not to outlaw prenatal sex selection is deeply concerning. Like all sex-selective practices, prenatal sex selection starkly violates the dignity and human rights of girl children, including their human

¹ New Zealand Abortion Legislation Act 2020

<<https://www.legislation.govt.nz/act/public/2020/0006/latest/LMS237550.html>>.

² New Zealand Contraception, Sterilisation, and Abortion Act 1977

<<https://www.legislation.govt.nz/act/public/1977/0112/latest/DLM17680.html>>.

³ New Zealand Crimes Act 1961

<<https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>>.

⁴ Abortion Legislation Bill, Government Bill 164—2 As reported from the Abortion Legislation Committee Commentary

<<https://www.legislation.govt.nz/bill/government/2019/0164/30.0/d1647369e2.html>>.

⁵ UNFPA, State of World Population 2020 <https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf>.

rights to life and equality before the law and non-discrimination.

8. Sex-selective practices, including prenatal sex selection, constitute an egregious violation of the dignity and human rights of girl children, including their rights to life and to equality and non-discrimination.
9. Article 6 of the Convention on the Rights of the Child (CRC) recognizes the inherent right to life of every child and establishes the obligation of states to “ensure to the maximum extent possible the survival and development of the child.”⁶ Article 2 further requires states to “respect and ensure” the child’s rights “without discrimination of any kind, irrespective of the child’s ... sex, ... birth or other status.”⁷
10. According to Article 1 of the CRC, a child is defined as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” This provides an upper limit as to who is a child but does not provide a lower limit on when the status of “child” attaches. Viewed in the context of the preamble, which recognizes that “the child ... needs special safeguards and care, including appropriate legal protection *before as well as after birth*” these provisions clearly imply the recognition of the personhood of the unborn child and the rights attached to that status.⁸
11. New Zealand’s obligations in the area of prenatal sex selection are reflected in multiple high-level political documents, including inter alia the Programme of Action of the International Conference on Population and Development and the Beijing Declaration and Platform for Action. In particular, the Beijing Declaration and Platform for Action calls on states to “enact and enforce legislation protecting girls from all forms of violence, including female infanticide and prenatal sex selection.”⁹ Relatedly, the Programme of Action of the International Conference on Population and Development (ICPD) states that “in no case should abortion be promoted as a method of family planning”, including evidently when motivated by sex selection.¹⁰

(b) Gender Self-Identification

Background

12. On 9 December 2021, the New Zealand Parliament passed the Births, Deaths, Marriages, and Relationships Registration Act (henceforth BDMR Act)¹¹, replacing the previous act of the same name from 1995¹².
13. In essence, the BDMR Act modifies the procedure for amending the sex recorded on a birth certificate. It transitions from a system that requires individuals to engage with the Family Court and disclose medical information as protective measures, to a self-

⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art. 6.

⁷ Ibid, art. 2.

⁸ Ibid, Preamble.

⁹ World Conference on Women ‘Beijing Declaration and Platform for Action’ (1995), art. 283(d).

¹⁰ International Conference on Population and Development, ‘Programme of Action’ (Cairo, 1994), art. 8.25.

¹¹ New Zealand Births, Deaths, Marriages, and Relationships Registration Act 2021 <<https://www.legislation.govt.nz/act/public/2021/0057/latest/whole.html>>.

¹² Births, Deaths, Marriages, and Relationships Registration Act 1995 <<https://www.legislation.govt.nz/act/public/1995/0016/99.0/DLM359369.html>>.

selecting administrative process. Furthermore, for children aged 16 and above, the BDMR Act removes the requirement of consent from parents or legal guardians and replaces it with the condition of a letter of support from a “suitably qualified” third party.¹³

14. The initial version of the BDMR Act did not include a self-identification clause. Rather, it concentrated on a range of minor modifications designed to enhance services related to births, deaths, and marriages. The issue of self-identification emerged during the Select Committee's consideration of a petition on this matter.¹⁴ The self-identification clauses were subsequently appended to the BDMR Act at the Select Committee stage, only after the closure of public submissions.¹⁵
15. In February 2019, the then-Minister of Internal Affairs expressed concerns regarding the significant implications of so-called “gender self-identification”, stating that these changes occurred without adequate public consultation and created a “fundamental legal issue”. She stressed that the “wider legal implications of changing to a self-identification system” needed “further consideration”, especially in light of “circumstances where a person’s sex or gender identity might need to be determined independently of the sex shown on their birth certificate and how this should be determined... for example, enrolment in single-sex schools would need to be looked at, as would access services at women’s refuges and the criminal justice system”. Regrettably, these valid concerns went unaddressed and the BDMR Act came into force on 15 June 2023.¹⁶

