



PROOF OF BIRTH

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CHAPTER 1

The right to universal birth registration in Australia

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Introduction

Having a birth certificate is a key to citizenship. Most people born in this country take it for granted that they can prove they are Australian and lawful citizens by producing their birth certificate. But a number of Australians — predominantly Indigenous people and those from culturally and linguistically diverse (CALD) communities — miss out on the benefits of citizenship and struggle to fully participate in society because their birth has never been registered, or if it was, they cannot produce a birth certificate to prove it.

Without a birth certificate, it is near impossible to obtain a driver's licence, passport or tax file number. But problems can start much earlier. Schools are not supposed to enrol children who don't have a birth certificate, and

sports clubs won't allow kids to play unless they can prove their age, to ensure they are playing in the right age group; for example, the under-9s netball team or under-12s footy team.

Engaging in the mainstream economy and developing financial literacy is seriously impeded if young people are unable to access the keys to economic participation, such as opening a bank account, because they lack a birth certificate. Thus, the result of a birth not being registered is that vulnerable groups, including Indigenous children and youth, who may already suffer intergenerational disadvantage, find themselves even further behind the eight ball, because they are unable to prove who they are and therefore cannot access the rights of citizenship that most Australians take as a given. Indeed, research is demonstrating that not having a birth certificate can lead to a life of isolation and exclusion from society from a very early age. Further problems, such as non-recognition as a citizen, increased risk of violence and abuse, and increased risk of separation from family during emergencies, are identified as serious issues of child protection for individuals whose birth has not been registered.¹

It is estimated that the births of approximately 230 million children aged under-five have never been registered. This equates to one in every three children under-five around the world.² Given the global scale of non-registration of births, the thousands of Australians from Indigenous and CALD communities who have not had their births registered may not seem like a significant

problem. However, for the individuals endeavouring to negotiate life without a birth certificate, the problem is very large and very real.

The issue of non-registration of births is being taken very seriously by the United Nations, and other international organisations such as UNICEF and the World Health Organization (WHO). The right to birth registration is a key human right articulated in, and informed by, a number of international instruments, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of Children (CRC) and the Declaration on the Rights of Indigenous Peoples. How each of these instruments addresses the right to birth registration and what this means for Australia are discussed below.

International Covenant on Civil and Political Rights

Article 24 of the ICCPR provides that:

1. Every child shall have, without any discrimination as to race, colour, 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.
2. Every child shall be registered immediately after birth and shall have a name.

Article 24 is designed to recognise a child's distinct legal personality from the moment of their birth and to reduce the risk of exploitation of children. The Human Rights Committee (the monitoring body for the ICCPR)

published a General Comment explaining the content of Article 24. Regrettably, only one paragraph is devoted to the birth registration component of Article 24:

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.³

So, the predominant purpose of the right set out in Article 24(2) is to be a safeguard to prevent the maltreatment of children.⁴ By stating that Article 24(2) is designed to promote recognition of a child's legal personality, the Committee makes the link between this right and the human right to recognition as a person before the law (Article 16, ICCPR). Unfortunately, this General Comment failed to explicitly state that the right to birth registration includes a right to a birth certificate. However, experts consider that countries have a positive obligation to:

... expedite recognition of a child's proper name by the provision of verification documentation, in order to facilitate the formal acknowledgment of the child's legal personality, in order to maximize access to legal entitlements.⁵

There are a number of other relevant rights contained within the ICCPR and CRC, including the protection of children, right to identity and recognition before the law, and equality and non-discrimination, which all support the right to birth registration as a human right.⁶

Convention on the Rights of the Child

Article 7 of the Convention on the Rights of the Child addresses the right to birth registration in much the same way as Article 24 of the ICCPR. It provides that:

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.

The UN Committee on the Rights of the Child has not published a General Comment specifically on Article 7; however, it has published a General Comment on Indigenous children in which it expressed concern 'that

indigenous children, to a greater extent than non-indigenous children, remain without birth registration',⁷ and recommended that registration should be free and universally accessible.

