



Submission to the Queensland Legal Affairs and
Community Safety Committee on the Electoral
Reform Amendment Bill 2013

16 January 2014

1. Executive Summary

We urge the Queensland Government not to enact the Electoral Reform Amendment Bill 2013, and in particular the provisions requiring that individuals produce proof of identity documents before being allowed to vote. We urge this course of action because imposing such a requirement would likely be a significant barrier to Indigenous Queenslanders exercising their democratic right to vote. This is because many Indigenous Queenslanders do not have a birth certificate, and without this foundational document are unable to obtain forms of ID such as a driver's license or passport.

The purpose of this submission is to highlight this problem and recommend that proof of ID not be made a prerequisite to participating in the electoral process.

2. Indigenous Australians and Birth Certificates

In 2005, of the 9,900 children born to Indigenous mothers in Australia, 13% (1,300 children) were not registered.¹ Whilst it is not known how many of these births were in Queensland, these numbers suggest that the lack of birth registration in Indigenous communities is a significant problem.

Preliminary investigations attribute the non-registration of births by Indigenous Australians to a lack of confidence in dealing with authorities, marginalisation from mainstream services, lack of understanding of the requirements and benefits of birth registration, poor literacy levels and the low priority afforded to birth registration.² It may also be that the now discredited government policies of removing Indigenous children from their parents, which created what has become known as the 'Stolen Generations', is a reason behind Indigenous Australians not registering the birth of their children. These policies may have left Indigenous Australians with a residual fear of government record keeping, particularly when it comes to their children. In this regard, birth registration could operate as an undiscovered site of inter-generational trauma. Intergenerational trauma being the 'trauma that is multigenerational and cumulative over time; it extends beyond the life span'.³

Anecdotal evidence suggests that Indigenous Australians encounter difficulties obtaining a birth certificate.⁴ There appear to be two principle causes of this inability to obtain a birth certificate, namely that:

¹ Orenstein J 'Being Nobody – The Difficulties Faced by Aboriginal Victorians in Obtaining Identification', Speech delivered at National Association of Community Legal Centres Conference, 14-17 September 2009.

² Gargett A, Gerber P, Castan M 'A Right to Birth Registration in the Victorian Charter? Seek and You Shall Not Find!' (2010) 36(3) *Monash University Law Journal* forthcoming; Gerber P 'Making Indigenous Australians "Disappear": Problems arising from our birth registration system' (2009) 34(3) *Alternative Law Journal* 158; Gerber P 'Making Visible the Problem of Invisibility' (2009) 83(10) *Law Institute Journal* 52; and Orenstein J 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (2008) 7(8) *Indigenous Law Bulletin* 14.

³ Cox D 'Working with Indigenous survivors of sexual assault' (2008) 5 *ACSSA Wrap* 1, 3.

⁴ Gargett, A. Gerber, P. and Castan, M. 'A Right to Birth Registration in the Victorian Charter? Seek and You Shall Not Find!', *Monash University Law Review*, Vol. 36, No 2, 2011 (forthcoming); Gerber, Making Indigenous Australians "Disappear", Problems arising from our birth registration system' (2009) 34(3) *Alternative Law Journal* 158; Gerber P 'Making Visible the Problem of Invisibility' (2009) 83(10) *Law Institute Journal* 52;

- (a) the birth was never registered (discussed above), or
- (b) although the birth was registered, the person is unable to subsequently satisfy the bureaucratic requirements that are imposed on applicants seeking to obtain a copy of their birth certificate.

In Queensland, a birth certificate is not automatically issued when a birth is registered. The person registering the birth must apply for a certificate and pay the prescribed fee. The cost of obtaining a birth certificate (\$40.50) may be one of the reasons why an Indigenous parent may not obtain a certificate at the time of birth registration.

If a person seeks to obtain a birth certificate after the time of registration, the Births, Deaths and Marriages Registrar has strict requirements regarding the production of documents to establish the individual's identity. This requirement also impedes Indigenous Australians from obtaining a birth certificate. Many of the required identification documents (e.g. a driver's licence and passport) can only be obtained by a person who already has a birth certificate. This creates a 'vicious circle' whereby a birth certificate will not be provided because a person cannot produce the requisite identity documents, documents that require a birth certificate to obtain!⁵ Applicants are also required to produce identity documents which include a current address. This can be problematic for persons who do not have a fixed address, which includes some Indigenous Australians.

3. Recommendations

For all the reasons set out above, we recommend that there should be **NO** requirement that individuals produce proof of identity documentation prior to being allowed to vote.

Alternatively, if the Bill retains a requirement for proof of identity, those ID documents should include forms of ID that the majority of Indigenous Queenslanders possess such as 'Proof of Aboriginality' documents.⁶ We note that the Bill does not specify what documents will constitute sufficient proof of identity, just stating in the definitions section that:

proof of identity document means a document relating to proof of a person's identity prescribed under a regulation.

Indigenous Australians already suffer disadvantage by not being able to obtain a birth certificate which is essential for accessing services that are only available to those with a birth certificate.

Orenstein J 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (2008) 7(8) *Indigenous Law Bulletin* 14.

⁵ Gerber P 'Making Visible the Problem of Invisibility' (2009) 83(10) *Law Institute Journal* 52.

⁶ Proof of Aboriginality documentation is a signed document bearing the seal of an Aboriginal organisation: Orenstein, *Being Nobody*, *loc.cit.* note 5.

The Castan Centre for Human Rights Law urges the Queensland Government to refrain from increasing disadvantage and exclusion, by not introducing voter identity requirements as a condition precedent to voting.

To further elaborate on this problem, and support the above recommendations, we include with our submission, the following two articles:

1. Castan, Melissa, Gerber, Paula & Gargett, Andy 'Indigenous Australians' Access to Birth Registration Systems: A Breach of International Human Rights Law?' (2011) 17(1) *Australian Journal of Human Rights* 55-89.
2. Gerber, Paula 'Making Indigenous Australians 'Disappear': Problems arising from our Birth Registration Systems' (2009) 34(3) *Alternative Law Journal* 158-167.

Please do not hesitate to contact us if you have any questions or would like clarification of any matters raised in this submission.



Dr Paula Gerber
Deputy Director, Castan Centre for Human Rights Law,
Associate Professor
Law School
Monash University
Clayton, Vic, 3800

Ph: (03) 9905 5085
Mob: 0410 596 494
Email: paula.gerber@monash.edu

Indigenous Australians' access to birth registration systems: a breach of international human rights law?

Melisa Castan, Paula Gerber and Andy Gargett*

It has recently been discovered that there are significant numbers of Indigenous Australians who are unable to prove their identity — either because their birth was never registered, or because they cannot satisfy the requirements of the Registrar of Births, Deaths and Marriages for obtaining a birth certificate. The effect is to make such people legally invisible, preventing them from enjoying all the rights of citizenship that the majority take for granted. This article explores whether international human rights law, in particular the International Covenant on Civil and Political Rights, can help redress this problem.

Introduction

'History doesn't repeat itself, but it does rhyme' were the prophetic words of Mark Twain. At the time of the colonisation of Australia in 1788, the British assumed sovereignty on the basis of *terra nullius* — that the land belonged to nobody. This was justified because the 'indigenous inhabitants were regarded as barbarous or unsettled and without settled law' (Brennan J in *Mabo v Queensland (No 2)*, 1992, at 38). Thus, *terra nullius* operated to make Indigenous people legal non-inhabitants of their own country, effectively making them legally invisible. It was not until 1992, in the now renowned Australian High Court case of *Mabo (No 2)*, that the myth of *terra nullius* was rejected. However, for many Indigenous Australians, the echo of *terra nullius* and legal invisibility can still be heard. In its current rhyme, legal invisibility is not due to the now antiquated perception that Indigenous communities are too 'barbaric' to establish a legal and political order, but rather exists because many Indigenous Australians are unable to obtain primary evidence of their identity and thus establish their legal personality.

* Melissa Castan is a Senior Lecturer in the Monash University Law School and a Deputy Director of the Castan Centre for Human Rights Law. Email: <Melissa.Castan@monash.edu>.

Paula Gerber is a Senior Lecturer in the Monash University Law School, a Deputy Director of the Castan Centre for Human Rights Law, and a member of the board of the Victorian Equal Opportunity and Human Rights Commission. Email: <Paula.Gerber@monash.edu>.

Andy Gargett was a researcher for the Castan Centre for Human Rights Law. Email: <andrew.gargett@humanrights.gov.au>.

There is emerging evidence that within Australia, Indigenous people are experiencing difficulties proving their legal identity simply because they are unable to produce a birth certificate — the instrument universally recognised as the fundamental evidentiary document establishing personal identification. This legal invisibility is well illustrated by the story of Bradley Hayes, a 31-year-old Indigenous man who grew up a ward of the state. For 30 years, Mr Hayes was legally invisible; he could not obtain a birth certificate and, in the eyes of the authorities, he simply did not exist. Mr Hayes battled to establish his legal identity, to allow him to enjoy what the legally visible take for granted, such as getting a driver's licence or registering a fishing boat. The inability to obtain a copy of his birth certificate was the constant stumbling block for Mr Hayes. After 10 years of struggle, and with the help of a community legal centre, Mr Hayes finally obtained a birth certificate and became legally visible. He jubilantly stated: 'Like I said to my kids, I'm somebody now, I'm not nobody anymore' (Topsfield 2009).

Another story that illustrates this problem is that of AH and TH, two 15-year-old Indigenous girls involved in an employment program. Neither had a birth certificate and this prevented them from obtaining a tax file number (TFN). As a consequence, the girls were taxed at the highest tax rate, significantly reducing their take-home pay. The administrative process the girls had to undertake in order to obtain birth certificates was lengthy and intimidating. By the time their employment pursuant to the program had finished, the girls were still without birth certificates and therefore TFNs. The girls withdrew from the program and were left disillusioned with mainstream employment. Thus, the lack of a birth certificate had a huge negative impact on their educational and employment experience (Orenstein 2009b).

