

# MAKING INDIGENOUS AUSTRALIANS 'DISAPPEAR'

## Problems arising from our birth registration systems

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Bradley Hayes is a 31-year-old Indigenous<sup>1</sup> man whose birth was never registered. He grew up as a ward of the state, not knowing his date of birth. From the authorities' point of view, he did not exist. For almost ten years, he battled bureaucracy to enjoy the rights most of us take for granted, such as getting a driver's licence or obtaining a passport. But without a birth certificate to prove his identity, he always came up against a brick wall. With the help of the Gippsland Community Legal Centre, Bradley Hayes was finally able to get a birth certificate and the relief he feels is overwhelming: 'Like I said to my kids, I'm somebody now, I'm not nobody any more.'<sup>2</sup> Sadly, this is only one of numerous examples of Indigenous Australians being denied the basic rights and privileges of citizenship, because they cannot prove their identity by producing a birth certificate.<sup>3</sup> The problem encountered by Bradley Hayes, and other Indigenous Australians, flows from two distinct, but related, issues:

1. non-registration of a birth; and
2. inability to obtain a birth certificate.

International law mandates that everyone has the right to have their birth registered.<sup>4</sup> However, universal birth registration is far from a reality for many people around the world — there are an estimated 48 million children under the age of five whose births have never been registered.<sup>5</sup> Many governments deliberately, or at least recklessly, fail to ensure that the births of ethnic or religious minorities are registered, so as to disenfranchise these groups.<sup>6</sup> As Archbishop Desmond Tutu has noted:

Registering a child at birth signifies the state's recognition of the child's existence and acceptance of its responsibility to ensure that the child enjoys the rights and privileges that he or she is entitled to throughout their lifetime.<sup>7</sup>

While the lack of birth registration has long been recognised as a problem in developing countries, many Australians were shocked to recently learn that it is also a problem for Indigenous Australians.<sup>8</sup> This article explores the obstacles encountered by some Indigenous Australians in realising the right to birth registration and taking the subsequent step of obtaining a birth certificate, and analyses these obstacles in light of international and domestic human rights laws.

### The situation in Australia

To date, there has been no empirical research undertaken to assess the magnitude of the problem of non-registration of births of Indigenous Australians.

However, there is anecdotal evidence that it may be a significant problem. The Gippsland Community Legal Centre in Victoria has reported that, because they cannot produce a birth certificate, many of their Indigenous clients have experienced difficulties in obtaining a tax file number, registering to vote, opening a bank account, obtaining social security benefits, enrolling children in school, and getting a driver's licence.<sup>9</sup>

Every state and territory in Australia has enacted legislation relating to birth registration<sup>10</sup> and all impose a two step process — first, submitting a request that a birth be registered; and second, paying a fee and ordering a copy of the birth certificate.

Thus, a birth certificate is not *automatically* issued to the person registering the birth, at the time of registration; a separate application form must be completed and the prescribed fee paid. This fee ranges from \$25 in the Northern Territory to \$42 in New South Wales and Western Australia.<sup>11</sup>

There are two main reasons why a person may not have a birth certificate:

1. their birth was never registered; or
2. their birth was registered but a certificate was not obtained at the time, and cannot now be obtained, either because the person seeking the certificate:
  - a. cannot afford the fee;<sup>12</sup> and/or
  - b. they are unable to satisfy the Registrar of Births, Deaths and Marriages of proof of identity requirements.

### Birth not registered

In Victoria, in 2008, there were 1841 births that have never been registered.<sup>13</sup> This means that a staggering 2.5 per cent of all births in that state have not been registered. It is not known what percentage of these births were Indigenous, but the highest number of unregistered births appear to come from areas with significant Indigenous communities.<sup>14</sup> There is currently not enough information available to definitively explain the non-registrations, but preliminary enquiries suggest that lower birth registration rates in Indigenous communities are attributable to:

- lack of confidence in dealing with the authorities;
- marginalisation from mainstream services;
- lack of understanding of the requirements and benefits of birth registration;
- poor literacy levels; and
- low priority accorded to birth registration.<sup>15</sup>

