

**Shadow Report to the UN Committee on the
Rights of the Child Regarding Australia's
compliance with Article 7 of the *Convention on
the Rights of the Child***

22 June 2011

1. Executive Summary

It appears that Australia is failing to fully comply with Article 7 of the Convention on the Rights of the child. The problem is twofold, namely:

- i. there are a significant number of Indigenous births that are not registered; and
- ii. Indigenous Australians experience difficulties obtaining a copy of their birth certificate, even if their birth was registered.

The purpose of this report is to highlight those two problems and make recommendations regarding how they can be overcome.

2. The Right to Birth Registration

Article 7 is a very short but important part of the Convention on the Rights of the Child. The relevant part of Article 7 provides that: "*The child shall be registered immediately after birth*". Birth registration is the process whereby a child's birth is officially recorded on a civil register. As Archbishop Desmond Tutu noted:

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.¹

It has recently come to light that there are a significant number of Indigenous Australians whose births are not being registered and who are experiencing difficulties obtaining a birth certificate; a piece of paper that is essential for obtaining important documentation such as a driver's license and passport.

In 2005, of the 9,900 children born to Indigenous mothers in Australia, 13% (1,300 children) were not registered.² 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.³ It

¹ Sharp N (2005) *Universal Birth Registration – A Universal Responsibility*, Plan International, London, 7.

² 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.

³ 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.

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'.⁴

Regardless of the underlying cause of non-registration of births within the Indigenous community, it is clear that there is not universal birth registration when it comes to Indigenous Australians. It is recommended that the Australian Government consult with Indigenous communities and undertake research to identify the underlying causes of under-registration of Indigenous births and develop culturally appropriate solutions

3. The Right to a Birth Certificate

Anecdotal evidence suggests that Indigenous Australians are encountering difficulties obtaining a birth certificate.⁵ There appear to be two principle causes of this inability to obtain a birth certificate, namely that:

- (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 Australia, 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 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 Registrars generally require that three separate documents establishing identity must be produced.⁶ This requirement similarly 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'

⁴ Cox D 'Working with Indigenous survivors of sexual assault' (2008) 5 ACSSA Wrap 1, 3.

⁵ 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; Orenstein J 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (2008) 7(8) *Indigenous Law Bulletin* 14.

⁶ *Births, Deaths and Marriages Registration Act 1996* (Vic) s 47 confers power on Victorian Registry to maintain written policies for the access of the register including the issue of certificates. It is this policy that prescribes the identification requirements. For the proof identity policy for a birth certificate application see Victorian Registry of Birth Deaths and Marriages, Application for Birth Certificate, www.bdm.vic.gov.au/, 24 January 2011.

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!⁷ 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. As it currently stands, Births, Deaths and Marriages Registries refuse to accept 'Proof of Aboriginality' documents⁸ as proof of identity, yet these documents are the most readily available form of identification for many Indigenous Australians.

In each Australian state and territory, the principal office of Births, Deaths and Marriages Registries are located in the capital cities of each state and territory. In Victoria, until recently, people living outside of the state capital had to either travel to the capital city or apply for a certificate by mail or online. Additional requirements are imposed on people who do not apply in person at the registry office. In particular, if the application is submitted via mail or online, the identity documents that accompany the application must be certified by a police officer. This requirement negatively impacts on Indigenous Australians, many of whom do not live in capital cities. The relationship between Indigenous Australians and the police is widely recognised as dysfunctional.⁹ There is no obvious reason why lawyers, or others who are recognised as being fit and proper persons to witness affidavits and other legal instruments, could not also certify the identity documents.¹⁰

The following two case studies illustrate the problems faced by Indigenous Australians who don't have, or can't obtain a birth certificate:

- (i) JW is an Indigenous mother of six children all under the age of 12 living in the Gippsland region of Victoria. The children's births were registered however no certificates were issued. JW's sole income is child support payments. She was notified by the school her children attend that she must supply birth certificates to continue their attendance. The Child Support Agency¹¹ also required JW to provide copies of her children's birth certificates to verify paternity in order to continue to receive child support payments. JW couldn't afford the money required to pay for the six certificates. While waiting to save or borrow the money, her children couldn't enrol at school and the child support payments were suspended, making it even more difficult to save enough money to pay for the certificates.¹² Thus, JW's children's education

⁷ Gerber P 'Making Visible the Problem of Invisibility' (2009) 83(10) *Law Institute Journal* 52.

⁸ Proof of Aboriginality documentation is a signed document bearing the seal of an Aboriginal organisation: Orenstein, *Being Nobody*, *loc.cit.* note 5.

⁹ Cunneen, C. *Conflict, Politics and Crime: Aboriginal Communities and the Police*, Allen & Unwin, Crows Nest, 2001.

¹⁰ 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).

¹¹ This is the government body in Australia that is responsible for administering the child support scheme, whereby separated parents make payments for the benefit of their children.

