
ACHIEVING UNIVERSAL BIRTH REGISTRATION FOR INDIGENOUS AUSTRALIANS: RECOMMENDATIONS FROM THE VICTORIAN LAW REFORM COMMISSION

by Paula Gerber and Melissa Castan

INTRODUCTION

Many people are surprised to learn that not all births of Indigenous children in Australia are registered, and that Indigenous peoples are encountering difficulties in obtaining a birth certificate. There is an expectation that a wealthy and developed nation such as Australia would have systems in place to ensure universal birth registration. In recent years, the problem has been well documented in law journals, but reform has been slow and patchy.¹

The consequences of not having a birth certificate can be dire and include inhibiting access to a driver's licence or passport and not being able to obtain a tax file number or take up employment opportunities. A person without a birth certificate is, in effect, legally invisible since they are unable to prove who they are to authorities and others who require ID. Evidence of the difficulties Indigenous people experience because they are unable to obtain a birth certificate is starting to be gathered. Stories range from young people not being able to participate in competitive sports because they cannot prove their age, thus making them ineligible to play in—for example—an under 16s' netball team. And youths in remote locations getting into trouble with the law for unlicensed driving, because without a birth certificate they cannot get a driver's licence, and without public transport, driving is the only way of getting around.²

The UN Committee on the Rights of the Child has taken notice of this problem, and recommended that the Australian Government:

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 the State party to issue birth certificates upon the birth of a child and for free.³

A 2013 report, from the Victorian Law Reform Commission ('VLRC'), provides useful guidance as to how these UN recommendations could be implemented, not only in Victoria, but across Australia.⁴

After extensive community consultation, with not only Indigenous Victorians, but also members of culturally and linguistically diverse communities, the VLRC produced a 162 page report that culminates in 26 specific recommendations. This article does not seek to provide scholarly analysis of the VLRC report, as that is not possible within the journal's word limit. Rather, it aims to raise awareness of the recommendations and provide some insight into whether the proposed reforms are likely to make birth registration systems more accessible to Indigenous Australians.

VLRC RECOMMENDATIONS

The recommendations cover issues such as birth notification; birth registration; birth certificates; fees; vulnerable groups; and awareness and access. A selection of the recommendations are considered below.

BIRTH NOTIFICATION

The Registrar of Births, Deaths and Marriages ('BDM') must be notified of a live birth within 21 days of the birth by the hospital, doctor or midwife, or if no medical practitioner was present, any other person in attendance at the birth.⁵ This birth notification process precedes, and is distinct from, the birth registration process (which must be completed by the parent or guardian within 60 days of the birth).⁶ When a birth registration application is submitted by a parent or guardian, the BDM matches it with the birth notification. Currently, only basic information is included in a birth notification such as date of birth, mother's name and address, sex of the baby, whether it was a multiple birth and whether the child was live or stillborn.⁷ The VLRC recommended that it would be useful to request additional information as part of the birth notification process including:

- details of the father
- the Indigenous status of the mother and father
- details of the next of kin
- a contact telephone number.⁸

The provision of this additional information may help to improve rates of birth registration. For example, having a contact phone

number and details of the father or next of kin—data which the hospital will have already collected on admission—should facilitate the BDM following up on late registrations.⁹

BIRTH REGISTRATION

One of the key recommendations for improving current birth registration processes was that:

The birth registration statement should include a statement that if a person other than the mother wishes to register a birth in a situation where they believe the mother will not, or cannot register the birth, they should contact the Registrar to find out how this can be done, and what information they will need to provide.¹⁰

This recommendation arose out of the need to address the situation where a child needs to be registered, but the mother is not available or able to complete the forms. Sometimes a father, or a grandparent, or other guardian has responsibility for the child whose birth has not been registered. It would be useful if it was made clear to fathers or other primary caregivers that the BDM is able to accept registration by a person other than the mother.

In order to ensure that Indigenous Australians can fully participate in society it is essential that they can readily obtain a birth certificate.