In 2012, the Committee on the Rights of the Child specifically urged Australia:

... to review its birth registration process in detail to ensure that all children born in Australia are registered at birth, and that no child is disadvantaged due to procedural barriers to registration, including by raising awareness among the Aboriginal population on the importance of birth registration and providing special support to facilitate birth registration for illiterate persons. It further urges [Australia] to issue birth certificates upon the birth of a child and for free.⁸

This is quite an indictment on Australia, given that non-registration of births is something that has traditionally been understood as being a problem unique to the developing world.

Declaration on the Rights of Indigenous Peoples

The adoption of the Declaration on the Rights of Indigenous Peoples by the General Assembly in late 2007 represented an important development in the construction of Indigenous human rights in international law.

The Declaration represents the culmination of a period of dynamic adjustment to the manner in which international law addresses issues of concern to Indigenous peoples.⁹ The proper meaning and scope of

the rights described in the Declaration¹⁰ are still evolving, and the Declaration is silent when it comes to the right to birth registration and the right to a birth certificate. However, there are some provisions that provide some direction on these issues.

For example, Article 21(1) of the Declaration 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 Article 21(2) specifies that states ‘shall take effective measures ... to ensure continuing improvement of their economic and social conditions’. An inability to obtain a birth certificate could potentially constitute a breach of Article 21, since it is likely to impede the improvement of Indigenous peoples’ economic and social conditions through education, health and access to financial services.

In addition, Article 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’. This may also be of significance in the Australian context of birth registration and certification where Indigenous naming practices mean a person may have a number of different names, used in different familial, social or formal contexts. Birth registration (and certification) regulations may not allow for the multiple naming (or even spelling of names) that are integral to an Indigenous person’s identity.¹¹

Any failure to effectively consult with Indigenous peoples is at odds with a ‘best practice’ human rights approach to community problems, evinced by Articles 18 and 19 of the Declaration. The non-binding nature of the Declaration does not mean that governments and their agencies, such as the Registrars of Births, Deaths and Marriages, have no obligations to meet the spirit and the letter of the Declaration. It establishes the appropriate standards for legislation and policies that impact on Indigenous people.¹²

The ‘best practice’ standard 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.¹³

The Declaration thus provides a useful lens through which to examine all human rights issues involving Indigenous peoples. For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, has said that:

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.¹⁴

The Declaration does offer some limited guidance on how the right to birth registration should be implemented in Australia in order to ensure that it is accessible to Indigenous Australians.

Work of the UN Office of the High Commissioner for Human Rights

Birth registration is already a strategic priority for many international and domestic organisations that deal with child protection. In 2014, the Human Rights Council adopted a report on birth registration and the right of everyone to recognition everywhere as a person before the law, by the Office of the UN High Commissioner for Human Rights (OHCHR).¹⁵ This report made many observations on the nature and importance of universal birth registration, provided examples of good practices when it comes to achieving universal birth registration, and concluded with a number of recommendations for improving universal implementation of the right to birth registration.

The OHCHR report noted the importance of birth registration as part of a broader civil registration system that is essential for recording key events that relate to vital statistics concerning a nation's population. As the WHO observed: 'Countries that do not have a well-functioning civil registration system only have approximate ideas of the numbers, the longevity and the health of their population.'¹⁶

The Report reiterated the importance of birth registration, noting that:

The right to birth registration is not only a right of the child but of all human beings. Birth registration, and more especially a birth certificate, is a life-long passport for the recognition of rights, which may be necessary to, inter alia, vote, marry or secure formal employment. In some countries, it may be needed to obtain a driver's licence, to open a bank account, to have access to social security or a pension, to obtain insurance or a line of credit, and, significantly, to be able to register one's own children. It is also vitally important for securing inheritance and property rights, particularly for women and within families.¹⁷