¹² Orenstein, *The Difficulties Faced by Aboriginal Victorians in Obtaining Identification*, *loc. cit.* note 5; Orenstein, J. '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 2009), <http://law.monash.edu/castancentre/events/2009/indigenous-birth-registration-symposium.html>.

was negatively impacted as a direct consequence of her inability to access copies of her children's birth certificates.

- (ii) In 2007, a coalition of community groups established the Gippsland East Aboriginal Driver Education Project in the state of Victoria. This project was created in an attempt to reduce the contact that Indigenous peoples were having with the criminal justice system. Driver education was ear-marked as a way of reducing some of the driving related factors that resulted in Indigenous youths coming into contact with the police e.g. through unlicensed driving.¹³ One hundred and twenty Indigenous participants enrolled in the program, but it turned out that half did not have, or could not obtain, a birth certificate. The program included the completion of all necessary merit and skill requirements to obtain a driver's licence. However, the 60 participants without birth certificates could not produce the requisite identification, and were thus unable to obtain a driver's licence upon completion of the program.¹⁴

The above examples of disadvantage suffered by Indigenous Australians who are unable to produce a birth certificate, demonstrates the pivotal role that such a certificate plays in the enjoyment of human rights. Even individuals whose births were registered find that they still cannot obtain a passport that enables them to travel, or a license to drive a car, if they cannot produce the piece of paper that proves their birth was registered. From the perspective of the individual it is the birth *certificate* that is crucial to their full participation in society; birth registration alone achieves little.

Although Article 7 does not expressly refer to birth certificates, the Committee on the Rights of the Child (CRC) has recognised that a right to a birth certificate is an implicit part of the right to birth registration. It is the birth certificate that is the key to an individual enjoying all human rights and privileges associated with citizenship, and birth registration without a birth certificate has little relevance for an individual.

Although the CRC has not published a General Comment on the meaning of Article 7, it has published other General Comments which shed light on whether the right to birth registration includes a right to a birth certificate. In particular, in General Comment 10 the CRC stated that it wished to emphasise that:

wishes to emphasize the fact that it is crucial for the full implementation of article 7... that every child shall be registered immediately after birth to set age-limits one way or another, which is the case for all States parties. A child without a provable date of birth is extremely vulnerable to all kinds of abuse and injustice regarding the family, work, education and labour, particularly within the juvenile justice system. *Every child must be provided with a birth certificate*

¹³ Orenstein, J. '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 2009), <http://law.monash.edu/castancentre/events/2009/indigenous-birth-registration-symposium.html>.

¹⁴ Ibid.

free of charge whenever he/she needs it to prove his/her age.¹⁵
(Emphasis added)

In addition to this explicit statement regarding a state's obligation to provide a birth certificate free of charge, the CRC has acknowledged the right to a birth certificate in various Concluding Observations, including, for example:

Bolivia (2009) 'The Committee welcomes that article 97 of the Child Code establishes that all children should be inscribed in the civil register, and that the first birth certificate is free... The Committee recommends that the State Party continue to take all necessary measures to ensure registration of all children, especially in rural areas, and that it take steps to identify all children who have not been registered or obtained an identity document'.¹⁶

Romania (2009) 'The Committee is in particular concerned that despite legislation requiring the registration of children within 30 days from ascertaining their abandonment, a very high proportion of abandoned children leave maternity hospitals without a birth certificate... The Committee recommends that the State party raise awareness among hospital staff, administrators and other health professionals, about their responsibilities to register births and to facilitate the issuing of birth certificates'.¹⁷

Many Indigenous Australians struggle to enjoy their human rights because they are unable to produce a birth certificate. Australia is in breach of its obligations under Article 7 of the Convention on the Rights of the Child by failing to ensure that all Australians are able to readily obtain a birth certificate.

4. Conclusion

Indigenous Australians are facing social exclusion and an inability to enjoy all the rights and privileges that flow from a birth having been registered and a birth certificate issued.

The CRC is urged to include in its Concluding Observations a recommendation that Australia fully comply with Article 7 of the Convention on the Rights of the Child by:

1. consulting with Indigenous Australians to develop culturally appropriate solutions to the under-registration of Indigenous births, for example, by the use of mobile birth registration units to reach Indigenous communities in rural and remote areas;


¹⁵ Committee on the Rights of the Child General Comment No 10: Children's rights in juvenile justice, 25 April 2007, CRC/C/GC/10, at [39].

¹⁶ Concluding Observations of the Committee on the Rights of the Child regarding Bolivia, 16 October 2009, CRC/C/BOL/CO/4, at [34]-[35].

¹⁷ Concluding Observations of the Committee on the Rights of the Child regarding Romania, 12 June 2009, CRC/C/ROM/CO/4, at [35]-[36].

2. ensuring that every parent/guardian is provided with a birth certificate free of charge upon birth registration; and
3. mandating that Registrars of Births Deaths and Marriages accept 'proof of aboriginality' documents in satisfaction of ID requirements, relax the bureaucratic requirements for obtaining a copy of a birth certificate and waive fees whenever a birth certificate is needed by an Indigenous person to prove his/her age..