Unfortunately, stories like those of Mr Hayes and AH and TH remain mere anecdotes, as nobody has yet undertaken comprehensive empirical research to uncover the full extent of this problem of legal invisibility within Australian Indigenous communities. For the reasons outlined in this article, problems associated with obtaining a birth certificate appear to disproportionately impact Indigenous Australians. This may be because:

- many Indigenous Australians live at or below the poverty line (Carr and Sloan 2003, 253) and may not have the capacity to pay the prescribed fee for obtaining a birth certificate;
- Indigenous Australians may not be aware of the significance, importance and benefits of birth registration and a birth certificate, and thus afford a low priority to birth registration;
- Indigenous Australians may lack confidence in dealing with authorities and are often marginalised from mainstream services;
- there may be a general suspicion of authorities among Indigenous Australians, stemming in part from the policies that led to the Stolen Generations;

- there may be language barriers or literacy issues in completing the birth registration process; and
- a requirement that the proof-of-identity documents (necessary for obtaining a copy of a birth certificate at any time other than simultaneously with an application for birth registration) must be certified by the police (if the application is not made in person) may be problematic for Indigenous Australians who have historically not enjoyed a good relationship with the police (Cunneen 2001).

It could well be that similar problems are faced by other vulnerable groups, such as those experiencing homelessness and people with different cultural and linguistic backgrounds.

The inability to obtain the basic identity documentation that a birth certificate represents stems from two principle causes: (i) that the birth was never registered; or (ii) that the birth was registered but, for a variety of reasons (discussed below), the person is unable to now acquire a copy of his or her birth certificate (Gargett, Gerber and Castan 2010; Gerber 2009a). This inability to obtain primary evidence of identification negatively impacts on the daily lives of the legally invisible and inhibits their ability to function as full members of society. Without a birth certificate, they experience difficulties enjoying basic citizenship rights, such as obtaining a driver's licence or passport, opening a bank account, and collecting social welfare benefits (Gargett, Gerber and Castan 2010; Gerber 2009a; 2009b; Orenstein 2008; 2009a; 2009b).

This article begins with an analysis of the problem — the non-registration of births of Indigenous Australians and their inability to obtain birth certificates. This involves an examination of the administrative systems within Australia for birth registration, including the role of birth registration and birth certificates. While each of Australia's six states and two territories has its own legislative and policy regimes relating to birth registration, they are all broadly similar. The authors have therefore selected just one jurisdiction (Victoria) for an in-depth case study. This case study highlights the scale of the problem and sheds light on the possible underlying causes of the legal invisibility encountered by members of Indigenous communities.

Having set the scene with a comprehensive examination of the problem in Australia, the authors then analyse the relevant international human rights law. While the right to birth registration is well established in the International Covenant on Civil and Political Rights (ICCPR, Art 24(2)) and the Convention on the Rights of the Child (CROC, Art 7), this is not the only human right that is potentially invoked by a person unable to obtain a birth certificate. This article examines a number of other applicable rights contained within the ICCPR, including the protection of children, recognition before the law, and equality and non-discrimination. The

authors have chosen to focus on the ICCPR rather than CROC for several reasons. First, the ICCPR has been incorporated into domestic law in two jurisdictions in Australia, including Victoria. This means that there is a potential for domestic remedies. Second, although CROC has more ratifications than the ICCPR, it is the ICCPR that is considered part of the International Bill of Human Rights and thus has preeminent status in international law (Nowak 2005). Third, the ICCPR has an individual complaint mechanism that can potentially provide some avenue for redress. This complaint mechanism also develops international jurisprudence. Fourth, although the issues related to birth registration and certificates occur at the time of birth (or early childhood), many of the issues relating to exclusion from society manifest as the child enters adulthood.

In addition to analysing the applicability of the ICCPR to this problem, the authors also consider the impact of the Declaration on the Rights of Indigenous People (the Declaration). Although the Declaration is non-binding, it does establish 'best practice' standards for legislation and policy that impact on Indigenous people (Anaya 2008, 34–43).¹

Having established that there is a right under international law to birth registration and a birth certificate, the authors examine the impact of these international human rights provisions within Australia. This highlights that international law is only enforceable in Australia if it has been expressly incorporated into domestic law. The authors argue that Australia's incorporation of international human rights law is currently inadequate, and there is an urgent need for legislative protection of the rights set out in international human rights treaties, such as the ICCPR, to which Australia is a party. It is suggested that there is currently insufficient protection of human rights within Australia. However, this lack of domestic incorporation of international human rights law does not mean that Australia can escape international scrutiny of its human rights practices. The authors analyse the extent to which the problems that Indigenous people face when trying to obtain a birth certificate is addressed in Australia's Periodic Reports to various UN treaty bodies, and those bodies' Concluding Observations. Although a treaty committee's comments are non-binding, they do have the potential to generate political pressure for reform.

Finally, the article makes preliminary conclusions as to the extent to which Australia is complying with international human rights law regarding Indigenous peoples' access to birth certificates, and emphasises the urgent need for further research into

1 It is noted that there are other human rights instruments that are potentially applicable, such as the International Convention on the Elimination of All Forms of Racial Discrimination.

this issue to determine the exact nature and extent of the problem across Australia. Governments are unlikely to reform their birth registration practices without strong empirical data indicating a need for change.

The problem: birth registration and birth certificates

Birth registration

Birth registration is the administrative process whereby a child's birth is officially recorded on a civil register. Archbishop Desmond Tutu commented:

Birth registration is much more than an administrative procedure. It is a key event in a child's life. This is because birth registration acts as the starting point for engagement between the state and the individual. Registering a child at birth signifies the state's recognition of the child's existence and acceptance of its responsibility to ensure the child enjoys the rights and privileges that he or she is entitled to throughout life. [Sharp 2005, 7.]

Thus, in marking the recognition of the state's responsibility for a child, birth registration has the effect of a legal birth (Todres 2003). Registration of a birth provides invaluable demographic data, essential for government planning and social policy development (United Nations Children's Fund 2002). In this way, birth registration serves the state's needs, whereas the birth certificate serves the individual's needs.

Birth certificates

Obtaining a birth certificate is a discrete event which follows the registration of a child's birth. A birth certificate operates as the 'most visible evidence of a government's legal recognition of the existence of a child as a member of society' (United Nations Children's Fund 2002, 2). The certificate is the essential document that attests that a state has taken responsibility for a child. It is the prerequisite for accessing the gamut of human and citizenship rights that flow from birth registration.

In all Australian states and territories, obtaining a birth certificate involves a two-step process: birth registration, and then a subsequent application for a certificate and the payment of a prescribed fee (Gerber 2009a; 2009b). There is anecdotal evidence to suggest that some Indigenous Australians are completing only the first step in the two-step process. While this helps to ensure that governments have accurate raw data on birth numbers, it does not help with the legal invisibility experienced by individuals who later in life may not be able to overcome the obstacles to obtaining a

birth certificate that are imposed if a request for a certificate is made at any time other than simultaneously with the birth registration.

Australia's legislative and policy regimes pertaining to birth registration

Each of Australia's states and territories has a legislative framework for the registration of births and the issue of birth certificates: *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). Each of these administrative systems is broadly similar. To avoid repetition, the authors use as a representative case study the Victorian legislative and policy regime. Victoria is the second most populous state in Australia² and most of the currently available data on legal invisibility in Indigenous communities comes from that jurisdiction.

The Victorian Registry of Births, Deaths and Marriages (BDM) was established in 1853. The BDM was given the role of recording and registering all births, deaths and marriages in Victoria and providing certificates for these events (Victorian Registry of Births, Deaths and Marriages, 'About us'). The BDM is regulated by the *Births, Deaths and Marriages Registration Act 1996* (Vic) (BDM Act, s 5). The main purpose of the BDM Act is 'to provide for the registration of births, deaths and marriages and changes of names in Victoria'. Thus, it creates the administrative regime to facilitate the registration of births (BDM Act, s 1). Following a birth, a birth registration statement must be lodged by the parents with the BDM (BDM Act, ss 14, 15). In this way, the BDM Act imposes responsibility for birth registration on the child's parents, and a fine of up to \$1,168.20 may be imposed if the birth registration statement is not lodged within 60 days of the birth (BDM Act, ss 15, 18).

As already noted, a birth certificate is not automatically supplied to a child's parents upon the birth being registered. Rather, a copy of the certificate must be ordered, and the application accompanied by the payment of a prescribed fee.³ The BDM is empowered, in appropriate cases, to waive the whole, or part, of the fee (BDM Act, s 49), but early indications are that this discretion is not always exercised when it

2 The most recent demographical data from the Australian Bureau of Statistics indicates that Victoria's population is 5,420,600 (Australian Bureau of Statistics 2009).

3 At the time of writing, the fee was \$26.60 (see Victorian Registry of Births, Deaths and Marriages, 'Fees and turnaround').

comes to requests from Indigenous people (Gerber 2009a; 2009b). If a parent does apply for a birth certificate for their child at the time that the birth is registered, they are not required to produce any form of identification.

A person may apply for a copy of their birth certificate at a later date (such as when they reach the age at which they can apply for a driver's licence), at which time not only must they complete an application form and pay the prescribed fee, but they must also produce three separate documents proving their identity. It is these proof-of-identification requirements that appear to be one of the main obstacles to Indigenous people overcoming their legal invisibility (discussed in detail below). Section 47 of the BDM Act confers the power of the Registrar to maintain written policies for the access of the register, including the issue of certificates. It is this policy that prescribes the identification requirements (see Victorian Registry of Births, Deaths and Marriages, 'Application for a birth certificate').

Scale of the problem

It is axiomatic that statistics on unregistered births worldwide remain approximations only. The most recent reliable statistics estimate that 51 million children born in 2006 did not have their births registered, and that 22.6 million, or 44%, of this number come from South Asia (United Nations Children's Fund 2007). Recognition of the problem in the developing world has been widely documented and acknowledged (United Nations Children's Fund 2005). As a consequence of this, the UN and non-government organisations such as Plan International have undertaken programs to address this deficiency (Plan International 2009). Statistics reveal that within these non-registration 'hot spots', people from remote areas and from ethnic minorities tend to have lower rates of birth registration than does the broader population (United Nations Children's Fund 2007; Plan International 2009). There is also a strong correlation between low socioeconomic status and non-registration of births (United Nations Children's Fund 2002). A consequence of the recognition of these problems in other countries is that detailed information is available that may help developed states, such as Australia, implement programs designed to address the problems experienced by Indigenous people. The Committee on the Rights of the Child (CRC) has expressed concern at the global under-registration of Indigenous births and has identified this as a significant problem (CRC 2009, 41). Given that Indigenous people are one of the most disadvantaged populations in the world (Secretariat of the Permanent Forum on Indigenous Issues 2010), it is not surprising that, worldwide, Indigenous people are over-represented in unregistered births.