In addition to the benefits to individuals, universal birth registration offers tangible benefits to governments. The report observed that:

While birth registration within such a system is a fundamental human right, its impact goes beyond the individual to have vital importance for the State, and a profound effect on governance at the national and international levels in improving services and ensuring accountability.¹⁸

The report recognised that among communities at high risk for low registration of births, child mortality may be systemically underestimated. This skews health and population data towards those of higher income, better education and living in urban communities, with access to increased civic services.¹⁹ In Australia, we might observe that such a misalignment of data would be reflected in a misalignment of statistics on Indigenous births and child mortality.²⁰

Australian Human Rights Legislation

In Australia there are two jurisdictions that have enacted human rights Acts, namely the Australian Capital Territory and Victoria. The *Victorian Charter of Human Rights and Responsibilities 2006* (Vic) was designed to give domestic effect to the ICCPR. However, it is silent on the right to birth registration.²¹ A decision was made that it was not necessary to incorporate Article 24(2) of the ICCPR, as lack of birth registration was perceived as being a historical rather than contemporary issue.²² The Australian Capital Territory's *Human Rights Act 2004* (ACT) similarly fails to include the right to birth registration.

In Victoria, there are signs that this omission may be righted in the not too distant future. When the Charter's operation was reviewed by the Scrutiny of Acts and Regulations Committee (SARC Committee) in 2011,²³ it recommended that the ICCPR Articles that had been omitted (for example, Article 24) be considered for future inclusion in the Charter. In its report, the SARC Committee paid considerable attention to the omission of birth registration from the Charter.²⁴ However, redressing the exclusion of this right from the Charter will have to wait until completion of a second review of the Charter by the new Andrews Government. In March 2015, the Attorney General, Martin Pakula, announced a further review of this human rights legislation. It will be undertaken by Victorian lawyer Michael Brett Young, who will deliver a report to the government by 1 September 2015.²⁵ The stated purpose of this review is to consider ways to

enhance the effectiveness of the Charter and any desirable amendments to improve the operation of the Charter. The inclusion of a right to birth registration in the Charter seems to fall squarely within these stated purposes.

The situation regarding birth registration in Australia

Australian governments must ensure that the births of all people, including, of course, Aboriginal and Torres Strait Islander peoples, are registered; without universal birth registration, we remain non-compliant with our international treaty obligations. Even where the majority of Australian children are registered, if a small percentage remain without birth registration it has a disproportionately adverse effect on that particular community (see Chapter 4 by Lanyon and John).

International children's rights organisations such as UNICEF and Plan International regularly organise campaigns to increase birth registration in developing countries such as Bangladesh, Cambodia, Nepal and Malawi. The UN High Commissioner on Refugees similarly runs birth registration programs in Thailand, Kenya and Cote d'Ivoire.²⁶ It is shocking to many people that a wealthy OECD country such as Australia has similar problems with under-registration of the births of a minority group.

The legal invisibility that occurs as a result of Australians lacking birth registration or a birth certificate is illustrated by the personal stories of many affected people. Just three examples are presented below.

1. Bradley Hayes, a Victorian Indigenous man, grew up a ward of the state. For over 30 years, he could not obtain a birth certificate; in the eyes of the law, he simply did not exist. Mr Hayes battled to establish his legal identity, to allow him to enjoy what most others take for granted, such as getting a driver's licence or registering a fishing boat. 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 any more.'²⁷
2. In Victoria, the East Gippsland Driver Education Program²⁸ was established to address unlicensed driving and other road safety problems within Indigenous communities. The initiative involved providing driver training and education to enable Indigenous people to acquire the skills necessary to obtain a driver's licence. However, for many Indigenous people these efforts did not result in the desired outcome of obtaining a driver's licence, because they were unable to satisfy VicRoads' proof of identity requirements. Indeed, it became apparent that the births of one in six of the program participants had never been registered, and 50% of the participants did not have a birth certificate.
3. Two 15-year-old Indigenous girls involved in an employment program could not obtain tax file

numbers (TFNs) because they did not have birth certificates. As a consequence, they were taxed at the highest tax rate, significantly reducing their take-home pay. By the time they finished their job placements, they were still embroiled in the lengthy and intimidating process of obtaining birth certificates in order to get TFNs. The low level of take-home pay the girls received left them disillusioned with mainstream employment, and they withdrew from the program.