To further elaborate on this problem, and support the above recommendations, we attach a copy of a forthcoming article on this issue, namely: Castan, Melissa, Gerber, Paula and Gargett, Andy 'Indigenous Australians' Access to Birth Registration Systems: A Breach of International Human Rights Law?' (2011) 17(1) *Australian Journal of Human Rights*



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Indigenous Australians' Access to Birth Registration Systems: A Breach of International Human Rights Law? Pre-publication copy (2011) 17(1) *Australian Journal of Human Rights* [forthcoming]

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Introduction

'History doesn't repeat itself, but it does rhyme' were the prophetic words of Mark Twain. At the time of colonisation of Australia in 1788, the British assumed sovereignty on the basis of *terra nullius* i.e. 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 (No2)*, 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 because many Indigenous Australians are unable to obtain primary evidence of their identity and thus establish their legal personality.

There is emerging evidence that indicates that within Australia, Indigenous people are experiencing difficulties proving their legal identity simply because they are unable to produce a birth certificate – the instrument that is universally recognised as the fundamental evidentiary document establishing personal identification. Until recently, this problem of legal invisibility was itself cloaked with invisibility. This second layer of invisibility is more invidious than the first, as it operates to hide that legal invisibility, thus inhibiting an effective solution to the problem. Preliminary inquiries in other comparative jurisdictions, such as the United States and Canada, indicate that there is a perception that there is no problem of legal invisibility within their Indigenous communities. The birth registration systems in these jurisdictions are largely similar to Australia's birth registration systems. It would perhaps be appropriate for research to be undertaken in these jurisdictions to ascertain if there is, in fact, a problem of legal invisibility that has yet to be exposed. If Indigenous communities in America and Canada have no problems accessing their birth certificates, then we need to ask: 'What is it that they doing that ensures Indigenous people can always get a birth certificate? And what can Australia learn from these regimes, in order to overcome the human rights violations that are occurring within its jurisdiction?'

In Australia this veneer of invisibility has only just begun to wear off with the emergence in the media of stories like that of Bradley Hayes, a 31-year-old Indigenous man who grew up a ward of the state (The Age 23 January 2009). For 30 years he 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

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identity, to allow him to enjoy what the legally visible take for granted, 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 ten 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'(The Age 23 January 2009). Unfortunately, stories like Mr Hayes remain just anecdotes, as nobody has yet undertaken comprehensive empirical research to uncover the full extent of this problem of legal invisibility within Australian Indigenous communities.

The inability to obtain the basic identity documentation that a birth certificate represents, stems from two principle causes, namely, that the birth was never registered, or that the birth was registered but for a variety of reasons the person is unable to now acquire a copy of his/her birth certificate (Gargett et al 2010; Gerber 2009a). This inability to obtain primary evidence of identification impacts on the daily lives of the legally invisible, as it 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/or collecting social welfare benefits (Gargett et al 2010; Gerber 2009a; Gerber 2009b; Orenstein 2008; Orenstein 2009).

This article analyses the potential of international human rights law to resolve this problem of legal invisibility. Part II reflects on the importance of birth registration which signifies a person's legal beginning and the start of their relationship with the state, and examines the administrative systems within Australia for establishing primary identification through the registration of a birth and the subsequent issue of a birth certificate. Whilst each of the six states and two territories within Australia has its own legislative and policy regimes relating to birth registration, they are all broadly similar and the authors have selected just one jurisdiction (the state of 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.

Part III analyses the relevant international human rights law. Whilst the right to birth registration is well established in 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. The impact of the Declaration of the Rights of Indigenous People (the Declaration) is also considered. Although the Declaration is non-binding, it does establish 'best practice' standards for legislation and policy that impacts on Indigenous people. Focus will be confined to these instruments. It is noted that the focus of the International Convention on the Elimination of all forms of Racial Discrimination (CERD) is predominantly on non-discrimination standards in general, as such there is little direct provision that addresses birth registration specifically. As this article deals with non-discrimination in the context of the ICCPR, it can be assumed that similar standards apply under CERD, and these authors suggest that the ICCPR offers a wider variety of applicable rights protection (for example see Committee on the Elimination of Racial Discrimination 2003, at 8).

In Part IV, 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 that there is an urgent need for legislative protection within

Australia of the rights set out in international human rights treaties, to which Australia is a party, such as the ICCPR. It is suggested that there is currently insufficient protection of human rights within Australia, and this exposes the Government to criticism that it is Janus faced – on the one hand it presents itself to the international community as a strong supporter of human rights, and is a party to all the major human rights treaties, yet domestically, it has taken very few steps to give effect to these rights (Charlesworth 2002). 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 extent to which the problems 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, are analysed in this section. Although a treaty committee's comments are non-binding, they do have the potential to generate political pressure for reform.