Although non-registration of births is often not recognised as a problem in the developed world, 2% of births in such countries are unregistered (United Nations

Children's Fund 2007). The lack of awareness was poignantly evident in Australia when the committee charged with making recommendations to the Victorian government on whether it should enact a Bill of Rights advised the government that a provision articulating a right to birth registration was unnecessary. The committee explained that although this was an issue in Europe in the era following the Second World War, it was irrelevant in Victoria in the modern era (Human Rights Consultation Committee 2005, 45). Because developed countries, such as Australia, have largely failed, and/or refused, to acknowledge that under-registration of births is a problem within their own jurisdictions, they lag behind the developing world in gathering empirical data and cultivating solutions. Todres (2003, 32) has argued that in industrialised countries, those whose births are not registered 'are often overlooked and at the margins of society. As a result, such children are often subject to the same human rights violations typically thought to be prevalent only in poorer, more resource-constrained environments, and they too need the benefit of birth registration'.

Unfortunately, Todres's fears appear to ring true in Australia. In 2008, 2.5% of all births in Victoria were not registered (Victorian Registry of Births, Deaths and Marriages 2009). This equates to 1,841 children who, through non-registration, cannot prove their identity to government authorities or others (such as banks) and thus are unable to access basic citizenship rights and services. This figure is based on the difference between birth notifications received and births registered.⁴

Therefore, it is likely that this is an under-representation of unregistered births, since it does not include births that were neither notified nor registered — which may include, for example, home births. Initial evidence suggests that the majority of those 2.5% of unregistered births may be Indigenous, since most come from geographical regions with high Indigenous populations, such as Shepparton, Traralgon West and Mildura (Gerber 2009a, 159). There is anecdotal evidence to support this thesis. A recent Aboriginal Driver Education Project in Gippsland, Victoria gave an indication as to the extent, and consequences, of the problem of legal invisibility. This project was a community partnership designed to address some of the driving-related factors that result in Indigenous people coming into contact with the police and the criminal justice system. The problems that the program sought to address were unlicensed driving, the driving of unroadworthy vehicles, and a general lack of education and training about road safety in Indigenous communities (Orenstein 2009a). There were 120 Indigenous participants, of whom half did not have a birth certificate and one

4 Section 12 of the BDM Act sets out a regime whereby 'responsible persons' are to notify the Registrar of the birth of a child. A 'responsible person' is generally the hospital, doctor or midwife present at the birth (ie, not the parents of the child, who are responsible for birth registration but not birth notification).

in six did not have their birth registered. As a consequence, 50% of the participants were unable to obtain a driver's licence, despite being able to drive, because they could not produce a birth certificate, which is a prerequisite to getting a licence (Orenstein 2009a).

Birth registration and birth certificate issues for Indigenous Australians do not appear isolated to Victoria. Tangentyere Council in Alice Springs has reported that, in the Northern Territory, an inability to obtain a birth certificate is a systemic problem — particularly for Indigenous people born in the bush, as generally their births have not been registered (Klerck 2009). A further illustration of the breadth of this problem comes from Dubbo, a regional town in New South Wales, where an Aboriginal Birth Certificate Registration Project was initiated because the absence of a birth certificate was preventing young Indigenous Australians from participating in organised sporting activities (SCRGSP 2009, 11.34).

More broadly, there is evidence to suggest that the problem of unregistered births of Indigenous children may be even higher in other Australian states and territories than it is in Victoria. In 2005, of the 9,900 children born to Indigenous mothers in Australia, 13% (1,300 children) were not registered (Orenstein 2009a). This suggests that the lack of birth registration in Indigenous communities is a significant problem in need of an urgent solution.

Causes of the problem

Non-registration of births

Preliminary investigations attribute the non-registration of births by Indigenous Australians to a lack of confidence in dealing with authorities, marginalisation from mainstream services, lack of understanding of the requirements and benefits of birth registration, poor literacy levels, and low priority afforded to birth registration. These contributing factors could, in part, be addressed by a targeted and comprehensive education and awareness program (Gargett, Gerber and Castan 2010; Gerber 2009a; 2009b). However, broader societal factors, such as low literacy and marginalisation from mainstream services, require a more holistic approach. In this regard, addressing legal invisibility could operate as the catalyst to addressing Indigenous inequality and marginalisation more generally. In addition, the authors recommend that further research be undertaken to examine the impact, if any, of the now discredited government policies of removing Indigenous children from their parents that created what has become known as the 'Stolen Generations'. The Stolen Generations refers to the children of Indigenous families who were forcibly removed pursuant to official mandate of

successive Australian governments during the period from 1909 to 1969 (Human Rights and Equal Opportunity Commission 1997; McRae et al 2009). It formed an integral part of a wider policy of assimilating Indigenous people into the mainstream Australian population. These policies may have left Indigenous Australians with a residual fear of government record-keeping, particularly when it comes to their children. In this regard, birth registration could operate as an undiscovered site of inter-generational trauma. Inter-generational trauma is defined as 'trauma that is multigenerational and cumulative over time; it extends beyond the life span' (Cox 2008, 3). Thus, any research into the causes of legal invisibility should utilise a human rights-based approach that seeks the active input and participation of the Indigenous communities which are affected by legal invisibility. It is only through such an approach that the underlying causes of non-birth registration in Indigenous populations can be identified, thereby creating a solid platform from which to begin addressing the problem. It is for these reasons that it is inadvisable for governments to try to solve the birth registration problem without first engaging in extensive consultation with Indigenous Australians to ascertain what Indigenous Australians see to be the principal causes of the problem and how they would like to see the problem resolved.

Inability to obtain a birth certificate

The inability of an Indigenous person to obtain a copy of their birth certificate appears to be largely the result of the BDM Registrar's rigid policies in two specific areas: the failure to regularly waive fees for Indigenous applicants, and inflexible requirements regarding proof of identification. The prescribed fee (which might appear to some to be modest) can make it economically prohibitive for many Indigenous parents to obtain a birth certificate for their child at the time of registration. It may also hinder subsequent applications. Although the Victorian BDM Registrar has the power to remit the fee, it appears that she is only exercising that discretion intermittently (Orenstein 2008).

In order to obtain a copy of their birth certificate other than at the time of registration, an applicant must comply with the BDM's proof-of-identity requirements. These requirements themselves operate as a significant barrier to access. Many of the required forms of identification — such as a passport and driver's licence — cannot be obtained without a birth certificate. This creates a vicious circle where a birth certificate will not be provided to a person who cannot produce the necessary identification — identification that can only be obtained with a birth certificate (Gerber 2009b). The Registrar does not accept the forms of identification most readily available to Indigenous people — such as proof-of-Aboriginality documents, which constitute a signed document bearing the seal of an Aboriginal organisation (Orenstein 2009a). Furthermore, at least one of the documents must include a current address, and this

can be problematic for those experiencing homelessness or those who are transitory (Gerber 2009a; 2009b).

The principal office of the BDM is located in the state capital of Melbourne. It is not practical for people living in rural and regional Victoria to travel to the capital to obtain a birth certificate. Until the recent advent of Regional Service Centres (discussed below), many Indigenous people seeking a copy of their birth certificate had to apply by mail or online. In these circumstances, the BDM requires that the identity documents be certified by a police officer. This requirement is problematic, given the widely recognised dysfunctional relationship between Indigenous Australians and the police, which is characterised by angst and distrust (Cunneen 2001; Blagg 2008). Recent statistical data gives credence to this distrust and fear: Indigenous people are 13.3 times more likely than non-Indigenous people to be imprisoned, and Indigenous juveniles are 28 times more likely than non-Indigenous juveniles to be detained (SCRGSP 2009). As has been noted in recent scholarship relating to this issue, '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' (Gerber 2009a, 159). There does not seem to be a plausible reason why the certification of ID documents is limited to police officers. The authors suggest that a logical alternative would be to allow lawyers, as officers of the court, to certify identification documents for the BDM's purposes. Importantly, this would include lawyers from organisations such as the Victorian Aboriginal Legal Service and other community legal centres, who are likely to be viewed by Indigenous people as more accessible and less intimidating and threatening than police officers.

The BDM is aware of the particular problems facing Indigenous people from regional areas of Victoria, and is attempting to address them. For example, the BDM ran a series of Aboriginal Community Information Sessions in June and July 2009 in 16 regional areas within Victoria (Gerber 2009a). Furthermore, although the BDM's principal office is still in Melbourne, in June 2010 the Registrar set up a regional service at 12 local Department of Justice Service Centres across Victoria (Victorian Registry of Births, Deaths and Marriages, 'Justice Service Centres'). While these initiatives are a welcome development, it is unclear whether such actions resolve all aspects of the problem. Furthermore, the process leading to these changes was fundamentally flawed, because it did not include any significant input from the Indigenous communities or elders. The failure to effectively consult with Indigenous peoples is at odds with a best practice human rights approach to community problems (Declaration, Arts 18 and 19). Failing to take account of the voices and opinions of those affected by the initiative risks imposing 'solutions' that may not be welcomed by Indigenous people, and may address the symptoms, rather than the causes, of the problem.

International human rights law: an avenue for redress?

Having identified the difficulties experienced by Indigenous Australians when it comes to birth registration and birth certificates, the authors now examine what international human rights law has to say about birth registration and related rights, and the extent to which it provides any guidance as to how these problems can be overcome. This section of the article, while focusing primarily on the rights contained within the ICCPR, also refers to other human rights instruments where relevant, including CROC.

The authors draw upon the jurisprudence of the treaty bodies responsible for the implementation of these instruments, namely the Human Rights Committee (HRC) and the CRC, in order to provide insight into the content and scope of the relevant rights under consideration. The impact of the Declaration on the relevant international human rights norms is also briefly considered in this section.

The right to birth registration

Birth registration is recognised as a human right under two core human rights treaties. The first is Art 24(2) of the ICCPR. The *travaux préparatoires* of the ICCPR are completely silent on the right to birth registration and therefore shed no light on the background to, and precise meaning of, this provision (Nowak 2005).