Whilst many of the VLRC's recommendations regarding birth registration are to be applauded, there are matters where the VLRC remained silent when a recommendation was warranted. In particular, the failure to address penalties that can be imposed under the *Births, Deaths and Marriages Registration Act 1996* (Vic) is regrettable. Section 18 of the Act provides that a fine of approximately \$1400 may be imposed if a parent fails to register a birth within 60 days of the birth.¹¹ Similar penalty provisions appear in the birth registration legislation of all state and territories.¹² While this is undoubtedly designed to motivate people to register the births of their children in a timely manner, anecdotal evidence suggests that it may in fact be acting as a *disincentive* for people to register the birth of their children after 60 days. Why would someone lodge birth registration papers if there is a risk they may have to pay a hefty fine for doing so late?

Governments are generally happy to receive birth registration papers, whenever they come in, and there is no evidence that people are being punished for late registrations. However, a parent who is late registering the birth of their child has no way of knowing in advance that they are unlikely to be prosecuted, and may only

note that they can be fined. In this way, the provision of a penalty is potentially deterring people from registering a birth post 60 days. Given that fines are not, in fact, being imposed for late registration,¹³ consideration should be given to repealing penalty provisions from the legislation and removing all references to penalties from the birth registration form.

BIRTH CERTIFICATES

If a person seeks a copy of their birth certificate as an adult, there are onerous proof of identity requirements. These ID requirements can present a significant barrier to people who do not have photo ID, such as a driver's licence or passport, and additional documentation with their name and current address on it, such as a utility bill or tenancy agreement. It is for this reason, that the VLRC recommended that:

The Registrar should consider improving the presentation of the proof of identity section of its application for a birth certificate. In particular, the application *should make it clear to applicants that other options are available* if they do not possess a list 1 [photo ID] identity document.¹⁴ (emphasis added).

The strict ID requirements are designed to prevent identity fraud. This legitimate aim must be balanced with the need for people to have a birth certificate in order to fully participate in society. Lack of a birth certificate may increase the likelihood of an Indigenous youth coming into contact with the criminal system, for example, through unlicensed driving. Indeed, it has been observed that, in Western Australia ('WA'), unlicensed driving greatly contributes to the over representation of Indigenous Australians in jail.¹⁵ Furthermore, in Queensland, recent amendments to voting laws¹⁶ mean that individuals will be required to present ID as a prerequisite to voting in elections, ID that may not be obtainable without a birth certificate.¹⁷

In order to ensure that Indigenous Australians can fully participate in society it is essential that they can readily obtain a birth certificate. The VLRC therefore recommended that the BDM consider Medicare's *No ID – No Worries* initiative as a model.¹⁸ Medicare adopts a flexible approach to proving identity, including accepting a statutory declaration verifying a person's identity from an approved referee. However, the VLRC also acknowledged that because a birth certificate is a primary identification document, higher standards of proof of identity are justified.¹⁹

Notwithstanding the need to guard against identity fraud, it is vital that BDMs assist disadvantaged and vulnerable groups to obtain a birth certificate by having flexible ID requirements, and that the existence of alternative means of proving a person's identity are widely publicised.

FEES

The fees for obtaining a birth certificate range from \$30.20 in Victoria to \$51 in New South Wales ('NSW'). These have consistently been identified as a barrier to Indigenous Australians obtaining this important document. It is therefore not surprising that the VLRC made several recommendations regarding fees.²⁰ However, the VLRC stopped short of recommending that all children be issued with free birth certificates upon registration, as the UN Committee on the Rights of the Child recommended. It justified not recommending universal free birth certificates on the basis that the majority of people are able to pay the fee without apparent difficulty, and the significant revenue generated from birth certificate fees (approximately \$2 million a year in Victoria) funds the operation of the BDM registry.²¹