Finally, this paper makes preliminary conclusions as to the extent of Australia's compliance with international human rights law regarding Indigenous peoples' access to birth certificates, and emphasises the urgent need for further research into this issue to determine the exact nature and extent of the problem across Australia, and indeed, in other countries. Governments are unlikely to reform their birth registration practices without strong empirical data indicating a need for change.

Birth registration and birth certificates

Legal birth

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 at 7).

Consequently, 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 has a dual impact; at the individual level it signifies the legal birth of a person, while at the administrative level, it provides invaluable demographic data, essential for government planning and social policy development (United Nations Children's Fund 2002). This data is particularly useful in the health arena (Setel et al 2007). In this regard, non-registration operates to make a person doubly invisible, at an individual level the person is legally invisible, and from a broader social policy perspective their existence remains hidden. If the problem of non-birth registration is widespread, it means that governments may be making decisions about the building of new infrastructure, such as hospitals and schools, based on erroneous assumptions regarding the population size in a particular region. Furthermore, attempts to address Indigenous disadvantage through benchmarking are likely to be flawed. For example, the Council of Australian Governments (COAG) Close the Gap Campaign,¹ includes a goal 'to halve the gap in mortality rates for Indigenous children under five within a decade' (COAG 2008). How can the Government measure whether mortality rates for Indigenous children have been halved, if it does not have accurate data regarding Indigenous births? It is outside scope of this article to pay this issue due regard, however it does signal the urgent need for more research into the impact of non-registration of Indigenous births on Government policies and planning initiatives.

¹ The Closing the Gap Campaign is official policy of the Australian Labour Party who form the current Government of the Commonwealth of Australia (www.alp.org.au/policy/).

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, at 2). In all Australian states and territories, obtaining a birth certificate involves a two-step process, namely birth registration and then a subsequent application for a certificate and the payment of a prescribed fee (Gerber 2009a; Gerber 2009b). There is anecdotal evidence to suggest that some Indigenous Australians are completing only the first step in the two-step process. While this means governments are getting accurate raw data on birth numbers, it does not help with the legal invisibility experienced by individuals who later in life cannot produce a copy of their birth certificate.

Legislative and policy regime

Each of Australia's state 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); Births, Deaths and Marriages Registration Act 1999 (Tas). Each of these administrative systems is broadly similar. To avoid repetition, the authors focus on only the legislative and policy regime of the state of Victoria as a representative case study. Victoria is the second most populace state in Australia² and most of the currently available data on legal invisibility in Indigenous communities comes from that jurisdiction.

The Victorian Registrar of Births Deaths and Marriages (BDM) was established in 1853, and 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). It 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', therefore it creates the administrative regime to facilitate registration of births (BDM Act s 1). When a child is born the responsible person must give notice of the birth to the Registrar within 21 days (BDM Act s 12). Who is a responsible person, depends on where the child is born; if born in a hospital, or brought to a hospital within 24 hours of the birth, it is the Chief Executive Officer of the hospital, if otherwise it is the doctor or midwife who was present at the birth. Finally, there is a catch all provision, that if no doctor or midwife was present, a responsible person is any other person in attendance at the birth (BDM Act s 12(6)). Notification of a birth is not the same as registration of a birth. Nor does it automatically trigger registration. A birth registration statement must be subsequently 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 AUD\$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 also 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

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

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 seldom exercised when it comes to requests from Indigenous people.

A person may apply for a copy of their birth certificate at a later date, 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 ID requirements that appear to be one of the main obstacles to Indigenous people overcoming their legal invisibility. BDM Act s 47 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. For the proof identity policy for a birth certificate application (see Victorian Registry of Births Deaths and Marriages, Application for a Birth Certificate).

Scale of the Problem

It is axiomatic that statistics on birth registration remain approximations only. UNICEF estimates that 51 million children born in 2006 have not had their births registered, it is estimated 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-Governmental Organisations (NGOs) like Plan International have undertaken programs to address this deficiency (Plan International 2009). Statistics reveal that within these non-registration 'hot spots', significant disparities exist between urban and regional/remote populations, and between ethnic majority and minority populations. There is also a strong correlation between low socio-economic 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 states, such as Australia, develop programs designed to address the problems being 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 identified it as a significant problem (CRC 2009 at 41). Given that Indigenous people are one of the most disadvantaged populations in the world, it is not surprising, that worldwide, Indigenous people are over-represented in un-registered births.

While non-registration of births is often not recognised as a problem in the developed world, 2% of births in these nations are unregistered (United Nations Children's Fund 2007). This 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, as although it was an issue in the era following the Second World War, it was irrelevant in Victoria in the modern era (Human Rights Consultation Committee 2005, at 45). Because developed countries, such as Australia, have 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 at 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'. Until recently, the birth registration problems being experienced by Indigenous Australians have been hidden. Exposing the problem is the first step. and implementation of the most appropriate solution(s).

³ At the time of writing was AUD\$26.60 (See Victorian Registry of Births Deaths and Marriages, Fees and Turnaround).