### REFERENCES

1. In this article, the term Indigenous refers to all Aboriginal and Torres Strait Islanders who identify as such.
2. Jewel Topsfield, 'The Unbearable Heaviness of Being No One', *The Age* (Melbourne), 23 January 2009.
3. For further stories of Indigenous Australians suffering because they cannot prove their identity, see Joel Orenstein, 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (2008) 7(8) *Indigenous Law Bulletin* 14.
4. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, art 24(2) (entered into force 23 March 1976).
5. UNICEF, *The 'Rights' Start to Life* (2005) The United Nations Children Fund, 3. This figure is from 2005, and more recent figures suggest the number of unregistered births may now be 51 million. See Simon Heap and Claire Cody, 'The Universal Birth Registration Campaign' <<http://repository.forcedmigration.org/pdf/?pid=fmo:4861>> at 9 May 2009.
6. Nicola Sharp, *Universal Birth Registration — A Universal Responsibility*, Plan UK (2005) 30.
7. *Ibid* 7.
8. See media reports on this issue. Jewel Topsfield, 'Aborigines Lack Proof of Identity', *The Age* (Melbourne) 23 January 2009; ABC Radio, 'Indigenous Australians Face Greater Difficulties Obtaining ID', *PM*, 12 December 2008 <<http://abc.net.au/pm/content/2008/s2445397.htm>> at 9 May 2009.
9. Gippsland Community Legal Service, *The Koori ID Project* May 2008, 3. Copy of report on file with the author.
10. *Births, Deaths and Marriages Registration Act 1996* (Vic); *Births, Deaths and Marriages Registration Act 1995* (NSW); *Births, Deaths and Marriages Registration Act 1997* (ACT); *Births, Deaths and Marriages Registration Act 2003* (QLD); *Births, Deaths and Marriages Registration Act 1996* (NT); *Births, Deaths and Marriages Registration Act 1998* (WA); *Births, Deaths and Marriages Registration Act 1996* (SA); and *Births, Deaths and Marriages Registration Act 1999* (Tas).

These are all issues which could be addressed with an education campaign designed to raise awareness of the benefits of birth registration, and by providing the Indigenous community with the skills and resources necessary to successfully engage with the bureaucracy to achieve birth registration. Aboriginal Community Information Sessions were run by the Victorian Registrar of Births, Deaths and Marriages in May and June 2009 in 13 regional areas.<sup>16</sup> However, it seems that these meetings were organised without input from key stakeholders and respected members of the Indigenous community such as elders, and it is unclear how successful they were in increasing birth registrations and/or facilitating Indigenous people getting birth certificates.

**Birth registered, but certificate not obtained**

In every Australian state and territory, a request for a copy of a birth certificate made at any time other than simultaneously with the request to register the birth, must be accompanied by identification documents which prove that the person requesting the birth certificate is the person named in the certificate. Victoria's system is used as a case study to demonstrate how the procedures work, and how they negatively impact on Indigenous Australians' efforts to get a copy of their own birth certificate.

The Victorian Registrar of Births, Deaths and Marriages requires an application for a copy of a birth certificate to be accompanied by three forms of identification from Table A. One form of identification should come from each column or, if that is not possible, two forms of identification from the second column and one from the third column.<sup>17</sup> It is not enough that these forms of identity are provided. If applying online or by mail, they must also be certified by a sworn member of the police force.<sup>18</sup> Given that the historical relationship between the Indigenous community and police has been one of tension and distrust,<sup>19</sup> it is extremely problematic to nominate the police as the only persons entitled to certify identification documents.

**Table A**

Documents containing a photograph and signature	Documents operating in the community	Documents evidencing residential address
<ul style="list-style-type: none"> <li>• Australian Driver's Licence</li> <li>• Australian Passport</li> <li>• Firearms Licence</li> <li>• Foreign Passport</li> </ul>	<ul style="list-style-type: none"> <li>• Citizenship Certificate</li> <li>• Full Birth Certificate<sup>20</sup></li> <li>• Credit or Account Card</li> <li>• Department of Veteran's Affairs Card</li> <li>• Security Guard / Crowd Control Licence</li> <li>• Tertiary Education Institution ID Card</li> <li>• Tax File Statement</li> <li>• Student Card</li> <li>• Medicare Card</li> </ul>	<ul style="list-style-type: none"> <li>• Utility Account (gas, electricity, home phone, etc)</li> <li>• Bank Statement</li> <li>• Rent/Lease Agreement</li> <li>• Rates Notice</li> </ul>