The second international human rights provision relating to birth registration is Art 7 of CROC. Although CROC was drafted more than 20 years after the ICCPR, the wording of both provisions is essentially the same. The *travaux préparatoires* of CROC do no more than indicate that Art 7 is based on Art 24(2) of the ICCPR (Detrick 1999). Thus, beyond affirming that the right to birth registration in the ICCPR and in CROC is essentially the same, the *travaux préparatoires* of the ICCPR and CROC provide no assistance in understanding the specific content of the right (Detrick 1999; Nowak 2005).

In these circumstances, the jurisprudence from both the HRC and the CRC is a useful means of further elucidating the nature of the right. The Vienna Convention on the Law of Treaties permits recourse to subsequent interpretations of international treaties (Arts 31(2) and 31(3)). Therefore, it is permissible to reference the work of the HRC and the CRC, being the two treaty bodies empowered to interpret the ICCPR and CROC. Furthermore, states parties as a general rule of thumb accept as authoritative interpretations of treaty provisions by these bodies (Mechlem 2009).

Treaty bodies publish General Comments to elucidate their interpretation of the content of the human rights outlined in their respective treaty or convention. As

such, they provide an invaluable source of soft law to inform the development of international human rights law. The HRC has published a General Comment relating to the content of Art 24 (1989a). Regrettably, this General Comment, consisting of only eight paragraphs, can be characterised by its brevity. Only one paragraph is devoted to the birth registration component of Art 24. It provides:

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. [HRC 1989a, 7.]

This clearly outlines that the predominant purpose of the right is to operate as a safeguard to prevent the maltreatment of children, including by trafficking. By stating that Art 24(2) is designed to promote recognition of a child's legal personality, the HRC has arguably established a link between this right and the right to recognition as a person before the law (Art 16), a point discussed further below. Overall, this General Comment provides little guidance on the normative content of the right. For example, it fails to discuss whether the right to birth registration encapsulates a right to a birth certificate.

Unfortunately, the CRC has not published a General Comment specifically on Art 7, and thus this treaty body, like the HRC, has failed to provide clear guidance on the normative content of the right to birth registration. However, the CRC has published a General Comment on Indigenous children where it expressed concern 'that indigenous children, to a greater extent than non-indigenous children, remain without birth registration', and recommended that registration should be free and universally accessible (CRC 2009, 41). Unfortunately, this General Comment is silent when it comes to any right to a birth certificate. There is no clear guidance as to whether a 'free birth registration system' includes the supply of a free and readily accessible birth certificate. While the attention focused on Indigenous children is welcome, the analysis offers little insight or guidance into the exact content of the right, or the specific obligations imposed on states parties. The CRC also touched on the issue of birth registration in its General Comment on children with disabilities, but once again provided minimal insight into the exact nature of the right. However, it does suggest that the absence of birth registration

has 'profound impacts' on the attainment of other rights (CRC 2006, 35–36). Both of these CRC General Comments make suggestions regarding how states might increase their number of birth registrations, including by waiving fees and establishing mobile registration units. It is suggested that implementing these types of initiatives in Victoria could have a significant impact on non-registration and the inability to obtain birth certificates. It is also implicit that the registration system must be effective in practice.

Pursuant to the First Optional Protocol to the ICCPR, the HRC is authorised to receive individual communications regarding alleged breaches of ICCPR rights. Jurisprudence from the HRC flowing from such communications provides another useful source of information about the exact nature of the rights within the ICCPR.

The communication to the HRC in the case of *Monaco v Argentina*, 1995, concerned a child whose parents were taken by the police in the 1970s and never seen again. The child, Ms Vicario, who was then nine months old, was taken with her parents. After extensive searches, the child was found by her grandmother, Mrs Monaco. She was by then seven years old and was being raised in the home of a nurse who claimed to have been caring for the child since birth. Genetic blood tests revealed that there was a 99.82% chance that Ms Vicario was the granddaughter of Mrs Monaco. Domestic proceedings were issued by Mrs Monaco to obtain custody and establish Ms Vicario's identity, including a birth certificate that accurately reflected the details of her birth. These proceedings had been underway for 10 years and had still not been finalised when the grandmother referred the matter to the HRC. 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' (*Monaco v Argentina* at 10.5). Two features of this case are of particular relevance. First, the HRC's finding that a failure to issue identity papers constitutes a breach of Art 24(2) adds further weight to the argument that the provision of identity papers, including a birth certificate, is implicit in the right to birth registration. Second, the lengthy delay in the establishment of the child's legal identity also constituted a violation of Art 24(2). In light of this, a strong argument can be made that the equally long delays encountered by some Indigenous Australians in trying to obtain a copy of their birth certificate would similarly amount to a breach of Art 24(2) of the ICCPR. Thus, the case of *Monaco v Argentina* provides strong support for the argument that Australia may be in breach of its international human rights obligations by failing to ensure that Indigenous Australians are able to readily access a copy of their birth certificate.

As noted above, a shortcoming of the text of the two treaty provisions and the General Comments published by the HRC and the CRC is that they do not specifically

enunciate that every child has a right to a birth certificate as an implicit part of the right to birth registration (Gerber 2009a). However, the CRC, in its Concluding Observation following Venezuela's Periodic Report, stated:

The Committee welcomes the measures taken by the State party in the area of birth registration, especially those recently implemented in the framework of the National Plan on Birth Registration, but it remains concerned at the large number of children without birth certificates and at the related impact on the enjoyment of their rights. [CRC 1999, 21.]

The CRC has repeated this point in other Concluding Observations, thereby clearly indicating that a birth certificate is implicit within the right to birth registration and states parties should ensure a system whereby birth certificates are accessible (see, for example, CRC 2001, 31; 2002a, 28; 2002b, 34).

Although references to the right to birth registration have featured infrequently in the HRC's Concluding Observations, in recent times it does appear to be the subject of greater attention, perhaps indicating an increased focus on the importance of the right. The HRC has made 13 references to the right to birth registration since 1998 in its Concluding Observations (HRC 2009, 27; 2008a, 28; 2008b, 8; 2008c, 19; 2007, 17; 2006a, 18; 2006b, 22; 2006c, 25; 2006d, 22; 2005, 22; 2003a, 17; 1998a, 18; 1998b, 18). Like the CRC, the HRC has begun to include, in its Concluding Observations, comments that indicate that the right to a birth certificate is implicit in the right to birth registration (HRC 2008b, 8; 2006b, 22; 2005, 22). In light of the HRC's decision in *Monaco v Argentina*, and the Concluding Observations of the CRC and the HRC, a strong argument can be made that the supply of a birth certificate is implicit within the right to birth registration.

As a consequence of these interpretations from two UN treaty bodies, it can be cogently argued that current Australian legislative and policy frameworks potentially violate Art 24(2) of the ICCPR and Art 7 of CROC in not facilitating ready access by Indigenous Australians to their birth certificates. While it is clear that all Australian jurisdictions legally recognise the right to birth registration through various legislative regimes, it is less clear whether Australia is actually meeting its obligations to ensure birth registration is being implemented in *practice* in Indigenous communities. There appears to be a gap between form and substance. On paper, Australia has the legal framework to facilitate birth registration and the provision of birth certificates, but the reality is that far too many Indigenous people are unable to effectively access the system, which leads to questions about the extent of Australia's actual implementation of Art 24(2) of the ICCPR. In particular, the shortfall in implementation is reflected in the inability of Indigenous people to obtain a birth certificate, and the considerable delays and onerous administrative

processes that Indigenous Australians such as Bradley Hayes and AH and TH must go through (Gerber 2009a).

Finally, it should be noted that the current attention paid by Australia to the right to birth registration and a birth certificate in its Periodic Reports to the HRC and the CRC is inadequate. The purpose of Periodic Reports is to record, monitor and evaluate a state party's progress towards the implementation of the instrument in question (Human Rights Law Resource Centre 2006, ch 6, 2.1). The HRC requests that state party reports:

... deal specifically with every article in Parts I, II and III of the Covenant [therefore including Art 24(2)]; legal norms should be described, but that is not sufficient: the factual situation and the practical availability, effect and implementation of remedies for violation of Covenant rights should be explained and exemplified. [HRC 2001, D2.1.]

Therefore, states parties must outline the legal *and* practical implications of each enumerated right. The CRC General Guidelines for Periodic Reports specifically state that states parties should report on:

... measures taken or envisaged to ensure 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. [CRC 1996, 46.]

Australia's Periodic Reports do not address these requirements. Australia's latest report to the CRC contains no reference to birth registration (Australia 2008) and the previous report only referenced birth registration in relation to Australia's provision of aid to Bangladesh 'for the development of a sustainable birth registration system' in that country (Australia 2004, 475). In Australia's Periodic Reports to the HRC on its implementation of the ICCPR, there is no mention of birth registration in either the Common Core Document or the annexed ICCPR specific report (Australia 2006; 2007). Australia is not adequately complying with the reporting guidelines for either CROC or the ICCPR when it comes to detailing the steps it has taken to fully implement the birth registration requirements of those two treaties. These omissions from Australia's Periodic Reports to the UN bodies, when read in conjunction with the comments of the Human Rights Consultation Committee in Victoria that the right to birth registration is not relevant in modern Australia, expose a complete lack of awareness of the problems that Indigenous Australians face when trying to obtain a birth certificate.

Protection of children

Article 24(1) of the ICCPR contains a general provision for the protection of children. It mandates that:

Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The HRC stated in General Comment No 17 (1989a, 3) that Art 24(1) extends to the enjoyment of economic, social and cultural rights. This means that Art 24(1) may be used to address issues such as a child being denied access to education, or refused vaccinations against diseases, because the child cannot produce a birth certificate (Gerber 2009b; Nowak 2005). CROC also extends protection to a range of economic, social and cultural rights. Of particular importance is the right to education (Arts 28 and 29) and the right to the highest attainable standard of health (Art 24).

Education and health are 'measures of protection' required by children by virtue of their status as children. Applying these provisions of CROC and the HRC's rationale in General Comment No 17, it is clear that current registration systems in Australia may constitute a breach of Australia's obligations to provide appropriate 'measures of protection' for children. This non-compliance may be triggered by a system that does not facilitate the ready provision of a birth certificate to a child. This inability to obtain a birth certificate can lead to a denial of a child's access to school or immunisations (Gerber 2009b). If a child is required to produce a birth certificate to access health or education services, then, in order to comply with Art 24(1) of the ICCPR and Arts 24, 28 and 29 of CROC, the state must either waive the requirement for production of a birth certificate or ensure that all children can readily obtain one.