Unfortunately, Todres' fears appear to ring true in Australia. In 2008 2.5% of all births in Victoria were not registered (Victorian Registry of Birth Deaths and Marriages 2009). This equates to 1,841 children who through non-registration are invisible to the authorities. This figure is based on the difference between birth notifications received, and births registered. Therefore it is likely that this is an under-representation of non-registered births, since it does not include births that were neither notified nor registered, which may include, for example, home births. Initial evidence suggests the majority of those 2.5% of unregistered births may be Indigenous, since the majority of the unregistered births come from geographical regions with high Indigenous populations, for example Shepparton, Traralgon West and Mildura (Gerber 2009a, at 159). There is anecdotal evidence to support this thesis. The recent Aboriginal Driver Education Project 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, driving of unroadworthy vehicles, and a general lack of education and training about road safety in Indigenous communities (Orenstein 2009). In the program there were 120 Indigenous participants, of which half did not have a birth certificate and one in six had not had their birth registered. As a consequence 50% of the participants were unable to obtain a driver's licence, despite being able to drive, as a direct result of not being able to satisfy the identity requirements needed for a licence. This all stemmed from the absence of a birth certificate (Orenstein 2009).

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

There is also anecdotal evidence that Indigenous Victorians are experiencing difficulties obtaining a copy of their birth certificate, even if their birth was registered (Orenstein 2008; Orenstein 2009). The BDM ran a series of Aboriginal Community Information Session in June and July 2009 in 16 regional areas within Victoria (Gerber 2009a). The fact that 312 birth certificates were issued to Indigenous Victorians at these sessions give an indication of the scale of the problem.⁴ Whilst this campaign was a welcome initiative, and an acknowledgement by the Registrar of Births Deaths and Marriages of the problem, the campaign was fundamentally flawed. It was conducted without any significant input from the Indigenous communities or elders. The failure to effectively consult with Indigenous peoples is at odds with best practice human rights approach to community problems. 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. Further, there is no indication that these sessions will translate into a coordinated ongoing campaign to address these issues (Gerber 2009a).

Causes of the 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 low priority afforded to birth registration. These contributing factors could, in part, be addressed by a

⁴ Information provided by Joel Orenstein (29 Sept. 2009) (Copy of email on file with authors).

targeted and comprehensive education and awareness program (Garget et al 2010; Gerber 2009a; Gerber 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 assimilation of Indigenous people into mainstream Australian population. In 2008, in recognition of the huge, and ongoing, harm caused by these policies, the Australian Prime Minister, Kevin Rudd (House of Representatives 2008) issued an apology to the members of the Stolen Generation on behalf of the Australian Parliament and the Australian people. It is suggested that 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 can be defined as 'trauma that is multigenerational and cumulative over time; it extends beyond the life span' (Cox 2008 at 3). Thus, any research into the causes of legal invisibility should utilize a human rights' based approach that seeks the active input and participation of the Indigenous communities who are affected by legal invisibility. It is only through such an approach that the underlying causes of legal invisibility can be identified, thereby creating a solid platform from which to begin addressing the problem.

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 namely, refusal to waive fees, 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 Registrar has the power to remit the fee, she rarely exercises this discretion (Orenstein 2008). The current proof of identity requirements also operate as a significant barrier to access. Many of the requisite forms of identification, for example 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 which can only be obtained with a birth certificate (Gerber 2009b). The Registrar does not accept forms of identification most readily available to Indigenous people, for example, proof of Aboriginality documents, this constitutes a signed document bearing the seal of an Aboriginal organisation (Orenstein 2009). Furthermore, at least one of the documents must have a current address on it, and this can be problematic for those experiences homelessness or who are transitory (Gerber 2009a; Gerber 2009b).

The only office of the BDM is located in the state capital of Melbourne. It is not practicable for people living in rural and regional Victoria to travel to the capital to obtain a birth certificate. It is therefore likely that many Indigenous people seeking a copy of their birth certificate will 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 as non-Indigenous people to be imprisoned, and Indigenous juveniles are 28 times

more likely to be detained than non-Indigenous juveniles (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 at 159). There does not seem to be a plausible reason why 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 than police officers.

Relevant International Law

Having identified the difficulties experienced by Indigenous Australians when it comes to birth registration and birth certificates, it is important to examine the extent to which international human rights law provides any guidance on how to overcome these problems. This section while focusing primarily on the rights contained within the ICCPR, also refers to other human rights instruments where relevant, including, the *Convention on the Rights of the Child* (CROC). The authors draw upon the jurisprudence of the treaty bodies responsible for the implementation of these instruments, namely the United Nations' Human Rights Committee (HRC), and the CRC to provide insight into the content and scope of the relevant rights under consideration. The impact of the DRIP 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. It is enshrined in article 24(2) of the ICCPR and article 7 of CROC. Although the ICCPR provision is more succinct than that in the CROC, the *travaux préparatoires* of CROC indicate that Article 7 is based on Article 24(2) of the ICCPR (Detrick 1999). It is also significant that although CROC was drafted over twenty years after the ICCPR, the wording of both provisions is essentially the same. In these circumstances, the jurisprudence from both the HRC and the CRC is useful for comprehensively identifying the content of the right.