None of the documents in the first column can be obtained without having produced a birth certificate, so a person who has never had a birth certificate is not going to be able to produce one of those documents. That leaves only documents from the second and third

columns. Many of the documents listed in the second column cannot be obtained without a birth certificate; so again, they are documents that a person who has never had a birth certificate is unlikely to have.<sup>21</sup> The documents in the third column must contain a current residential address which is an impossible requirement for persons who are homeless, or living with friends and family. The Registrar's prescriptive list of identification documents which are acceptable, and the requirement for certification by police, present significant, and at times insurmountable, obstacles to Indigenous Australians.

If an Indigenous person attends one of the Aboriginal Community Information Sessions referred to above, the proof of identity requirements are slightly different. At these sessions, the Victorian Registrar of Births, Deaths and Marriages will accept three original forms of ID from Table B. Two must come from the first column and one from the second column.<sup>22</sup>

**Table B**

Documents with Applicant's name	Documents with Applicant's address
<ul style="list-style-type: none"> <li>Credit Card or ATM Card</li> <li>Department of Veteran's Affairs Card</li> <li>Australian Security Guard or Crowd Control Licence</li> <li>Student or tertiary ID Card</li> <li>Tax Office Assessment</li> <li>Medicare Card</li> </ul>	<ul style="list-style-type: none"> <li>Rental Statement or current Lease</li> <li>Bank Statement</li> <li>Rates Notice</li> <li>Utility account (excluding mobile phone)</li> </ul>

While these new identity requirements for Indigenous Australians are an improvement, they appear to only apply when a person actually attends one of the information sessions, and are not relevant if an Indigenous person applies online or by mail. Furthermore, the sessions were held in May and June 2009, with no indication of whether they will become a regular occurrence. Finally, it should be noted that the comments above concerning problems that Indigenous Australians may have producing identification with a current address on it, are not addressed by the above changes.

Even if an Indigenous person is able to produce the required identification documents and have them certified, poverty and disadvantage may mean they are unable to pay the prescribed fee. Although the Registrar has legislative power to waive fees,<sup>23</sup> this discretion is rarely exercised.<sup>24</sup> Those working to improve birth registration systems have recommended that governments remove 'existing economic barriers (eg charges for birth certificates).'<sup>25</sup> It is argued that Australian governments should heed this advice. The waiver of fees for those in financial hardship would alleviate at least some of the hardships currently experienced by Indigenous Australians when endeavouring to obtain a copy of their birth certificate.<sup>26</sup>

11. The fee is \$26.60 in Victoria; \$42 in New South Wales; \$33 in Queensland; \$25 in the Northern Territory; \$38 in South Australia; \$36 in the Australian Capital Territory; \$42 in Western Australia; and \$35.84 in Tasmania.

12. If the exact details of the birth are not known, further fees may be incurred in conducting searches to locate the birth information.

13. Registrar of Births, Deaths and Marriages Victoria, *Indigenous Access Project Update*, March 2009. Copy on file with author.

14. For example, Shepparton, Traralgon West and Mildura. Source - Registrar of Births, Deaths and Marriages Victoria, *Indigenous Access Project Update*, March 2009. Copy on file with author.

15. Orenstein, above n 3.

16. Births, Deaths and Marriages Victoria, 'News archive', 2009 *Aboriginal Community Information Sessions* <http://online.justice.vic.gov.au/CA2574F700805DE7/page/About+us-News+archive?OpenDocument&l=70-About+us-&l=60-News+archive-&l=3=> at 30 June 2009.

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The practices and policies described above represent significant barriers to Indigenous Australians in registering their births and obtaining birth certificates and, as the analysis below demonstrates, may also constitute breaches of international and domestic human rights laws.

### International human rights law

Birth registration has been described as 'one of the most important events in a child's life',<sup>27</sup> and is recognised in international law as a fundamental human right. In particular, there are provisions regarding a person's right to have their birth registered in the Convention on the Rights of the Child (CROC) and the International Covenant on Civil and Political Rights (ICCPR), each of which is analysed below.