Recognition before the law

Article 16 of the ICCPR states that 'everyone shall have the right to recognition everywhere as a person before the law'. Nowak has argued that the right to birth registration is closely related to the right to recognition before the law, as 'only by registration is it guaranteed that the existence of a newborn child is legally recognized' (2005, 559–60). Nowak's argument is supported by the HRC's General Comment No 17 (1989a), which provides that birth registration is designed to promote the recognition of a child's legal personality. This right to legal personality, the term adopted by Nowak to describe the right, guarantees the right to a legal subjectivity, from which other legal protections naturally flow. This operates to prevent the reduction of a human to a mere object of the law, where a person:

... would no longer be a person in the legal sense and thus [could] be deprived of all other rights. This fate was encountered e.g., by slaves under Roman law but also to a lesser degree slaves and serfs in modern times, as well as by colonial peoples, Jews under Nazi rule or blacks under South Africa's apartheid regime. [Nowak 2005, 369.]

Thus, it can be seen that the right in Art 16 of the ICCPR operates as a prerequisite to obtaining other human rights. The fundamental importance of everybody's right to be recognised as a person before the law pursuant to Art 16 is highlighted by the fact that this provision is one of only seven Articles in the ICCPR that is non-derogable (Art 4(2)) — that is, this right is absolute, and there are no circumstances under which a state party is permitted to limit or refuse to recognise and respect this right (Human Rights Law Resource Centre 2006, ch 5, 3.2).

Unfortunately, there is minimal HRC jurisprudence to provide guidance as to the exact scope and content of the right to be recognised as a person before the law (Joseph, Schultz and Castan 2004). It has been argued that it operates merely to inform other rights (Robertson 1972; Nowak 2005). However, notwithstanding the absence of jurisprudence, Nowak asserts that it is nevertheless an autonomous right (2005). This is supported by the HRC's General Comment No 28 relating to equality rights between men and women, which provides, in relation to Art 16, that states must take measures to eradicate laws and policies that inhibit women from functioning as full legal persons (2000, 19). Of particular relevance is the prohibition of imposing on a person a 'civil death', a penalty that, historically, was used in some legal systems to deny a person legal capacity. Nowak (2005, 373) suggests that "'civil death" without doubt represents the most severe form of violation of Article 16'. Another scholar argues that 'it is not open to a State to subject a citizen to a "civic death", that is to deprive an individual of legal personality' (Smith 2007, 236).

Applying this rationale, there is a strong argument that a failure to legally recognise a person because of a lack of birth registration, and/or the inability to obtain a birth certificate, constitutes a violation of Art 16. Birth registration signifies a state's recognition of a person's existence and non-registration equates to non-recognition of that person before the law. A birth certificate is the primary documentary evidence of a person's recognition before the law (Sharp 2005). It is, therefore, arguable that in Australia the inflexible policies and practices of the BDM constitute a violation of Art 16, as they make it impractical, if not impossible, for some Indigenous people to obtain a birth certificate. Unfortunately, the argument cannot be stated more strongly, due to the underdeveloped nature of the jurisprudence relating to Art 16 (Gargett, Gerber and Castan 2010; Gerber 2009a; Joseph, Schultz and Castan 2004).

Equality and non-discrimination

The ICCPR contains three main provisions on non-discrimination. Of most relevance to the issue under consideration here are Art 2(1), which prohibits discrimination in relation to the implementation of ICCPR rights, and Art 26, which concerns equality before the law. Nowak eloquently suggests that the 'principle of equality and the prohibition of discrimination runs like a red thread throughout the *Covenant on Civil and Political Rights*' (2005, 600). This centrality of equality and non-discrimination is significant. There is an abundance of empirical evidence that shows an incredibly strong correlation between inequality and negative social indicators (see, for example, Wilkinson and Pickett 2009). With regard to Indigenous communities in Australia, this is particularly important given the mass over-representation of Indigenous people in low socioeconomic factors, such as life expectancy, young child mortality, numeracy and literacy, unemployment, disability and chronic disease, poverty, imprisonment, and homelessness (SCRGSP 2009).

Article 2(1) of the ICCPR states:

Each State Party ... undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This is a non-freestanding right, in that the prohibited discrimination is limited to the enjoyment of rights contained in the ICCPR (Gargett, Gerber and Castan 2010; Clayton and Tomlinson 2009; Pound and Evans 2008). Applying Art 2(1) to the issue under consideration here means that any discrimination in the implementation of the right to birth registration (Art 24) is prohibited and will constitute a violation of Art 2(1).

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This is a significant extension of the protection against discrimination as it confers a freestanding right prohibiting any discrimination before the law, not just in relation to the realisation of ICCPR rights (HRC 1989b, 12). This is evidenced by the HRC's finding of only three violations of Art 2(1) in individual complaint communications,

whereas many more have been found in relation to Art 26 (Nowak 2005, 47). This freestanding right does not extend to a general protection against discrimination. Rather, it is confined to prohibiting discrimination in the operation of the law (*Broeks v Netherlands*, 1990). However, there are positive elements of the right which mandate affirmative action to address existing inequality and disadvantage. Article 26 is relevant to the issue of legal invisibility of Indigenous Australians because birth registration systems are established under law — such as, in Australia, the various state and territory legislative regimes.

It is clear that discrimination, or differential treatment, on the basis of race is prohibited under both Art 2(1) and Art 26 of the ICCPR, as well as by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Therefore, if it can be established that there is discriminatory treatment of Indigenous people when it comes to birth registration issues, Australia will, *prima facie*, be in violation of these provisions. The HRC has construed discrimination to capture both direct and indirect discrimination (HRC 1989b, 6; *Althammer v Austria*, 2003; *DH v Czech Republic*, 2008; *R(L) v Manchester City Council*, 2002). This is important because it is not suggested that the current laws and BDM policies in Australia directly discriminate against Indigenous people. For example, there is no prohibition on Indigenous parents registering the births of their children, which would constitute direct discrimination. Rather, in Australia, the regime, on its face, operates neutrally, but may in practice discriminate against Indigenous people and, as such, may amount to indirect discrimination.

The critical question is whether sufficient evidence is available to establish differential treatment of Indigenous people. The recent case of *DH v Czech Republic*, 2008, heard by the European Court of Human Rights (ECHR), is informative as to what evidence is necessary to establish indirect discrimination. While the ECHR declined to adopt a general test, it stated that statistical data could be sufficient to *prima facie* establish evidence of discrimination (at 178, 180, 187, 188). The ECHR held that Roma children had been discriminated against on the basis that they were disproportionately selected for ‘special schools’ that had different educational curriculum and were isolated from other children. Although on its face the selection law was neutral, in practice Roma children were disproportionately being singled out, and they represented half of the student body in these special schools. To ascertain evidence of differential treatment, the ECHR relied upon statistical data that was ‘not entirely reliable’ but was accepted as evidence of discrimination as it revealed a dominant trend of differential treatment (at 191).

There is currently an absence of empirical data to establish the precise extent of non-registration of Indigenous births and the numbers of Indigenous people in Australia

who are unable to obtain a birth certificate. Notwithstanding this, the available anecdotal evidence strongly indicates that there are differential outcomes between Indigenous and non-Indigenous Australians (Gerber 2009a; 2009b). If the HRC adopts the ECHR line of reasoning, where 'not entirely reliable' data can evidence differential treatment, then there is a strong argument that the non-discrimination grounds of the ICCPR are currently being violated by Australia in relation to birth registration. However, further empirical data and research should be undertaken before a conclusive view can be reached (Gargett, Gerber and Castan 2010).

Declaration on the Rights of Indigenous Peoples

The adoption of the Declaration by the General Assembly in late 2007 represented another thread in the construction of Indigenous human rights in international law. Although the Declaration was adopted by an overwhelming majority of states, Canada, Australia, New Zealand and the United States were conspicuous in being the only states to vote against it.

The Declaration is not of itself an end to the development of international human rights law concerning Indigenous peoples. Instead, it represents the culmination of a period of dynamic adjustment in international law. The Declaration can be described as representing a transition of Indigenous peoples from 'object' to 'subject' (Barsh 1994). There is still debate and contention between states, international law scholars and Indigenous peoples themselves about the proper meaning and scope of the rights described in the Declaration (see, for example, Charters and Stavenhagen 2009). The Declaration is silent when it comes to the right to birth registration and the right to a birth certificate. However, there are provisions that do provide some guidance. For example, Art 21(1) makes reference to the right of Indigenous peoples, 'without discrimination, to the improvement of their economic and social conditions, including ... education ... health and social security', and Art 21(2) specifies that states 'shall take effective measures ... to ensure continuing improvement of their economic and social conditions'. As already noted, being able to produce a birth certificate can be a prerequisite to a child enrolling in school and accessing immunisations. Therefore, an inability to obtain a birth certificate may constitute a breach of Art 21, since it potentially impedes the improvement of Indigenous peoples' economic and social conditions through education and health.

In addition, Art 33 states that 'Indigenous peoples have the right to determine their own identity ... in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live'. While this Article is of importance to Indigenous peoples residing in jurisdictions where tribal or collective identity may be a feature of a regulatory

framework articulated by the state (such as in Canada and the United States), it is not of significant relevance in the Australian context of birth registration and certification.

The Declaration, being an instrument adopted by the UN General Assembly rather than ratified by states, is not a legally binding document per se, but it is increasingly argued that some parts of it may capture customary international practice or recognition of such practice, and therefore constitute international law (Joffe 2010; Permanent Forum on Indigenous Issues 2009, Annex; Anaya 2008, 43; Anaya and Wiessner 2007). Article 38 of the Declaration does provide that states shall, in cooperation with Indigenous peoples, 'take the appropriate measures, including legislative measures, to achieve the ends of this Declaration'⁵ — that is, states elect to become bound by their own legislative requirements (United Nations Department of Public Information, 2007).