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. In a, the HRC (1989a) published a General Comment relating to the content of Article 24. 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 Article 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 at 7).

This clearly outlines the predominate purpose of the right, which is to operate as a safeguard to prevent the maltreatment of children, including trafficking. By stating that article 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 (article 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 article 7, and thus the treaty body similarly fails 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 at 41). Whilst 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 State 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 at 35-36). Both of these CRC General Comments make suggestions regarding how States might increase their number of birth registrations including, waiving fees and establishing mobile registration units. It is suggested that implementing these types of initiatives in Victorian could have a significant impact on non-registration. 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* 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 being raised in the home of a nurse who claimed to have had the care of her 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 the 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 ten years, and had still not been finalised when the grandmother referred the matter to the HRC (*Monaco v Argentina*, 1985). The HRC found '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' (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 article 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 article 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 article 24(2) of the ICCPR.

As noted above, a shortcoming of the text of the two treaty provisions, and the General Comments published by the HRC and 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 at 21).

The CRC has repeated these points in other Concluding Observations to indicate that a birth certificate is implicit within the right, and to encourage States to implement regimes to address obstacles that impede individuals accessing a birth certificate (see for example CRC 2001 at 31; CRC 2002a at 28; CRC 2002b at 34). Although reference to the right to birth registration has infrequently featured 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 their Concluding Observations (HRC 2009 at 27; HRC 2008a at 28; HRC 2008b at 8; HRC 2008c at 19; HRC 2007 at 17; HRC 2006a at 18; HRC 2006b at 22; HRC 2006c at 25; HRC 2006d at 22; HRC 2005 at 22; HRC 2003a at 17; HRC 1998a at 18; HRC 1998b at 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 at 8; HRC 2006b at 22; HRC 2005 at 22). In light of the HRC's decision in *Monaco v Argentina*, and the Concluding Observations made by 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 Article 24(2) 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 implemented in Indigenous communities in practice. 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 Article 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 like Mr Hayes have to go through (Gerber 2009a).

Finally, it should be noted that the current attention paid to the right to birth registration and a birth certificate, by Australia, 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 at chap 6, 2.1). The HRC requests that State Party Reports:

[D]eal specifically with every article in Parts I, II and III of the Covenant [therefore including Article 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 at D2.1).

Therefore, State Parties must outline the legal *and* practical implications of each enumerated right. The CRC General Guidelines for Periodic Reports specifically state that State 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 at 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 one prior the only reference to it is in relation to Australia's provision of aid to Bangladesh 'for the development of a sustainable birth registration system' in that country (Australia 2004 at 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; Australia 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 these two treaties. These omissions from the 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 no longer relevant, exposes 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 (1989a at 3) stated, in General Comment No. 17, that article 24(1) extends to the enjoyment of economic, social and cultural rights. This means that article 24(1) may be used to address issues such as a child being denied access to education, or refused vaccinations against diseases, because they cannot produce a birth certificate (Gerber 2009b; Nowak 2005). Education and health are 'measures of protection' required by children by virtue of their status as children. Applying the HRC's rationale in this General Comment, it becomes clear that by not facilitating the provision of a birth certificate to a child, on the grounds that the parents' cannot pay the required fee and/or satisfy the proof of identification requirements, coupled with a denial of access to school or immunisations in the absence of a birth certificate, may constitute a breach of Australia's obligation to provide appropriate 'measures of protection' for children. If a child is required to produce a birth certificate to access health or education services, then, in order to comply with Article 24(1) of the ICCPR, the state must either waive the requirement for production of a birth certificate, or ensure 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 (2005 at 559-560) 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 new born child is legally recognized'. Nowak's argument is supported by the HRC's (1989a) General Comment No. 17, 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 at 369).

Thus it can be seen that the right in Article 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 Article 16, is highlighted by the fact that this provision is one of only seven articles in the ICCPR which is non-derogable (article 4(2)). That is, this right is absolute, and there are no circumstances when a State Party is permitted to limit or refuse to recognise and respect this right (Human Rights Law Resource Centre 2006 at chap 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 et al 2004). It has been argued that it operates to merely to inform other rights (Robertson 1972; Nowak 2005). However, notwithstanding the absence of jurisprudence, Nowak (2005) asserts that it is nevertheless an autonomous right. This is supported by the HRC's (2000 at 19) General Comment No. 28 relating to equality rights between men and women, which provides, in relation to Article 16, that States must take measures to eradicate laws and policies that inhibit women from functioning as full legal persons. 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 at 373) suggests that "'civil death" without doubt represents the most severe form of violation of Article 16'. While 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 at 236).

Applying this rationale, there is a strong argument that a failure to legally recognize a person, because of a lack of birth registration and/or the inability to obtain a birth certificate, constitutes a violation of article 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 possible, that in Australia, the inflexible policies and practices of the BDM, constitute a violation of article 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 article 16 (Gargett et al 2010; Gerber 2009a; Joseph et al 2004).