### Convention on the Rights of the Child

CROC is the most widely accepted human rights treaty, having been ratified by 193 States. Only two countries (the United States and Somalia) have failed and/or refused to ratify CROC. Thus, it can be said that the principles in CROC enjoy broad-based support. Of most relevance to the situation described above, is article 7 of CROC which provides:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

This provision has been described as providing the 'initial foundation for the fulfilment of other rights of the child'.<sup>28</sup> The use of the word 'immediately' in article 7(1) of CROC stresses the urgency with which this right should be realised 'so that there is no delay in officially recognising the existence of the child and granting that child access to the privileges and protections afforded to each member of society'.<sup>29</sup>

For Australia to comply with its obligations under article 7 of CROC, it must take steps to ensure the right to birth registration is recognised by law and implemented in practice.<sup>30</sup> There is little doubt that the legislation in place in every state and territory means that Australia has complied with the first limb

of this obligation. For example, in Victoria, legislation requires that a birth be registered within 60 days.<sup>31</sup> This probably satisfies the immediacy requirement of article 7.<sup>32</sup> However, there is doubt concerning whether Australia is implementing this mandate *in practice*.

Guidance about what is required is provided by the Committee on the Rights of the Child (CRC) in the General Guidelines for Periodic Reports which provides that State Parties should report on:

... the measures taken or envisaged to ensure that every child is registered immediately after birth. Please also indicate the steps undertaken to prevent the non-registration of children immediately after birth, including in view of possible social or cultural obstacles, *inter alia* in rural or remote areas, in relation to nomadic groups, displaced persons, as well as asylum-seeking and refugee children.<sup>33</sup>

Australia's most recent periodic report to the CRC does not comply with these guidelines. Indeed, the only mention of birth registration is a reference to Australia supporting 'the development of a sustainable birth registration system ... in Bangladesh'.<sup>34</sup> The anecdotal evidence currently available suggests that Australia is not complying with article 7 of CROC in practice, because it is not taking effective measures to overcome social and cultural obstacles to birth registration experienced by Indigenous Australians in rural and remote areas.

One shortcoming of article 7 of CROC is that, although it sets out a child's right to be registered, it does not also specify that every child also has a right to obtain a copy of their birth certificate. A General Comment from the CRC, elaborating generally on the content of article 7, and indicating that a right to obtain a copy of one's birth certificate is implicit, would be a useful step in redressing this oversight.

Although the CRC has not yet drafted a General Comment on article 7, it has recently published a General Comment on Indigenous Children and their Rights under the Convention.<sup>35</sup> This General Comment notes that the CRC is 'concerned that indigenous children, to a greater extent than non-indigenous children, remain without birth registration'.<sup>36</sup> The CRC recommends that State Parties should:

Take special measures in order to ensure that indigenous children, including those living in remote areas, are duly registered. Such special measures, to be agreed following consultations with the communities concerned, may include mobile units, periodic birth registration campaigns or the designation of birth registration offices within indigenous communities to ensure accessibility.<sup>37</sup>

17. Births, Deaths and Marriages Victoria, 'Proof of identity', <<https://online.justice.vic.gov.au/CA2574F700805DE7/page/About+us-Registry+policies-Proof+of+identity?OpenDocument&l=70-About+us-&2=40-Registry+policies-&3=30-Proof+of+identity>> at 7 August 2009.

18. In Victoria, the only Registry office for Births, Deaths and Marriages is in Melbourne. Getting to this office can be difficult for rural and regional people, with the result that the majority of Indigenous applicants are likely to have to apply online or by mail and therefore go through the police certification process to apply for a copy of their birth certificate.

19. 'Indigenous Deaths in Custody 1989-1996' A Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner <[hreoc.gov.au/Social\\_Justice/publications/deaths\\_custody/index.html](http://hreoc.gov.au/Social_Justice/publications/deaths_custody/index.html)> at 7 August 2009.

20. It is a curious requirement to have your birth certificate listed as one of the identification documents required by the Registrar in order to obtain a copy of your birth certificate!

21. This is increasingly likely to be the case, as nowadays there is increasing dependence on documents such as birth certificates. Historically, it was less of a problem as you were able, for example, to open a bank account without a birth certificate.

22. Births, Deaths and Marriages Victoria, 'Registering a Birth' Information Flyer <[http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMContentSite-PDFs/\\$file/4060\\_BDM%20Aboriginal%20C5Flyer\\_Final.pdf](http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMContentSite-PDFs/$file/4060_BDM%20Aboriginal%20C5Flyer_Final.pdf)> at 7 August 2009.