Impact on Parental Rights and Responsibilities

16. The previous BDMR Act of 1995 permitted adults, as well as children only through the application of their parents or legal guardians, to request – under stringent scrutiny – the amendment of the sex recorded on their birth certificate.¹⁷ Instead, the recently adopted BDMR Act nullifies the rights of parents or legal guardians by allowing children aged 16 and above to undertake the gender self-identification process without their involvement, provided that a third party provides a “letter of support” with the best interest of the child as their basic concern.¹⁸
17. The former Minister of International Affairs sought to justify this change, stating that it empowers “young people to make their own decisions about how they are identified on their birth certificates”, and that “it gives them agency over their identity, which will promote their mental health and sense of well-being”.¹⁹

¹³ New Zealand Births, Deaths, Marriages, and Relationships Registration Act 2021, Section 24 <<https://www.legislation.govt.nz/act/public/2021/0057/latest/whole.html>>.

¹⁴ Government of New Zealand ‘Births, Deaths, Marriages and Relationships Registration Bill to be deferred’ (25 February 2019) <<https://www.beehive.govt.nz/release/births-deaths-marriages-and-relationships-registration-bill-be-deferred>>.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Births, Deaths, Marriages, and Relationships Registration Act 1995, Section 29 <<https://www.legislation.govt.nz/act/public/1995/0016/99.0/DLM359369.html>>.

¹⁸ New Zealand Births, Deaths, Marriages, and Relationships Registration Act 2021, Section 24 <<https://www.legislation.govt.nz/act/public/2021/0057/latest/whole.html>>.

¹⁹ New Zealand Library of Congress ‘New Zealand: Bill Enabling Gender Self-Identification on Birth Certificates Passed’ <<https://www.loc.gov/item/global-legal-monitor/2021-12-20/new-zealand-bill-enabling-gender-self-identification-on-birth-certificates-passed/>>.

18. In 2022, consultations began regarding the qualifications of a suitably qualified third party to support gender self-identification applications for children aged 16 and above. The Department of Internal Affairs (DIA) introduced an application form entitled “Application to update sex marker on birth certificate”, specifying that a “third party” could be a doctor, psychologist, psychotherapist, nurse, social worker or counselor registered in New Zealand. At the bottom of this list, the application document states that a Letter of Support could also be obtained “from a person aged 18 years or over who has known you for 12 months or more”. This third party must confirm that the person requesting to update the sex marker on their birth certificate understands the implications of such an update, and desires to proceed. However, the same document highlights that “the third party is not assessing if the change is in your best interest [...]”. Essentially, the Letter of Support is nothing more than a document affirming the views of the child and consequently a mere formality rather than any kind of objective assessment.²⁰
19. The DIA, in a Q&A section on its website, responded to the question, “What has been done to ensure that children and young people are not disadvantaged by unsupportive parents or guardians?” with: “The risk of children not being able to access the process [to update the sex-marker] due to unsupportive guardians has been balanced against recognizing a guardian’s responsibilities to help their child make important decisions”.²¹
20. In conclusion, the BDMR Act and subsequent regulations have barred any assessment of the best interest of the child by completely side-lining parents and legal guardians and essentially encouraging third parties to abstain from conducting such an assessment when considering a letter of support. As a result, children aged 16 find themselves navigating such critical decisions absent the involvement of their families and devoid of a structured support and evaluation system.

Impact on Female-only Spaces, Including Sport

21. The topic of gender self-identification has ignited extensive debate among human rights groups in New Zealand. For instance, the Lesbian Rights Alliance Aotearoa (LRAA) vehemently opposed the BDRA Act due to concerns that it would endanger women by nullifying the sex discrimination protection present in New Zealand’s Human Rights.²² A spokesperson for the LRAA underscored that allowing gender to be self-declared would put women at risk as it would make it “impossible” for women to retain the right to female-only spaces. The spokesperson noted further that any male could simply declare himself to be female and consequently gain full legal access to such spaces since.²³

²⁰ New Zealand Department of Internal Affairs ‘Application to update sex marker on birth certificate Aged 16-17’ <<https://www.govt.nz/assets/Documents/Passports-citizenship-and-identity/BDM72-Application-to-update-sex-marker-on-birth-certificate-aged-16-and-17.pdf>>.

²¹ New Zealand Department of Internal Affairs ‘Frequently Asked Questions: Self-identification, including children and young people categories’ <<https://www.dia.govt.nz/bdmreview---Frequently-asked-questions>>.

²² New Zealand Herald ‘Birth certificate gender changes would put women and girls in danger, lesbian alliance says’ (13 August 2018) <<https://www.nzherald.co.nz/nz/birth-certificate-gender-changes-would-put-women-and-girls-in-danger-lesbian-alliance-says/CNSONZRQK45PLLTFBHWZCYJRFQ/>>.

²³ Ibid.

