30 March 2012

Fenella Bovett
Clerk
Government Administration Committee
Parliament Buildings
Wellington

Dear Fenella Bovett

ELECTRONIC IDENTITY VERIFICATION BILL

Introduction

Thank you for the opportunity to make a submission in support of the Electronic Identity Verification Bill.

The Human Rights Commission particularly welcomes the high level of consultation undertaken with the Privacy Commissioner during the development of the Bill and the protections it contains that will ensure this service is optional and that alternative non-electronic means of identity verification will be retained.

This brief letter draws on concerns raised with the Commission during its the Transgender Inquiry and highlights provisions in the Bill that are likely to have specific implications for whakawāhine, fa’afafine, transgender and transsexual people. The Commission uses the terms ‘trans people’ to cover the broad range of people whose gender identity is different from their sex at birth.

Since the publication of the Transgender Inquiry’s 2008 final report the Commission has had discussions with a range of government agencies on legal recognition and data management issues. This includes writing to the Privacy Commissioner and the Chief Executives of the Department of Internal Affairs and the NZ Bankers’ Association about separate but related issues arising from the Identity Information Confirmation Bill. That correspondence is attached as Appendix 1.

Specific Issues for trans people

Subclause 9(2) of the Electronic Identity Verification Bill sets out the details that may be included in an electronic identity credential. These include the following name and sex details:

- Name – current name, full name at birth (if different from the current name) and other names the individual may use for example a name change under the Births, Deaths, Marriages and Relationships Registration Act (BDMRRA) 1995
• Sex – sex as recorded at birth; the individual’s nominated sex “if the individual can provide to the chief executive evidence of a sex change (for example a declaration of the Family Court under section 28 or 29 of the BDMRRA 1995”).

Providing name and sex details potentially raises a number of specific issues for trans people as outlined below.

**Sex details**

As the Transgender Inquiry’s final report noted in paragraph 8.5, there is no New Zealand statute that provides the legal definition of a person’s sex.¹ Sections 28 and 29 of the BDMRRA 1995 simply set out the legal requirements for changing sex details on a birth certificate.

The Transgender Inquiry recommended this provision should be simplified by substituting its ‘physical conformation’; threshold with the requirement that someone “has taken decisive steps to live fully and permanently” in their nominated sex / gender identity. Shortly after the report’s publication there was a June 2008 Family Court case clarifying the current legal requirements.² However the Commission’s December 2010 review of human rights in New Zealand reiterated the need for legislative change.³

Even in the absence of specific legislative requirements, some government agencies’ policies require the high threshold for changing sex details on a birth certificate in order to make similar changes on other official documentation. Other public and private sector agencies require less evidence or allow trans people to self-identify their sex / gender identity. As a result, the Transgender Inquiry found that many trans people have incongruent documentation of their sex and/or gender identity. This raises two issues in relation to the proposed Bill.

Firstly the Commission would be concerned if trans people were unable to record their appropriate sex details in the Electronic Identity Verification Service (EIVS) unless they met the high threshold for changing sex details on a birth certificate. This risk emerges because the wording of subclause 9(2) makes it unclear what evidence is required before trans people are able to record their nominated sex.

The current provision allows such details to be recorded “if the individual can provide to the chief executive evidence of a sex change (for example a

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declaration of the Family Court under section 28 or 29 of the BDMRRA 1995).” The Commission considers that requiring a Family Court declaration would be an inappropriate application of a threshold for one purpose (changing sex details on a birth certificate) to the registration of sex details for other purposes. In practical terms, subclause 9(2) would mean that many trans women who live as women and are recorded on public and private sector records as female would now be recorded as male on the EVIS. Similarly many trans men would be inappropriately recorded as female.

Furthermore, the Commission notes it would be inconsistent with recent case law if the phrase “evidence of a sex change” was interpreted to mean “evidence of sex / gender reassignment surgery”. The 2008 Michael case clarified that even the high legal threshold for changing sex details on a birth certificate does not always require a trans person to have undergone such procedures. 4

A separate but related issue is the impact on trans people from having incongruent sex details across various private and public sector records. While this is an existing challenge for trans people, the introduction of the EVIS will mean greater potential for data matching that will alert agencies to inconsistencies, thereby raising concerns that trans people may be committing identity fraud. For many trans people who have transitioned it would mean their previous sex / gender identity could be disclosed to government and private sector agencies. This raises privacy issues and potentially exposes trans people to discrimination.

The Commission notes that subclause 9(2) is inconsistent with clause 26 in the proposed Bill which sets out when an application can be made to amend an electronic identity credential. Specifically subclause 26(1)(c) states an amendment can be made if “an individual has assumed and intends to maintain the gender identity of a person of a different sex from the sex that is included in the individual’s electronic identity credential”. This threshold contains only one component of the significantly higher threshold in section 28 of the BDMRRA. If it was also applied to subclause 9(2) it would better enable trans people to record their nominated sex on the EVIS, whether or not they had been able to meet the high threshold required to change sex details on a birth certificate.

**Name details**

The Commission considers it would be useful to clarify whether trans people would be required to provide all previous names in their electronic identity credential, given this has the potential to disclose someone’s previous sex / gender identity and therefore may also expose them to risk of discrimination. It recommends that trans people who have “assumed and intend to maintain” a specific gender identity should be able to choose whether previous names are removed from the EVIS.