23. *Birth, Deaths and Marriages Registration Act 1996* (Vic), s 49.

24. Orenstein, above n 3, 15.

25. Jonathan Todres, 'Birth Registration: An Essential First Step toward Ensuring the Rights of All Children' (2003) 10 *Human Rights Brief* 32, 35.

In addition, the CRC recommends that State Parties should ensure that, 'indigenous communities are informed about the importance of birth registration and of the negative implications of its absence on the enjoyment of other rights for non-registered children.'<sup>38</sup> Thus, the UN has recognised the problem of low rates of birth registration amongst Indigenous communities. The fact that the CRC has developed a General Comment that discusses the issue of low rates of birth registration of Indigenous children signifies that this is a problem that extends beyond Australia. It would be useful if empirical research was undertaken to investigate the extent of this problem, both within Australia, and worldwide, and identify what, if anything, other countries are doing to overcome it.

Although this General Comment is a welcome contribution to the dialogue about birth registration in Indigenous communities, it is suggested that it is lacking in that it acknowledges the problem of low rates of birth registration, but does not recognise, or address, the other problem experienced by Australian Indigenous populations; namely, difficulties in obtaining official copies of their birth certificates. This may suggest that this is a problem peculiar to Australian Indigenous people, because of the two-step system used in this country, and is not an issue in other parts of the world. Alternatively, it may be that the CRC is simply not yet aware of this aspect of the problem. Recognition of this issue, and guidance from the CRC on how to address it, would be useful, and could provide Indigenous communities and non-government organisations with a powerful tool with which to lobby Australian governments for reform in this area.

#### *International Covenant on Civil and Political Rights*

The ICCPR contains a provision that is similar, but more succinct than article 7 of CROC. Article 24(2) of the ICCPR simply states that: 'Every child shall be registered immediately after birth and shall have a name'. The Human Rights Committee (HRC), being the treaty body responsible for monitoring State Parties' compliance with the ICCPR, has published General Comment No 17 relating to article 24.<sup>39</sup> It is a relatively short General Comment, consisting of only eight paragraphs and only one of these relates to the provision regarding birth registration. It states:

Under article 24, paragraph 2, every child has the right to be registered immediately after birth and to have a name. In the Committee's opinion, this provision should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child's legal personality. Providing for the right to have a name is of special importance in the case of children born out of wedlock. The main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Covenant. Reports by States Parties should indicate in detail the measures that ensure the immediate registration of children born in their territory.

While the main purpose of this statement is to expressly recognise how birth registration helps to

combat the problem of child abduction and trafficking, it should also be interpreted as serving a broader purpose, in emphasising to State Parties the importance that the HRC places on State Parties having systems in place to ensure prompt birth registration. However, General Comment No 17 does not provide any guidance on the related issue of individuals being able to readily obtain a certificate of that registration.

In addition to receiving State Parties' reports and issuing General Comments, the HRC is also empowered to receive and determine communications from individuals complaining that their rights under the ICCPR have been violated.<sup>40</sup> The case of *Mónaco v Argentina*<sup>41</sup> concerned a complaint to the HRC regarding breaches of article 24(2). In that case, the parents of a nine-month-old girl, Ximena Vicario, were taken by the police in the 1970s and never seen again. The girl was raised in the home of a nurse until the age of seven when her grandmother found her. Legal proceedings were instituted by the grandmother in the domestic courts in Argentina relating to custody and identity of the child. The HRC noted that these proceedings had been going on for ten years and some were still not finalised. In particular, the child still had to bear the name given to her by the nurse and she could not obtain a passport in her real name. It was argued that this violated her right to an identity. The HRC found that:

the delay in legally establishing Ms Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.<sup>42</sup>

Thus, having to battle the authorities for a decade to claim her identity was a breach of her human rights. In order to comply with article 24 of the ICCPR, the authorities needed to take 'prompt and effective'<sup>43</sup> action to relieve this child from her predicament.

Bradley Hayes, whose experience was discussed in the Introduction, tried to establish his identity and obtain birth registration papers for almost ten years. Applying the rationale in *Mónaco v Argentina*, it could be argued that Australia is similarly in breach of international human rights law; in particular article 24 of the ICCPR, by not taking prompt and effective action to allow him to unequivocally establish his legal personality and obtain official identification documentation.