During the adoption debate in the General Assembly, Australia's representative was critical of the Declaration (Hill 2007) but, 18 months later, with a change in national government, Australia reversed its position. In April 2009, the responsible Commonwealth Minister, the Hon Jenny Macklin MP (2009), publicly stated that Australia now supports the Declaration. It would be inappropriate to overstate the importance of Australia's invigorated support for the Declaration (on Australia's implementation, see Castan and Yarrow 2010). The non-binding nature of the Declaration does not mean that governments and their agencies, such as the BDM Registrar, do not have obligations to meet the spirit and the letter of the Declaration. This is reflected in a recommendation of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people following a mission to Australia:

The Commonwealth and state governments should review all legislation, policies and programmes that affect Aboriginal and Torres Strait Islanders, in light of the Declaration on the Rights of Indigenous Peoples. [Anaya 2010, 72.]

Given the newness of the Declaration, and the lack of extensive juridical or scholarly commentary regarding this instrument, it cannot offer much guidance on the level of rights protection that the Declaration may offer regarding the difficulties for Indigenous Australians in establishing their identity, as discussed in this article. However, overall, the Declaration provides a useful lens through which to examine

5 The Supreme Court of Belize referred to the Declaration as expressing general principles of international law, and of such force that the government of Belize should not disregard it (*Aurelio Cal v Belize*, 2007). The Committee on the Elimination of Racial Discrimination recommended the use of the Declaration to inform the content of the obligations of the United States under that Convention (2008, 29).

all human rights issues involving Indigenous peoples. For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, has announced:

I will use the Declaration to guide my work during my term. And I am committed to working with [the Australian] Government to ensure that the full implementation of both the spirit and intent of the Declaration is achieved in Australia. [Gooda, 2010.]

Impact of international law in Australia

Australia is a dualist state, rather than a monist one. This means that, unlike in the United States and many European countries, an international treaty does not automatically become part of domestic law upon ratification. Although Australia does assume an obligation under international law to give effect to all treaties that it ratifies (Vienna Convention on the Law of Treaties, Art 26), no treaty becomes part of Australia's domestic law unless and until parliament expressly incorporates the treaty provisions into legislation. The High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh*, 1995, held that administrative decision makers in government were required to take into account obligations in treaties Australia had ratified, even if those treaties had not been incorporated into domestic law. However, the impact of this decision appears to have diminished since the High Court's more recent judgement in *Minister for Immigration and Multicultural Affairs; Ex parte Lam*, 2003. A detailed analysis of these cases is beyond the scope of this article. Examples of Australia incorporating international human rights laws into Australian domestic law can be seen in the *Sex Discrimination Act 1984* (Cth), which was intended to give effect, in part, to the Convention on the Elimination of All Forms of Discrimination Against Women, which Australia ratified in 1983, and the *Racial Discrimination Act 1975* (Cth), which was intended to give effect, in part, to CERD, which Australia ratified in 1975.

Australia ratified the ICCPR in 1980 and CROC in 1990. However, the federal government has made no effort to incorporate either of these two treaties into domestic law. Although the ICCPR has been made a Schedule to the *Australian Human Rights Commission Act 1986* (Cth), the effect of this is that the rights contained in the ICCPR become 'human rights' for the limited purposes of that Act, which is to establish the Australian Human Rights Commission (formerly known as the Australian Human Rights and Equal Opportunity Commission). This means that the violation of a right in these treaties is not justiciable in Australian courts.⁶ This is particularly evident in the decision in *Collins v South Australia*, 1999 (at 209), where a judge stated, 'I am

6 Except in Victoria and the Australian Capital Territory, which both recently enacted human rights Acts, discussed further below.

satisfied on the evidence I have been given that article 10(1) and article 10(2) of the Covenant have been breached', but went on to hold that, 'Much as I regret it, ... I am not able to give force to the basic human rights set out in these conventions' (at 213). Thus, in Australia, a breach of an ICCPR right is a wrong without a remedy.

However, two jurisdictions within the federation of states and territories that make up Australia have enacted legislation to give effect to *some* of the rights within the ICCPR. In particular, Victoria and the Australian Capital Territory have enacted human rights legislation (*Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT)). This means that although the rights in CROC are not directly enforceable in any Australian court (*Dietrich v R*, 1992; *Nulyarimma v Thompson*, 1999), some of the rights in the ICCPR may be justiciable in the courts of two out of the eight Australian states and territories. However, the human rights legislation enacted in Victoria and the Australian Capital Territory may not assist Indigenous Australians looking for judicial assistance in obtaining a birth certificate. This is for two reasons. First, both the Victorian and the ACT Acts replicate only some of the rights in the ICCPR, and Art 24(2) relating to birth registration is not one of the rights that was incorporated. However, a number of other ICCPR rights that were analysed above have been incorporated and may therefore be relied upon, such as s 8(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which relates to recognition before the law (Gargett, Gerber and Castan 2010). Second, the only remedy available to the courts under these human rights Acts is to issue a declaration of incompatibility (*Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36 and *Human Rights Act 2004* (ACT), s 32). The court is only empowered to declare that a legislative provision is inconsistent with human rights; it cannot grant any relief to the victim of the human rights violation, or order the payment of any compensation.

Although an Indigenous person who is unable to obtain a birth certificate may not be able to obtain relief in an Australian court, he or she may be able to bring a complaint before a UN treaty body after exhausting domestic remedies. As previously noted, the First Optional Protocol to the ICCPR allows an individual to bring a complaint before the HRC by way of a communication.⁷ Australia acceded to the first Optional Protocol to the ICCPR in 1991. Thus, an individual can bring a claim before the HRC alleging that Australia is breaching his or her ICCPR rights. This is a slow process, and the decision of the HRC is non-binding and unenforceable. Nevertheless, in the absence of a domestic remedy for breaches of ICCPR rights, this is a viable option, and a favourable outcome could be used to exert pressure on the Australian government to reform the current practices that are effectively preventing Indigenous Australians

7 There is no similar complaint mechanism available for alleged breaches of CROC rights.

from obtaining birth certificates. Australia has responded positively to some of the HRC's decisions which found Australia to be in violation of the ICCPR. For example, the *Human Rights (Sexual Conduct) Act 1994* (Cth) was enacted to give effect to the HRC's decision in *Toonan v Australia*, 1992. However, Australia has not been quick to embrace the HRC's decisions when it finds violation of ICCPR rights in relation to Australia's treatment of Indigenous people, asylum seekers and refugees (see, for example, *D & E v Australia*, 2006; *Brough v Australia*, 2006; *Bakhtiyari v Australia*, 2003; *A v Australia*, 1997). Thus, the ICCPR has the potential to assist Indigenous Australians to address breaches of their rights relating to birth registration and birth certificates, notwithstanding the current lack of direct domestic implementation within Australia of this important international human rights instrument.⁸

Conclusion

This article has highlighted that there is a recurring rhyme of Indigenous legal invisibility in Australia. The stories of Bradley Hayes and AH and TH are just two examples of the latest incarnation of legal invisibility that stems from a lack of universal registration of Indigenous births in Australia and / or an inability to overcome bureaucratic hurdles to obtain a birth certificate. This legal invisibility impedes the enjoyment of numerous rights of citizenship, including obtaining a passport, a driver's licence, and a tax file number, and potentially accessing education and health services. Under international human rights law, Australia has an obligation not only to provide a legal mechanism that facilitates birth registration, but also to ensure that it is implemented in practice. The non-registration of Indigenous births suggests that Australia may be in breach of Art 24(2) of the ICCPR, Art 7 of CROC and Art 21 of the Declaration. The failure to achieve universal birth registration may also constitute a violation of a number of other rights contained in the ICCPR.

It is less clear whether the inability to obtain a birth certificate constitutes a breach of international human rights law. While there is no express right to a birth certificate under any international human rights convention, recent Concluding Observations from the HRC and the CRC suggest that these treaty bodies interpret the right to birth registration as including the right to a birth certificate. Nevertheless, it would be useful for the CRC to provide a General Comment, or the HRC to update its General Comment on the right to birth registration, to put the right to a birth certificate beyond doubt. This would provide much-needed clarity and elaboration on the rights

⁸ It should be noted that the Australian government has recently adopted a human rights framework. Although there are some positive aspects of the framework, it does not include the enactment of a federal human rights Act (Attorney-General's Department 2010).

relating to birth registration. However, even in the absence of such enunciations, the weight of authority analysed in this article indicates that the right to a birth certificate is implicitly protected under a number of ICCPR provisions. Therefore, Australia appears to be in breach of its international law obligations for both birth registration and birth certificates in relation to Indigenous people. However, for the reasons set out above, this may not give rise to any cause of action that can be litigated in an Australian court. ●

References

Australian cases

Collins v South Australia (1999) 74 SASR 200

Dietrich v R (1992) 177 CLR 291

Mabo v Queensland (No 2) (1992) 175 CLR 1

Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1

Nulyarimma v Thompson [1999] FCA 1192

International cases and opinions

A v Australia (1997) Human Rights Committee, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993

Althammer v Austria (2003) Human Rights Committee, Communication No 998/2001, UN Doc CCPR/C/78/D/998/2001

Aurelio Cal v Belize, Supreme Court of Belize, No 171/2007

Bakhtiyari v Australia (2003) Human Rights Committee, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002

Broeks v Netherlands (1990) Human Rights Committee, Communication No 172/1984, UN Doc CCPR/C/OP/2 at 196

Brough v Australia (2006) Human Rights Committee, Communication No 1044/2002, UN Doc CCPR/C/86/D/1184/2003

D & E v Australia (2006) Human Rights Committee, Communication No 1050/2002, UN Doc CCPR/C/87/D/1050/2002

DH v Czech Republic (2008) 47 EHRR 3

Monaco v Argentina (1995) Human Rights Committee, Communication No 400/1990, UN Doc CCPR/C/53/D/400/1990

R(L) v Manchester City Council [2002] 1 FLR 43

Toonen v Australia (1994) Human Rights Committee, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992

Australian legislation

Australian Human Rights Commission Act 1986 (Cth)

Births, Deaths and Marriages Registration Act 1995 (NSW)

Births, Deaths and Marriages Registration Act 1996 (NT)

Births, Deaths and Marriages Registration Act 1996 (SA)

Births, Deaths and Marriages Registration Act 1996 (Vic)

Births, Deaths and Marriages Registration Act 1997 (ACT)

Births, Deaths and Marriages Registration Act 1998 (WA)

Births, Deaths and Marriages Registration Act 1999 (Tas)

Births, Deaths and Marriages Registration Act 2003 (Qld)

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Human Rights Act 2004 (ACT)