Prompted by personal stories such as these, a team of researchers from Monash University Law Faculty, the Monash Indigenous Centre and the Melbourne School of Population Health²⁹ have been working on this issue since late 2009. The team have been seeking to identify the extent of under-registration of Indigenous births and the causes behind a significant number of Indigenous Australians not having a birth certificate. This research has identified two distinct, but related, issues:

1. Births are not being registered, so no certificate is available; and
2. Births are registered, but a birth certificate is not obtained at the time, and cannot now be obtained because of:
 - (i) an inability to satisfy ID requirements; and/or
 - (ii) an inability to pay fees.

There are several steps involved in registering a birth and getting a birth certificate:

1. The hospital or midwife notifies the Registrar of Births, Deaths and Marriages of a birth.
2. The hospital or midwife provides parent(s) with a birth registration form.
3. Both parents must complete and sign the birth registration form. If only one parent has signed, s/he must explain to the Registrar why the other parent has not signed.
4. The birth registration form must be submitted to the Registrar within 60 days of the birth.
5. If the parents wish to obtain a birth certificate for their child they must also pay the prescribed fee, which ranges from \$30.20 in Victoria to \$51 in New South Wales.

A breakdown in any one of these steps may result in an individual not being able to get a birth certificate. It should also be noted that there are significant *potential* penalties for late registration; for example, in Victoria, a fine of up to \$1,400 can be imposed, but rarely is. However, the very existence of the possibility that a parent could be fined if they have not submitted the birth registration form within 60 days, may act as a disincentive against submitting the form late.

Coming up with solutions

The Achieving Universal Birth Registration Symposium, held in Melbourne in December 2014, was designed to explore ways of overcoming the barriers that Indigenous Australians face accessing the birth registration systems

across the Australian states and territories. Organised by the Castan Centre for Human Rights Law, Plan International Australia and UNICEF Australia, the Symposium brought together experts from a range of disciplines. The causes of non-registration of births, particularly Indigenous births, are complex and require a multifaceted solution, so the speakers came from such diverse fields as human rights law, maternal and child health, anthropology, international development and government.

This book gathers together the papers of the Symposium speakers, as well as some additional invited contributions from experts unable to participate in the Symposium. Each author was invited to address a specific issue, development or innovation within their area of research or practice, in order to provide both general and specific perspectives on increasing both birth registration and the ease with which one can obtain a birth certificate. As a result, this collection represents a cross-section of legal, health, statistical and community-based approaches to the issues, and it provides insight into the diverse range of factors and issues that underlie the efforts to achieve universal birth registration.

This collection makes it clear that while Australia generally has a robust and well-managed system of birth registration, in some specific communities we are failing to achieve universal birth registration. We cannot expect to achieve real progress in closing the gap on Indigenous disadvantage until we prioritise birth registration and birth certificates for Indigenous Australians. The chapters

in this book contain insights, ideas and recommendations that will bring us a step closer to achieving universal birth registration for ALL Australians.