22. The impact of gender self-identification is also apparent in the field of sports. In 2022, Sports New Zealand, a central government agency, published a new guideline entitled “Guiding Principles for the Inclusion of Transgender People in Community Sport”.²⁴ The guideline states that “transgender people can take part in sports in the gender they identify with [...] it does not ask people to prove or otherwise justify their gender, sex or gender identity”.²⁵ Fundamentally, any individual who registers as a female will be eligible to join any women’s or girls’ sports team and participate in female competitions.
23. Sports New Zealand’s guideline has resulted in widespread harm to women and girls, including the denial of a level playing field, increased risk of physical injury, the loss of athletic and other opportunities and publicity, and a diminished drive to compete. Its stance on eligibility requirements is unscientific, anti-woman, and violates international law. Based on a mounting number of cases across the globe, the anticipated impact of these gender identity policies on female athletes is clear: women and girls will suffer discrimination, physical harm, lost opportunities, and more.
24. It must be recalled that CEDAW Article 4 stresses that “[A]doption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination”. As also articulated by the Human Rights Committee, “not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [International] Covenant [on Civil and Political Rights]”.²⁶ In this regard, it is evident that female-only spaces pursue various legitimate aims, notably the safeguarding of women’s and girls’ privacy, safety and dignity.
25. The CEDAW Committee has also affirmed the need to adopt measures responding to the specific needs of females. In the area of education for example, the Committee recommends to States Parties that, in order to ensure the availability of physical facilities for the education of girls and women, they should inter alia “improve sanitation facilities by providing sex-segregated toilets and washrooms in all schools.”²⁷
26. The BDMR Act and Sports New Zealand’s Guiding Principles for the Inclusion of Transgender People in Community Sport take these safeguards away from females and instead do not introduce mechanisms to ensure that the procedures are not, as far as can be reasonably assured, abused to perpetrate violence and discrimination against them.
27. As the Special Rapporteur on violence against women and girls highlighted in a recent communication on the topic of gender self-identification, “The insistence on

²⁴ Sports New Zealand ‘Guiding Principles for the Inclusion of Transgender People in Community Sport’ (December 2022) <https://sportnz.org.nz/media/z1rbu0gp/spnz015_gps-for-the-inclusion-of-tg-in-comm-sport-1_3_v3.pdf>.

²⁵ Ibid, page 11.

²⁶ Human Rights Committee, ‘General Comment No. 18: Non-discrimination’ (10 November 1989) UN Doc HRI/GEN/1/Rev.9, 13.

²⁷ General recommendation No. 36 (2017) on the right of girls and women to education (CEDAW/C/GC/36, 27 Nov 2017) para 31.

safeguarding and risk management protocols is based on empirical evidence that demonstrates that the majority of sex offenders are male, and that persistent sex offenders will go to great lengths to gain access to those they wish to abuse. One way that this can be done is by abusing the process to access single-sex spaces or take up roles which are normally reserved to females for safeguarding reasons.”²⁸

28. Similarly, moreover, removing the rights of parents and legal guardians to be involved in life-altering decisions concerning their children is a violation of New Zealand’s international human rights obligations.
29. The Convention on the Rights of the Child (CRC) sets children apart from adults due to their physical and mental immaturity, necessitating “special safeguards and care, including appropriate legal protection”.²⁹ Because of this, the CRC requires that children receive appropriate direction and guidance from their parents or, in their absence, legal guardians on any matter affecting them: “State parties shall respect the responsibilities, rights and duties of parents [...] to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”³⁰
30. It should be noted that the child involves him or herself in the decision-making of parents progressively, until he or she becomes the sole decision-maker upon reaching the age of 18 (or earlier under applicable law). The prior right of parents or legal guardians to make decisions concerning their children, with their best interest as a basic concern, is indeed retained until majority is attained.
31. It clearly stems from the aforementioned arguments that the child’s parents or, as the case may be, legal guardians are generally best placed to determine his or her best interest, which the CRC requires to be the primary consideration in all actions concerning children.

Recommendations

32. In light of the aforementioned, ADF International suggests the following recommendations be made to New Zealand:
 - a. Explicitly prohibit abortion on the basis of sex in New Zealand’s Abortion Legislation Act of 2020;
 - b. Guarantee the right of women and girls to access single-sex spaces in order to safeguard their privacy, ensure their safety, and prevent violence and discrimination against them;
 - c. Amend the New Zealand Births, Deaths, Marriages, and Relationships Registration Act of 2021 to ensure full conformity with its international human rights obligations, especially concerning the rights of women and girls, and

²⁸ Mandate of the Special Rapporteur on violence against women and girls, its causes and consequences, Ref.: OL GBR 14/2022, 29 November 2022
<<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=27681>>.

²⁹ Preamble of the Convention on the Rights of the Child.

³⁰ Ibid, Article 5.

parents and legal guardians.



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