Human Rights (Sexual Conduct) Act 1994 (Cth)

Racial Discrimination Act 1975 (Cth)

Sex Discrimination Act 1984 (Cth)

International legal materials

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13

Convention on the Rights of the Child, 20 November 1989, 28 ILM 1448

Declaration on the Rights of Indigenous People, 13 September 2007, UN Doc A/Res/61/295

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195

Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171

Vienna Convention on the Law of Treaties, 22 May 1969, UN Doc A/CONF.39/27 8 ILM 679

Other references

Anaya J (2008) *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, report to the Human Rights Council, UN Doc A/HRC/9/9

Anaya J (2010) *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, the Situation of Indigenous People in Australia*, report to the Human Rights Council, UN Doc A/HRC/15/37/Add.4

Anaya S and Wiessner S (2007) 'Op-ed: The UN Declaration on the Rights of Indigenous Peoples: towards re-empowerment' *Jurist*

Attorney-General's Department (2010) *Australia's Human Rights Framework* Attorney-General's Department, Canberra

Australia (2004) *Australia's Combined Second and Third Periodic Reports to the Committee on the Rights of the Child* UN Doc CRC/C/129/Add.4

Australia (2006) *Core Common Document Forming Part of Reports for State Parties – Australia – Incorporating the Fifth Report under the International Covenant of Civil and Political Rights and the Fourth Reports under the International Covenant of Economic, Social and Cultural Rights*

Australia (2007) *Australia's Fifth Report under the International Covenant of Civil and Political Rights* UN Doc CCPR/C/AUS/5

Australia (2008) *Fourth Report under the Convention on the Rights of the Child*

Australian Bureau of Statistics (2009) '3101.0 — Australian demographic statistics', March [Online] Available: <www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/> [2010, May 9]

Australian Labour Party (nd) 'Policy' [Online] Available: <www.alp.org.au/policy/> [2010, May 9]

Barsh R (1994) 'Indigenous peoples in the 1990s: from object to subject of international law' 7 *Harvard Human Rights Journal* pp 33–86

Blagg H (2008) *Crime, Aboriginality and the Decolonisation of Justice* Hawkins Press, Sydney

Carr S and Sloan T (2003) *Poverty and Psychology: From Global Perspective to Local Practice* Kluwer Academic Publishers, New York

Castan M and Yarrow D (2010) 'Australia and the Declaration on the Rights of Indigenous Peoples — from aspiration to implementation' *Australian Indigenous Law Review* forthcoming

Charters C and Stavenhagen (eds) (2009) *Making the Declaration Work* IWGIA, Copenhagen

Clayton R and Tomlinson H (2009) *The Law of Human Rights: Volume 1* (2nd edn) Oxford University Press, Oxford

Committee on the Elimination of Racial Discrimination (2003) *Concluding Observations on Malawi* UN Doc CERD/C/63/CO/12

Committee on the Elimination of Racial Discrimination (2008) *Concluding Observations on the United States of America* UN Doc CERD/C/USA/CO/6

Committee on the Rights of the Child (1996) *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by State Parties Under Article 44, Paragraph 1 (b) of the Convention* UN Doc CRC/C/58, 20

Committee on the Rights of the Child (1999) *Concluding Observations on Venezuela* UN Doc CRC/C/15/Add.109

Committee on the Rights of the Child (2001) *Concluding Observations on Gambia* UN Doc CRC/C/15/Add.165

Committee on the Rights of the Child (2002a) *Concluding Observations on Burkina Faso* UN Doc CRC/C/15/Add.193

Committee on the Rights of the Child (2002b) *Concluding Observations on Sudan* UN Doc CRC/C/15/Add.190

Committee on the Rights of the Child (2006) *General Comment No 9: The Rights of Children with Disabilities* UN Doc CRC/C/GC/9

Committee on the Rights of the Child (2009) *General Comment No 11: Indigenous Children and Their Rights under the Convention* UN Doc CRC/C/GC/11

Cox D (2008) 'Working with Indigenous survivors of sexual assault' 5 *ACSSA Wrap* pp 1–8

Cunneen C (2001) *Conflict, Politics and Crime: Aboriginal Communities and the Police* Allen & Unwin, Crows Nest

Detrick S (1999) *A Commentary on the United Nations Convention on the Rights of the Child* Martin Nijhoff, The Hague

Gargett A, Gerber P and Castan M (2010) 'A right to birth registration in the Victorian Charter? Seek and you shall *not* find!' 36(3) *Monash University Law Review*

Gerber P (2009a) 'Making Indigenous Australians "disappear": problems arising from our birth registration system' 34(3) *Alternative Law Journal* pp 158–67

Gerber P (2009b) 'Making visible the problem of invisibility' 83(10) *Law Institute Journal* pp 52–55

Gooda M (2010) 'Towards a reconciled Australia', speech delivered at the National Press Club, 3 November [Online] Available: <www.humanrights.gov.au/about/media/speeches/social_justice/2010/20101103_npc.html> [2010, November 23]

Hill R (2007) *UN GAOR, 61st Session, 107th Plenary Meeting* UN Doc A/61/PV.108

Human Rights and Equal Opportunity Commission (1997) *Bringing Them Home* Sydney

Human Rights Committee (HRC) (1989a) *General Comment No 17: Rights of the Child (Article 24)* UN Doc HRI/GEN/1/Rev.6 at 144

Human Rights Committee (HRC) (1989b) *General Comment No 18: Non-discrimination* UN Doc HRI/GEN/1/Rev.1 at 26

Human Rights Committee (HRC) (1998a) *Concluding Observations on Ecuador* UN Doc CCPR/C/79/Add.92

Human Rights Committee (HRC) (1998b) *Concluding Observations on Uruguay* UN Doc CCPR/C/79/Add.90

Human Rights Committee (HRC) (2000) *General Comment No 28: Equality of Rights between Men and Women (Article 3)* UN Doc CCPR/C/21/Rev.1/Add.10

Human Rights Committee (HRC) (2001) *Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights* UN Doc CCPR/C/66/GUI/Rev.2

Human Rights Committee (HRC) (2003a) *Concluding Observations on Latvia* UN Doc CCPR/CO/79/LVA

Human Rights Committee (HRC) (2003b) *General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17)* UN Doc HRI/GEN/1/Rev.6 at 142

Human Rights Committee (HRC) (2005) *Concluding Observations on Thailand* UN Doc CCPR/CO/84/THA

Human Rights Committee (HRC) (2006a) *Concluding Observations on Honduras* UN Doc CCPR/C/HND/CO/1

Human Rights Committee (HRC) (2006b) *Concluding Observations on Bosnia and Herzegovina* UN Doc CCPR/C/BIH/CO/1

Human Rights Committee (HRC) (2006c) *Concluding Observations on the Democratic Republic of the Congo* UN Doc CCPR/C/COD/CO/3

Human Rights Committee (HRC) (2006d) *Concluding Observations on Paraguay* UN Doc CCPR/C/PRY/CO/2

Human Rights Committee (HRC) (2007) *Concluding Observations on Sudan* UN Doc CCPR/C/SDN/CO/3

Human Rights Committee (HRC) (2008a) *Concluding Observations on Japan* UN Doc CCPR/C/JPN/CO/5

Human Rights Committee (HRC) (2008b) *Concluding Observations on Ireland* UN Doc CCPR/C/IRL/CO/3

Human Rights Committee (HRC) (2008c) *Concluding Observations on Panama* UN Doc CCPR/C/PAN/CO/3

Human Rights Committee (HRC) (2009) *Concluding Observations on Chad* UN Doc CCPR/C/TCD/CO/1

Human Rights Consultation Committee (2005) *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* Victorian Department of Justice, Melbourne

Human Rights Law Resource Centre (2006) *Human Rights Law Resource Centre Manual* Melbourne

Joffe P (2010) 'Canada's opposition to the UN Declaration: legitimate concerns or ideological bias?', in *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action*, ed J Hartley, P Joffe and J Preston, Purich Publishing pp 70–95

Joseph S, Schultz J and Castan M (2004) *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn) Oxford University Press, Oxford

Klerck M (2009) email to J Orenstein, 2 July, copy on file with authors

Macklin J (2009) 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples', 3 April [Online] Available: <www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm> [2010, May 9]

McRae H, Nettheim G, Anthony T, Beacroft L, Brennan S, Davis M and Janke T (2009) *Indigenous Legal Issues* (4th edn) The Law Book Company, Sydney

Mechlem K (2009) 'Treaty bodies and the interpretation of human rights' 42 *Vanderbilt Journal of Transnational Law* pp 905–47

Nowak M (2005) *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn) NP Engel, Khel

Orenstein J (2008) 'The difficulties faced by Aboriginal Victorians in obtaining identification' 7(8) *Indigenous Law Bulletin* pp 14–17

Orenstein J (2009a) 'Being nobody — the difficulties faced by Aboriginal Victorians in obtaining identification', speech delivered at the National Association of Community Legal Centres Conference, 14–17 September

Orenstein J (2009b) 'Being nobody: difficulties faced by Koori Victorians in obtaining ID', paper presented at the Castan Centre for Human Rights Law Symposium on Indigenous Birth Registration and Birth Certificates, 1 December [Online] Available: <<http://law.monash.edu/castancentre/events/2009/indigenous-birth-registration-symposium.html>> [2010, December 24]

Permanent Forum on Indigenous Issues (2009) *Report on the Eighth Session* UN Doc E/C.19/2009/14

Plan International (2009) *Count Every Child: The Right to Birth Registration* Plan International, London

Pound A and Evans K (2008) *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* Law Book Company, Sydney

Robertson A H (1972) *Human Rights in the World* Manchester University Press, Manchester

Secretariat of the Permanent Forum on Indigenous Issues (2010) *The State of the World's Indigenous Peoples* United Nations, New York

Sharp N (2005) *Universal Birth Registration: A Universal Responsibility Plan* International, London

Smith R (2007) *Textbook on International Human Rights Law* (3rd edn) Oxford University Press, Oxford

Steering Committee for the Review of Government Service Provision (SCRGSP) (2009) *Overcoming Indigenous Disadvantage: Key Indicators 2009* Productivity Commission, Canberra

Todres J (2003) 'Birth registration: an essential first step toward ensuring the rights of all children' 10 *Human Rights Brief* pp 32–35