#### **Domestic human rights law**

Currently only the Australian Capital Territory<sup>44</sup> and Victoria have human rights legislation.<sup>45</sup> The question that needs to be asked is whether the system of birth registration and provision of birth certificates in these two jurisdictions breaches any provisions of this legislation. Since the provisions of both Acts are broadly similar, this analysis will concentrate on the Victorian legislation, namely the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).

Before analysing which specific rights in the Charter are applicable to the issue under consideration, there are two preliminary points that need to be taken into account. The first is that the Registrar of Births, Deaths

26. It is noted that the Victorian Registrar of Births, Deaths and Marriages created a specific simplified form for victims of the Black Saturday bushfires (7 February 2009), and waived all fees, thereby demonstrating a willingness to be flexible when deemed necessary. <[http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMApplication\\_Forms/\\$file/Form%20Bushfire09.pdf](http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMApplication_Forms/$file/Form%20Bushfire09.pdf)> at 30 June 2009.

27. Todres, above n 25, 32.

28. *Ibid* 33.

29. *Ibid*.

30. Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999), 145–146.

31. A penalty fine of approximately \$1000 may be imposed for failing to register a birth within this period.

32. It should be noted that Australia is the State Party to CROC, and as such has an obligation to ensure that the states and territories comply with the Convention.

33. CRC/C/58, 20 November 1996, para 49.

34. CRC/C/129/Add.4, 29 December 2004, para 475.

35. General Comment No 11, CRC/C/GC/11, January 2009.

36. *Ibid* para 41.

37. *Ibid* para 42.

38. *Ibid* para 43.

39. Thirty-fifth session of the HRC, 7 April 1989.

40. First Optional Protocol to the ICCPR, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

41. Communication No 400/1990, 3 April 1995, CCPR/C/53/D/400/1990.

42. *Ibid* para 10.5.

43. *Ibid*.

44. *Human Rights Act 2004* (ACT).

45. Other jurisdictions are considering enacting Human Rights Acts including Tasmania, WA and the Commonwealth.

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and Marriages is a public authority pursuant to section 4 of the Charter, and therefore is required to act in a way that is compatible with the human rights set out in the Charter.<sup>46</sup> The second point is that the Charter is intended to give effect to the rights set out in the ICCPR.<sup>47</sup> However, not all rights in the ICCPR have been included in the Charter. In particular, article 24(2) is not replicated in the Charter, or for that matter the *Human Rights Act 2004* (ACT). It will be recalled that article 24(2) of the ICCPR provides that 'every child shall be registered immediately after birth and shall have a name.' The Consultation Committee which drafted the Charter acknowledged the omission, stating that:

... the Committee has not included the article 24 provisions concerning the right to birth registration and to a name. While these rights were more relevant in the post-World War II context in which the ICCPR was drafted, they are less relevant for inclusion in a modern Victorian Charter.<sup>48</sup>

This demonstrates a complete lack of awareness of the problems that Indigenous people in Victoria face with birth registration and obtaining a copy of their birth certificate. The failure to translate the right set out in article 24(2) of the ICCPR, into the Charter, in the belief that there are no issues surrounding birth registration in Victoria, is an error of judgment, to the detriment of the Indigenous population in that state. The Charter is to be reviewed by the Attorney-General after it has been in operation for four years, with a view to considering whether any additional human rights should be included.<sup>49</sup> The author recommends that such a review recognise that the right to birth registration and a birth certificate are still live issues for Indigenous Australians, and accordingly the Charter should be amended to include a provision giving effect to article 24(2) of the ICCPR.