Equality and Non-Discrimination

The ICCPR contains three main provisions on non-discrimination. Of most relevance to the issue under consideration here, are article 2(1) which prohibits discrimination in relation to the implementation of ICCPR rights, and article 26 which concerns equality before the law. Article 3 ensures the equal right for men and women to enjoy civil and political rights, it is not at play here. Nowak (2005 at 600) eloquently suggests the 'principle of equality and the prohibition of discrimination runs like a red thread throughout the *Covenant on Civil and Political Rights*'. 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 socio-economic factors, for example life expectancy, young child mortality, numeracy and literacy, unemployment, disability and chronic disease, poverty, imprisonment and homelessness (SCRGSP 2009).

Article 2(1) 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 et al 2010; Clayton and Tomlinson 2009; Pound and Evans 2008). Applying article 2(1) to the issue under consideration here, means that any discrimination in the implementation of the right to birth registration (article 24) is prohibited, and will constitute a violation of article 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 protection against discrimination as it confers a freestanding right prohibiting any discrimination before the law, not just in relation to the realization of ICCPR rights (HRC 1989b at 12). This is evidenced by the HRC's finding of only three violations of article 2(1) in individual compliant communications, whereas many more have been found in relation to article 26 (Nowak 2005 at 47). However, 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, for example, 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 articles 2(1) and 26 of the ICCPR and it is covered under the 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 at 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 (ECtHR) is informative as to what evidence is necessary to establish indirect discrimination. Whilst the ECtHR 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 ECtHR held that Roma children had been discriminated 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 ECtHR 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 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; Gerber 2009b). If the HRC adopts the ECtHR 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 in Australia in relation to birth registration. However, further

empirical data and research should be undertaken before a conclusive view can be reached (Gargett et al 2010).

Privacy

Article 17(1) of ICCPR states 'no one shall be subjected to arbitrary or unlawful interference with his privacy'. Nowak (2005) has argued the right to birth registration is closely connected to identity rights protected under privacy. The term privacy is contentious and, to date, the HRC has not attempted to establish a precise definition (Joseph et al 2004). In *Coeriel and Aurik v the Netherlands* (1994) the HRC decided that a person's surname is an important component of a person's identity and therefore came within the scope of article 17. The HRC made it clear that article 17(1) is broader than just the privacy of information, and encapsulates aspects integral to a person's dignity, autonomy and identity (at 10.2). The majority of the HRC stated, 'the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it into relationships with others or alone' (at 10.2).

In the same case, Committee Member, Mr Herndl who dissented on the application of the right, rather than its scope, suggested that 'Article 17 is one of the more enigmatic provisions of the Covenant. In particular the term privacy would seem to be open to interpretation. What does privacy really mean?' It is perhaps because the margins of privacy are not fully determined that it is often relied upon in the absence of other obvious alternatives. The case of *Hopu and Bessert v France* (1997) is a poignant example. In that case, the Indigenous authors of the communication objected to a hotel development on sacred ground in Tahiti. Jurisprudentially, such a complaint would ordinarily engage article 27 of the ICCPR protecting minorities' rights to culture. However, France, against whom the complaint was made, had a reservation against this right, preventing reliance upon it. The HRC found that France had violated the privacy rights of the authors because the proposed hotel development directly bordered a sacred burial ground. Although this line of reasoning has not been adopted subsequently by the HRC, or elsewhere, it illustrates the flexible utility of the right.

The right to privacy has an internal limitation; the interference must be 'unlawful' or 'arbitrary'. In this regard, lawful interference is one that is envisaged by the law (HRC 2003b at 3). The law must also be precise and sufficiently specific to provide a legal safeguard against arbitrary exercise of a broad discretionary power (*Pinkney v Canada*, 1985; HRC 2003b at 8; Joseph et al 2004). The threshold of arbitrariness, supplements the requirement of lawfulness, as otherwise any specific legislative interference with privacy would be construed as legitimate (Joseph et al 2004). To not be an arbitrary interference it must be in accordance with the provisions, aims and objectives of the ICCPR, as well as be reasonable and proportionate (HRC 2003b at 4; *Toonen v Australia*, 1994 at 8.3-8.5). It is suggested that although the current birth registration regimes operating within Australia, are outlined under law, they do not, in express language, outline a justification for non-registration of births, or the failure to issue of birth certificates, to Indigenous Australians. Therefore they are unlikely to meet the lawfulness requirements. Furthermore, it is likely that the interference caused by the current Australian systems will be deemed arbitrary as they operate contrary to a number of ICCPR provisions including the right to birth registration (article 24) and recognition before the law (article 16).