Topsfield J (2009) 'The unbearable heaviness of being no one' *The Age* (Melbourne), 23 January [Online] Available: <www.theage.com.au/national/the-unbearable-heaviness-of-being-no-one-20090122-7nx5.html> [2010, May 9]

United Nations Children's Fund (2002) 'Birth registration: right from the start' 9 *Innocenti Digest* pp 1–34

United Nations Children's Fund (2005) *The Rights Start to Life* United Nations Children's Fund, New York

United Nations Children's Fund (2007) *A World Fit for Children* United Nations Children's Fund, New York

United Nations Department of Public Information (2007) 'General Assembly adopts Declaration on Rights of Indigenous Peoples; major step forward towards human rights for all, says President', press release, 13 September [Online] Available: <www.un.org/News/Press/docs/2007/ga10612.doc.htm> [2010, May 9]

Victorian Registry of Births, Deaths and Marriages (nd) 'About us' [Online] Available: <<https://online.justice.vic.gov.au/CA2574F700805DE7/page/About+us?OpenDocument&1=70-About+us~&2=~&3=->> [2010, May 9]

Victorian Registry of Births, Deaths and Marriages (nd) 'Application for a birth certificate' [Online] Available: <[http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMApplication_Forms/\\$file/Birth_App.pdf](http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMApplication_Forms/$file/Birth_App.pdf)> [2010, May 9]

Victorian Registry of Births, Deaths and Marriages (nd) 'Fees and turnaround' [Online] Available: <<https://online.justice.vic.gov.au/CA2574F700805DE7/page/Listing-Bar+Menu+Buttons-Fees+and+turnaround?OpenDocument&1=0-Listing~&2=-Bar+Menu+Buttons~&3=30-Fees+and+turnaround~>> [2010, May 9]

Victorian Registry of Births, Deaths and Marriages (nd) 'Justice Service Centres' [Online] Available: <<http://online.justice.vic.gov.au/CA2574F700805DE7/page/About+us-Contact+us-Justice+Service+Centres?OpenDocument&1=70-About+us~&2=70-Contact+us~&3=05-Justice+Service+Centres~>> [2010, December 24]

Victorian Registry of Birth Deaths and Marriages (2009) 'Indigenous Access Project update', Victorian Department of Justice, Melbourne

Wilkinson R and Pickett K (2009) *The Spirit Level: Why More Equal Societies Almost Always Do Better*, Penguin, London

MAKING INDIGENOUS AUSTRALIANS 'DISAPPEAR'

Problems arising from our birth registration systems

PAULA GERBER

Bradley Hayes is a 31-year-old Indigenous¹ 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.'² 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.³ 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.⁴ 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.⁵ 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.⁶ 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.⁷

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.⁸ 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.⁹

Every state and territory in Australia has enacted legislation relating to birth registration¹⁰ 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.¹¹

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;¹² 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 1,841 that have never been registered.¹³ 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.¹⁴ 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.¹⁵

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 not 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* (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).

Birth registration has been described as ‘one of the most important events in a child’s life’, and is recognised in international law as a fundamental human right.

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.¹⁶ 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 the table below. 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.¹⁷ 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.¹⁸ Given that the historical relationship between the Indigenous community and police has been one of tension and distrust,¹⁹ it is extremely problematic to nominate the police as the only persons entitled to certify identification documents.

Documents containing a photograph and signature	Documents operating in the community	Documents evidencing residential address
<ul style="list-style-type: none"> • Australian Driver’s Licence • Australian Passport • Firearms Licence • Foreign Passport 	<ul style="list-style-type: none"> • Citizenship Certificate • Full Birth Certificate²⁰ • Credit or Account Card • Department of Veterans Affairs Card • Security Guard / Crowd Control Licence • Tertiary Education Institution ID Card • Tax File Statement • Student Card • Medicare Card 	<ul style="list-style-type: none"> • Utility Account (gas, electricity, home phone, etc) • Bank Statement • Rent/Lease Agreement • Rates Notice

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.²¹ 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 the table below. Two must come from the first column and one from the second column.²²

Documents with Applicant’s name	Documents with Applicant’s address
Credit card or ATM card	Rental statement or current lease
Department of Veteran’s Affairs card	Bank statement
Australian security guard or crowd control licence	Rates notice
Student or tertiary ID card	Utility account (excluding mobile phone)
Tax Office Assessment	
Medicare card	

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 & Marriages Victoria, ‘News archive’, 2009 Aboriginal Community Information Sessions <<http://online.justice.vic.gov.au/CA2574F700805DE7/page/About+us-News+archive?OpenDocument&I=70-About+us-&2=60-News+archive-&3=~>> at 30 June 2009.

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 ID 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,²³ this discretion is rarely exercised.²⁴ Those working to improve birth registration systems have recommended that governments remove 'existing economic barriers (eg charges for birth certificates).'²⁵ 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.²⁶

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',²⁷ 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'.²⁸ 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.'²⁹

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.³⁰ 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.³¹ This probably satisfies the immediacy requirement of article 7.³² 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.³³

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'.³⁴ 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.³⁵ This General Comment notes that the CRC is 'concerned that indigenous children, to a greater extent than non-indigenous children, remain without birth registration'.³⁶ 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

17. Births, Deaths & 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 <http://hreo.c.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 & 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)> on 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.

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.

mobile units, periodic birth registration campaigns or the designation of birth registration offices within indigenous communities to ensure accessibility.³⁷

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.'³⁸ 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 24.³⁹ 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.⁴⁰ The case of *Mónaco v Argentina*⁴¹ 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.⁴²

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'⁴³ action to relieve this child from her predicament.

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.* paragraph 41.

37. *Ibid.* paragraph 42.

38. *Ibid.* paragraph 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.* paragraph 10.5.

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 Territory⁴⁴ and Victoria have human rights legislation.⁴⁵ 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 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.⁴⁶ The second point is that the Charter is intended to give effect to the rights set out in the ICCPR.⁴⁷ 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.⁴⁸

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.⁴⁹ 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 word-for-word 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'.⁵⁰ 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.⁵¹ 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.⁵²

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.⁵³

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.⁵⁴ 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.⁵⁵ 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 failing to facilitate provision of a birth certificate, is arguably in breach of section 8(1) of the Charter.⁵⁶ 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.⁵⁷

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.⁵⁸ 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.⁵⁹ Thus, a child should not be refused enrolment at school, 'Making Indigenous Australians ...' continued on page 167

43. Ibid.

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

45. Other jurisdictions are considering enacting human rights Acts including Tasmania, Western Australia and the Commonwealth.

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 ICCPR Commentary* (2nd ed, 2005), 372.

52. Rhona KM 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. There are also arguments that 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, paragraph 3.

60. Nowak, above n 51, 547.

61. It should be noted that 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.

... the CRPD did include a dynamic new concept which has the potential of revolutionising the treatment of people with disabilities. This concept expressly rejects the medical model of disability in favour of the social justice model.

Conclusion

This article has analysed how the acts of sex discrimination and racial discrimination attract the powerful labels of sexism and racism and has suggested that disability discrimination advocates embrace the label of ableism as an equivalent term. When a woman is not given a promotion because of her gender this act is labeled sexism and the discriminator is labeled a sexist. If an Indigenous person is not given a promotion because of their race this act is labeled racism and the discriminator is labeled racist. If a person in a wheelchair is not given a promotion because they cannot walk what is this act called? In the common vernacular and consciousness, there is no obvious label. This article argues for the increased adoption of the emerging label of ableism, both as a term of common usage and as a guide to policy making and as a legislative template.

Powerful labels, such as sexism and racism, have the capacity to ameliorate the use of negative stereotypes

and facilitate cultural change. To date, the act of disability discrimination has not attracted a powerful label to assist in facilitating such change. The term ableism reflects the underlying objective of disability discrimination legislation. This form of legislation, as adopted in Australia, focuses on preventing people from excluding others based upon their different abilities. This article has argued that attention should be focused upon the act of ableist discrimination rather than diverting the focus to an individual's disability. If the term ableism became widely embraced then perhaps an act of ableist discrimination may eventually attract the negative social stigma currently associated with a racist or sexist act.

PAUL HARPUR teaches law at Queensland University of Technology, and is a guide dog user.

© 2009 Paul Harpur

The author would like to thank Professor Thomas Hehir of Harvard University for meeting with the author in November 2008.

33. Fiona Kumari Campbell, 'Exploring internalized ableism using critical race theory' (2008) 23 *Disability & Society* 2, 151. I have had personal experience of the internalisation of ableist beliefs. At a conference, a senior colleague commented that I had 'achieved a lot for a blind person'. At this point, I had been awarded a Masters of Laws (GPA 6.5), a prize for my PhD candidature, an International Law Association of Australia prize and been successful in practice since 2003. Underlying the comment is a disturbing message that people with disabilities confront substantial barriers imposed by society and that they are unlikely to break the mould and be successful.

34. (2003) 217 CLR 92, 162.

35. *Ibid.*

36. *Ibid.*

37. See Colin Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator under the Disability Discrimination Act 1992 (Cth)' (2007) 35 *Federal Law Review* 111, 113–115; Elizabeth Dickson, 'Disability Discrimination in Education: *Purvis v New South Wales* (Department of Education and Training), Amendment of the Education Provisions of the Disability Discrimination Act 1992 (Cth) and the Formulation of Disability Standards For Education' (2005) 24 *The University of Queensland Law Journal* 213, 219; Susan Roberts, 'The Inequality of Treating Unequals Equally: The Future of Direct Discrimination Under the Disability Discrimination Act 1992 (Cth)?' (Speech delivered at ANU Public Law Weekend, Canberra, 6 November 2004) at 30; Belinda Smith, 'From *Wardley* to *Purvis* – How far has Australian Anti-Discrimination Law come in 30 years?' (2008) 21 *Australian Journal of Labour Law* 12, 1.

38. Standing Committee on Legal and Constitutional Affairs, 'Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008', above n 10, 43.

'*Making Indigenous Australians ...*' continued from page 162

or denied access to immunisations, simply because a parent cannot produce evidence of birth registration.⁶⁰

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 yet be said, with any certainty, that the Registrar's conduct is incompatible with sections 8 and/or 17 of the Charter.⁶¹

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.⁶²

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.

PAULA GERBER teaches law at Monash University.

© 2009 Paula Gerber