Endnotes

- 1 UN High Commissioner for Refugees (UNHCR), *Child protection issue brief: birth registration*, August 2013, retrieved 22 January 2015 from <http://www.refworld.org/docid/523fe9214.html>
- 2 UNICEF, *Every child's birth right: Inequities and trends in birth registration*, 2013, p. 14, retrieved from http://www.unicef.org/media/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf.
- 3 Human Rights Committee (HRC), General comment No 17: rights of the child, 1989. (Article 24) UN Doc HRI/GEN/1/Rev.6 at 144, at 7.
- 4 See S Joseph & M Castan, *The International Covenant on Civil and Political Rights: cases, materials and commentary*, Oxford University Press, 2014, p. 722.
- 5 Ibid.
- 6 These are explored at length by M Castan et al., 'Indigenous Australians' access to birth registration systems: a breach of international human rights law?', *Australian Journal of Human Rights*, vol. 17, no. 1, 2009, pp. 55–89, particularly at p. 70 on the right to recognition before the law (Article 16).
- 7 Human Rights Committee (HRC), General comment No 11: Indigenous, Children and their rights under the Convention UN Doc CRC/C/GC/11, 2009.
- 8 Committee on the Rights of the Child, *Concluding observations: Australia*, 28 August 2012, CRC/C/AUS/CO/4.
- 9 M Castan, P Gerber & A Gargett, 'Indigenous Australians' access to birth registration systems: a breach of International Human Rights Law?', *Australian Journal of Human Rights*, vol. 17, no. 1, 2011, pp. 55–89.
- 10 See, for example, C Charters and R Stavenhagen (eds), *Making the Declaration work: The United Nations Declaration on the Rights of Indigenous Peoples*, IWGIA, Copenhagen, 2009.
- 11 See further, R Hagen's 'Identity and Identification, Traditional Aboriginal Naming Processes', Chapter 7 in this book.
- 12 J Anaya, *Report to the Human Rights Council*, A/HRC/9/9, 11 August 2008, paragraphs 34–43
- 13 J Anaya, *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 at 72, 2010.
- 14 M Gooda, *Social Justice report*, Australian Human Rights Commission, 2010, pp. 29–30.

- 15 Office of the UN High Commissioner for Human Rights, *Birth registration and the right of everyone to recognition everywhere as a person before the law*, A/HRC/27/22 (UNHCHR report), 17 June 2014.
- 16 World Health Organization, *Civil registration: why counting births and deaths is important*, Fact sheet No. 324, May 2014, retrieved from <http://www.who.int/mediacentre/factsheets/fs324/en/>
- 17 UNHCHR report, op cit. p. 5.
- 18 Ibid.
- 19 Ibid.
- 20 The Australian Bureau of Statistics (ABS) uses an estimating methodology to account for lags in birth registrations. The methodology did not take into account the under-registration of Indigenous births. See ABS, *Demographic estimates and projections: Concepts, sources and methods*, 1999, retrieved from <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8CFA82476FAC3633CA25697E0018FD22?opendocument>
- 21 The Charter issues are explored in greater detail elsewhere; A Gargett et al., 'The right to birth registration in the Victorian Charter: seek and ye shall not find', *Monash University Law Review*, vol. 36, no. 3, 2011, pp. 1–32.
- 22 Ibid.
- 23 Scrutiny of Acts And Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006*, 2011.
- 24 Ibid, pp. 33–34.
- 25 'Review To Strengthen Victoria's Charter Of Human Rights', retrieved from <http://www.premier.vic.gov.au/review-to-strengthen-victorias-charter-of-human-rights>.
- 26 UN High Commissioner for Refugees (UNHCR), *Child protection issue brief: birth registration*, August 2013, retrieved 22 January 2015 from <http://www.refworld.org/docid/523fe9214.html>
- 27 J Topsfield, 'The unbearable heaviness of being no one', *Sydney Morning Herald*, 23 January 2009, retrieved from <http://www.smh.com.au/national/the-unbearable-heaviness-of-being-no-one-20090122-7nx5.html>.
- 28 See <http://www.healthinonet.ecu.edu.au/key-resources/programs-projects?pid=907>.
- 29 The chief investigators on the ARC-funded project, *Closing the Gap on Indigenous Birth Registration*, are Paula Gerber, Melissa Castan, Lynette Russell, Jane Freemantle and Rod Hagen. See http://indigenousbirthreg.org/Indigenous_Birth_Registration/Introduction.html