Notwithstanding that the Charter does not expressly include a right to birth registration and a birth certificate, there are other provisions in the Charter that are relevant to this issue. In particular, section 8(1) provides that 'every person has the right to recognition as a person before the law.' This is almost the same as article 16 of the ICCPR which provides that 'everyone shall have the right to recognition everywhere as a person before the law'.<sup>50</sup> This means that everyone is entitled to the protection of the legal system; that is, that all persons are recognised as having the right and capacity to be involved in legal proceedings and to exercise their legally recognised rights.<sup>51</sup> As one scholar noted:

It is not open to a State to subject a citizen to a 'civic death', that is to deprive an individual of legal personality. Any

total or partial denial of legal personality will infringe these provisions.<sup>52</sup>

The lack of birth registration and/or a birth certificate that some Indigenous Australians face arguably amounts to civic death, and a violation of the fundamental right to be recognised as a person before the law. The importance of this right is reflected in the fact that under the ICCPR, this is a non-derogable right.<sup>53</sup>

It can be argued that a crucial element of being recognised as 'a person before the law' is being able to produce legally recognised proof of identity.<sup>54</sup> For example, being recognised as a person before the law includes the right to the protections of the juvenile justice system. If a child commits an offence and, because their birth was never registered, or they have no proof of their age, they cannot establish that they fall within the jurisdiction of the Children's Court, they may be tried as an adult without the protections afforded to young people by the juvenile justice system.<sup>55</sup> Thus, being a person recognised before the law, means being a person who can legally substantiate their age and identity. The Registrar of Births, Deaths and Marriages, by failing to facilitate the legal recognition of all persons born in Victoria — either by failure to register *all* births, or by failure to facilitate provision of a birth certificate, is arguably in breach of section 8(1) of the Charter.<sup>56</sup> However, there is limited jurisprudence on this matter, and therefore a lack of certainty surrounds this argument.

Another section of the Charter relevant to this issue is section 17 which provides:

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.<sup>57</sup>

Section 17 of the Charter may be breached if a child is not able to enjoy the protections needed by him/her, because their birth has not been registered.<sup>58</sup> It has been observed, with respect to the corresponding provision in the ICCPR, that 'such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be [for the enjoyment of] economic, social and cultural' rights.<sup>59</sup> Thus, a child should not be refused enrolment at school, or denied access to immunisations, simply because a parent cannot produce evidence of birth registration.<sup>60</sup>

46. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

47. Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008) 3.

48. Victorian Department of Justice, *Rights, Responsibilities and Respect: The report of the Human Rights Consultation Committee*, November 2005, 45.

49. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 44.

50. Article 16 of the ICCPR is based on article 6 of the Universal Declaration of Human Rights which provides that 'Everyone has the right to recognition everywhere as a person before the law.'

51. Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd ed, 2005), 372.

52. Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007), 236.

53. Article 4(2).

54. Orenstein, above n 3, 16–17.

55. Todres, above n 25, 33.

56. Other arguments could be raised about discrimination against Indigenous Australians in the enjoyment of this right, but that is beyond the scope of this article.

57. This is based on article 24 of the ICCPR.

58. For example, access to medical care, social security and education.

59. General Comment No 17: Rights of the Child (Art 24), Human Rights Committee, 7 April 1989, para 3.

It is regrettable that the Charter does not include an express provision mandating everyone's right to have their birth registered and to obtain evidence of that registration. However, there are still sections of the Charter which may afford some protection to Indigenous Victorians who are experiencing difficulties with obtaining evidence of their birth registration from the Registrar of Births, Deaths and Marriages. The Charter is still relatively new, and as yet no cases have made it to the courts to test the applicability of these sections to the birth registration problems encountered by Indigenous Australians born in Victoria. So it cannot be said, with any certainty, that the Registrar's conduct is incompatible with sections 8 and/or 17 of the Charter.<sup>61</sup>

**Conclusion**

In February 2008, Prime Minister Kevin Rudd apologised to Indigenous Australians saying that:

The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past

and so moving forward with confidence to the future. We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.<sup>62</sup>

For most Australians saying 'sorry' was a proud and historic moment. However, such an apology is meaningless if we continue to inflict suffering on Indigenous Australians. Australia's laws and policies are still disadvantaging Indigenous Australians, with the lack of birth certificates, a real and substantive barrier to their enjoyment of the rights and privileges of Australian citizenship. It is time for all Australian governments to explore ways of changing the practices of their registry offices, so that they cease to be in breach of international, and potentially, domestic, human rights laws, pertaining to birth registration.

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60. Nowak, above n 51, 547.

61. The Charter does not create an independent cause of action and a breach of the Charter does not give rise to a cause of action in and of itself.

62. Kevin Rudd, 'Apology to Australia's Indigenous Peoples' *Hansard*, 13 February 2008, 167.



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