The VLRC did, however, recommend legislative reform so that holders of a health care card should be exempt from paying a fee for a birth certificate, provided one has not been previously been issued to the applicant. It also recommended that lost or misplaced birth certificates issued under the exemption could be reissued for free on the Registrar's general discretion to waive fees.²²

Prior to the VLRC report, the Victorian BDM had already put in place a fee support scheme. Aboriginal or Torres Strait Islander individuals, who hold a pension concession card or a health care card, can obtain their birth certificate without charge. The fee is met by the Indigenous Access Fund, which was set up by the Department of Justice for this purpose. It is understood that in 2012-13, this fund paid the fees for approximately 660 certificates.²³ This high uptake suggests that fee support is helping to overcome financial barriers that Indigenous people face when trying to obtain a birth certificate.

Other states and territories do not appear to have equivalent schemes to redress financial disadvantage faced by some Indigenous people; and there may even be a reluctance within BDM registries to adopt such initiatives out of a concern that it will "open the floodgates" for people seeking free birth certificates. However, failing to provide birth certificates to people who cannot afford them is probably a breach of their human right to a birth certificate²⁴ and constitutes indirect discrimination. It is imperative that all BDM offices have appropriate policies and practices in place to ensure that disadvantaged and vulnerable persons are not denied their right to a birth certificate.

AWARENESS AND ACCESS

The VLRC made several constructive recommendations regarding the need for the BDM Registrar to take steps to promote the '...benefits of obtaining a birth certificate, including listing the important identity documents which can only be obtained on

production of a birth certificate'.²⁵ It also recommended that the legislation be '...amended to include the promotion of public awareness of the importance of birth registration through the conduct of education and information programs'.²⁶

Lack of a birth certificate may increase the likelihood of an Indigenous youth coming into contact with the criminal system.

As a means of increasing accessibility to birth registration services, the VLRC recommended that '[t]he Registrar should consider expanding the range of venues where registry applications may be lodged'.²⁷ This has already happened in Victoria where BDM services are now provided at 25 regional Justice Centres. This has been accomplished by training existing Justice Centre staff, rather than employing additional BDM staff. These centres provide people with an opportunity to lodge applications, have documents witnessed, make payments and obtain information, without the need to travel to the capital city or make long distance phone calls. In a country as large as Australia with a dispersed population, the decentralisation of birth registration and certification processes makes sense. While states such as WA have established outreach programs that see BDM staff travelling to remote communities on an intermittent basis, this is no substitute for the permanent provision of BDM services in regional centres.

CONCLUSION

Birth registration and birth certificates are fundamental human rights.²⁸ Yet these rights are not reflected in the Australian legislative regime. Rather than focusing on the rights of children to have their birth registered and a birth certificate issued, the statutory regime is framed around the obligation of the parent to undertake these tasks, or risk being fined. This regulatory approach means that the message being sent to parents is "register your child, or else" rather than "your child has a right to a birth certificate and getting one will benefit them later in life."

Although the VLRC's recommendations were specific to birth registration in Victoria, all state and territory BDM Registrars will no doubt carefully consider the report, given the similarity between regulatory frameworks in all Australian jurisdictions. Implementation of these recommendations around the country would go a long way to ensuring that Indigenous Australians can readily obtain a birth certificate; the key document to unlocking all the rights and privileges of citizenship.

Reform of birth registration systems and access to certification should be a priority for all key stakeholders. Civil society, community groups and statutory authorities all have a role to play in facilitating Indigenous peoples' access to birth registration and certificates.

For further information on Indigenous peoples' access to the birth registration/birth certificates visit: www.indigenousbirthreg.org/Indigenous_Birth_Registration/Introduction.html.