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Summary

Identity verification processes provide specific challenges for trans people because of the high legal threshold for changing sex details on a birth certificate, which is sometimes reflected in policy decisions about amending these details on other official documents. These details often conflict with those held by banks and government agencies who will amend name and sex details based on how trans people live and present themselves in the world. Disclosure of previous name and/or sex details potentially raises privacy concerns and can expose trans people to risk of discrimination.

If the EIVS enabled trans people who “have assumed and intend to maintain” a given gender identity to nominate the appropriate name and sex details to be included on their electronic identity credential, this could be a significant step forward in protecting the privacy and safety of trans people.

Therefore the Commission recommends that:

- the threshold used in subclause 26(1)(c) for amending sex details (“having assumed and intending to maintain” a given gender identity) is applied to the creation of an electronic identity credential too – in subclause 9(2)
- trans people who “have assumed and intend to maintain” a given gender identity are able to nominate the appropriate name and sex details to be included on their electronic identity credential and
- specific advice is sought from the Privacy Commissioner about ways the EIVS can respect the privacy of trans people.

Please feel free to contact the Commission if you require any further assistance. The relevant staff member is Senior Policy Analyst Jack Byrne who can be contacted on jackb@hrc.co.nz or (09) 375-8647.

Yours sincerely

David Rutherford
Chief Commissioner
Te Amokapua
Dear Brendan Boyle, Marie Shroff and Sarah Mehrtens

IDENTITY INFORMATION CONFIRMATION BILL

Introduction
The Human Rights Commission would like to offer its assistance to help ensure that the identity verification process proposed under the Identity Information Confirmation Bill addresses the specific needs of trans people.

In its assessment of the Bill's provisions, the Commission noted potential challenges for trans people whose banking and other client records do not match the details held on the Department of Internal Affairs' (DIA) databases. This letter provides some details about those concerns and offers some potential solutions.

As you are aware, the Bill's current provisions will enable a private agency such as a bank to verify a person's identity against DIA registers, specifically:

- the citizenship register
- the passports database and/or
- various registers of births, deaths and marriages.

Where information provided by a customer or potential customer is not consistent with the database, this will result in an alert that there is a potential risk of fraud. Name and sex details are two of the categories of information that can be provided through this identity confirmation process.

Issues for trans people
As the Commission's Transgender Inquiry noted, many trans people are not able to change the sex details on DIA databases to reflect their gender identity. In particular, section 28 of the Births, Deaths, Marriages and Relationships Registration Act (BDMRRA) 1995 sets a 'physical conformation' threshold before sex details can be amended on a birth certificate. Many trans women and men do not meet this threshold because they have not undergone sufficient medical
and/or surgical procedures, are not confident about how to prepare an application to the Family Court or cannot afford a lawyer to assist with the application.

At a practical level this means, for example, that many trans women who live and work full-time as women will have:
- the sex details on bank and other client records listed as female, to accurately reflect how they live
- a birth certificate where the sex details are listed as male
- a passport, if they have one, where the sex details are listed as either X (indeterminate) or male.

The Transgender Inquiry highlighted the difficulties trans people face from having incongruent documentation. It recommended amending s28 of the BDMRRA to enable trans women who have taken decisive steps to live fully and permanently as a female (and trans men who live full-time as a male) to have this reflected in amended birth certificates. Consistent documentation also improves identity security for trans people and government and private sector agencies.

This Inquiry recommendation is yet to be implemented. Therefore there is a strong likelihood that trans people may not be able to verify the sex details on their customer records with the sex details held on a citizenship, passport, birth or marriage register. This may make some trans people very reluctant to provide their sex details due to concerns that:
- their gender identity, which is very personal information, will be exposed
- they may face discrimination because they are trans and/or
- they may be suspected of identity fraud because their details are incongruent.

Possible solutions
Provisions currently in the Bill could perhaps be utilised to protect trans people whose identity is not easily confirmed by being matched against Department of Internal Affairs’ records. One possible option could be emphasising in the generic agreement or template being developed by the Department of Internal Affairs that not all forms of identity incongruence are reasons to suspect identity fraud, and that some people (including trans people) may be particularly reluctant to allow access to such personal details.

The Privacy Commissioner has a role in checking and reviewing the Department’s generic agreement and could be requested to pay particular attention to the needs of those with incongruent or incomplete documentation.

The Commission notes that the Bill requires an individual's consent before a private agency can check details against a DIA database. Furthermore such agencies must maintain another process for checking someone's identity if they do not consent to the check. The Commission is happy to talk with banks or other private sector agencies about alternative ways to obtain such information that better protect a trans person's dignity and privacy. For some trans people a drivers license is often the preferred form of identification as it contains a photograph and name but no sex details (though these are held on the relevant databases).
I hope that this information usefully informs your discussions both while the Bill is going through the Select Committee process and, assuming it is enacted, as the provisions are implemented. Please feel free to contact the Commission if it is able to provide any further assistance. The relevant staff member is Senior Policy Analyst Jack Byrne who can be contacted on jackb@hrc.co.nz or (09) 375-8647.

Yours sincerely

Rosslyn Noonan
Chief Commissioner
Te Amokapua