Other than the dissenting opinion of Mr Herndl, the HRC has developed minimal jurisprudence on the right to privacy and the protection of identity (Joseph et al 2004). However, importantly in *Monaco v Argentina*, the case discussed above under the right to birth registration, the HRC held *inter alia* that

the falsification of a birth certificate is a violation of the right to privacy (at 10.4). In contrast, the extensive jurisprudence emanating from the ECtHR may provide some guidance for the HRC on the operation of privacy rights (Gargett et al 2010; Human Rights Law Resource Centre, 2006). For example, in *Goodwin v United Kingdom* (2002) the ECtHR found that there was a positive obligation to create an administrative or legal regime to facilitate the alteration of a person's birth certificate in recognition of a transsexual's post-operative gender status. If there is an obligation to change the gender on the birth certificate, then it is axiomatic that there is a positive obligation to have the birth certificate. Logically this would also entail a positive duty to have the birth registered, as without birth registration no certificate can be issued. This approach appears consistent with that adopted by HRC in *Monaco v Argentina*, and therefore, it can be argued that the preferred reading of the scope of the right to privacy in article 17 of the ICCPR includes a right to a birth certificate. On this interpretation, Australia is potentially in violation of the right to privacy by not facilitating ready access to a birth certificate by Indigenous people.

Declaration of 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; it 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 to a birth certificate. However, there are provisions that do provide some guidance. For example, article 21(1) makes reference to Indigenous peoples 'right, 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'. As already noted, being able to produce a birth certificate can be a prerequisite to a child enrolling in school and accessing immunizations. Therefore an inability to obtain a birth certificate may constitute a breach of article 21 since it potentially impedes the improvement of Indigenous peoples' economic and social conditions through education and health.

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.' Whilst 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 some parts of it may capture customary international practice or recognition of such practice, and therefore constitute international law (Anaya

2008 at 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 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, the responsible Commonwealth Minister, the Hon Jenny Macklin MP (2009), publicly stated, in April 2009, 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 might appear to free the Australian state and territory governments from the obligation of its full implementation, but those governments, and their agencies, such as the BDM Registrar, are obliged to meet the spirit and the letter of the Declaration.

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 the Declaration may offer regarding Indigenous Australian's difficulties establishing their identity as discussed in this article. However, overall the Declaration provides a useful lens through which to examine all human rights issues involving Indigenous peoples.

Impact of International Law in Australia

Australia is a dualist state, rather than a monist one. This means, that unlike 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 article 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) 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

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 and Ors v Belize*, 2007). The CERD Committee recommended the use of the Declaration to inform the content of the USA's obligations under that Convention (CERD Committee 2008 at 29).

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 (formally 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 State of South Australia* (1999 at 209) where a judge stated, 'I am 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, the state of Victoria and the Australian Capital Territory (ACT) 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 The Queen*, 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 ACT may not assist Indigenous Australians looking for judicial assistance in obtaining a birth certificate. This is for two reasons. First, both the Victorian and ACT Acts replicate only some of the rights in the ICCPR, and article 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. For example, Charter of Human Rights and Responsibilities Act 2006 (Vic) s 13 relates to privacy and s 8(1) to recognition before the law (Gargett et al 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). That is, 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, they 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/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 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 they find 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*, 2003; *Bakhtiyari v*

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

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

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

The story of Bradley Hayes revealed the latest incarnation of the recurring rhyme of Indigenous legal invisibility in Australia. Its current guise is the inability to access fundamental proof of identity documentation as a consequence of the fact a birth was never registered and/or the inability to obtain a birth certificate. This legal invisibility impedes on the enjoyment of numerous rights of citizenship, including obtaining a passport, a drivers licence, a tax file number and perhaps most importantly of all the dignity attached with being recognised as a legal personality. Under international human rights law, Australia has an obligation to not only provide a legal mechanism that facilitates birth registration, but also to ensure it is implemented in practice. As a consequence of the non-registration of Indigenous Victorians' births, Australia is in breach of Article 24(2) of the ICCPR, Article 7 of the CRC and Article 21 of DRIP. The failure to obtain universal birth registration may also constitute a violation of a number of other rights contained within 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 black letter protection of a right to a birth certificate under any international human rights convention, recent Concluding Observations from the HRC and 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 relating to birth registration. However, even in the absence of such authoritative enunciations, there is enough soft law to indicate that the right a birth certificate is implicitly protected under a number of ICCPR articles. Therefore, Australia appears in breach of its international law obligations for both birth registration and birth certificates in relation to Indigenous people. However, for the reasons set about above, this may not give rise to any cause of action that can be litigated in an Australian court.

One recurring theme that the exact nature, extent and causes of the problems relating to proof of identity documentation in Indigenous communities in Australia is under-researched. It is currently very difficult to understand the scale of the problem and design effective solutions to redress it. There is also a need for an examination of jurisdictions with similar legal and political cultures and Indigenous populations, like the USA and Canada. It is important to ascertain whether Indigenous people in the United States and Canada are experiencing problems with birth registration and certificates similar to the those recently exposed in Australia. This comparative research is necessary because it might serve to uncover a hidden violation of human rights, and/or provide useful insight into how to overcome the problem in Australia.

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).

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