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1 See, for example, Joel Orenstein 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (2008) 7(8) *Indigenous Law Bulletin* 14; Paula Gerber 'Making Visible the Problem of Invisibility' (2009) 83(10) *Law Institute Journal* 52; Paula Gerber 'Making Indigenous Australians 'Disappear': Problems arising from our Birth Registration Systems' (2009) 34(3) *Alternative Law Journal* 157; Melissa Castan, Paula Gerber and Andy Gargett, 'Indigenous Australians' Access to Birth Registration Systems: A Breach of International Human Rights Law?' (2011) 17(1) *Australian Journal of Human Rights* 55; Paula Gerber, Andy Gargett and Melissa Castan 'Does the Right to Birth Registration Include a Right to a Birth Certificate?' (2011) 29(4) *Netherlands Quarterly of Human Rights* 429; Alannah Calabro 'Registering the Births of Indigenous Australians: Has New South Wales Got it Right?' (2013) 36(3) *University of New South Wales Law Journal* 809.

2 Data is being collected pursuant to the ARC Linkage Grant project: *Closing the Gap on Indigenous Birth Registration*, LP120100160.

3 Committee on the Rights of the Child, *Considerations of reports submitted by States parties under article 44 of the Convention: Concluding Observations on Australia*, 16th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) 9 [36].

4 Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report (2013).

5 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 12.

6 *Ibid* s 18(1).

7 *Ibid* s12(1); Letter from Erin Kelleher, Victorian Registrar of Births, Deaths and Marriages to the Hon P.D. Cummins, Chair, Victorian Law Reform Commission, 21 February 2013.

8 Victorian Law Reform Commission above n 4, 14.

9 *Ibid* 14 [2.47].

10 *Ibid* xv [2].

11 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 18(1); *Monetary Units Act 2004* (Vic) s 11.

12 See *Births, Deaths and Marriages Registration Act 1995* (NSW) s 16(1); *Births, Deaths and Marriages Registration Act 1996* (NT) s 16(1); *Births, Deaths and Marriages Registration Act 2003* (Qld) s 8 (1); *Births, Deaths and Marriages Registration Act 1998* (WA) s 16(1); *Births, Deaths and Marriages Registration Act 1997* (ACT) s 10(1); *Births, Deaths and Marriages Registration Act 1999* (Tas) s 15(1); *Births, Deaths and Marriages Registration Act 1996* (SA) s 16(1).

13 Information gathered from interviews conducted by the author with BDM registrars.

14 Victorian Law Reform Commission above n 4, 60.

15 Committee to Explore the Effect of Motor Driver's Licence and Driving Laws on Remote Communities, Western Australia, *Indigenous Licensing and Fine Default: A Clean Slate*, (2007).

16 *Electoral Reform Amendment Act 2014* (Qld) ss 9, 10.

17 Graeme Orr and Emily Howie, 'New ID laws threaten to leave voters behind' *The Brisbane Times* (online) 21 May 2014, <www.brisbanetimes.com.au/queensland/new-id-laws-threaten-to-leave-voters-behind-20140522-zrjr1.html#ixzz33obazmyh>.

18 Victorian Law Reform Commission above n 4, 59 [4.66].

19 Victorian Law Reform Commission above n 4, 59 [4.68]; An approved referee can be a community elder, medical/health manager/nurse, school principal, permanent Commonwealth employee with five or more years of continuous service, council chairperson, minister of religion, welfare organisation worker. The referee must have known the applicant for six months or confirm who they are by using medical, school or church records: Medicare Australia, *Aboriginal and Torres Strait Islander Medicare enrolment and amendment form* (905.02.08.10).

20 Victorian Law Reform Commission above n 4, xvi-xvii.

21 *Ibid* 82 [5.72-5.73].

22 *Ibid* 84 [5.86-90].

23 Email from Registrar of Births, Deaths and Marriages to Paula Gerber.

24 In particular, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 24 and *Convention on the Rights of a Child*, opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990) art 7. See also, Castan, Gerber and Gargett, above n 1.

25 Victorian Law Reform Commission above n 4, xvii [21].

26 *Ibid*, xviii [26].

27 *Ibid*, xviii [25].

28 *Ibid*; Gerber, Gargett and Castan, above n 1.