



# Victorian Aboriginal Legal Service Co-operative Ltd.

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**Presentation by Frank Guivarra at Castan Centre for Human Rights Law Symposium on Indigenous Birth Registration and Birth Certificates, titled *Potential Legal Solutions* - 1<sup>st</sup> December 2009**

## INTRODUCTION

Proof of identity is problematic for the Aboriginal and Torres Strait Islander community. I get to hear about the problems at the Victorian Aboriginal Legal Service Co-operative Limited. I have been asked to focus on potential legal solutions to these problems. I will mention domestic laws and international laws.

Without an adequate birth registration system, Aboriginal and Torres Strait Islander peoples are in effect refugees in their own country without proof of who they are. This contributes to an identity crisis within the Aboriginal and Torres Strait Islander community. The current birth registration system is unacceptable as Aboriginal and Torres Strait Islander peoples should not be denied basic rights of citizenship. For Aboriginal and Torres Strait Islander peoples exclusion from citizenship is a recent memory. Some people in the Aboriginal and Torres Strait Islander community attempt to make a point about this by saying that they were only recognized as being alive after the 1967 referendum when some problems with the Constitution were fixed.

## BACKGROUND

Others who have spoken here today have provided a background to problems with the birth registration system. I would like to add to the list of things that may have contributed to 2.5% of births not being registered in Victoria in 2008.<sup>1</sup> Some causes that have not been discussed or causes that I wish to expand upon are those some Aboriginal and Torres Strait Islander peoples:

- Fear authority to the extent they do not want their details to be on any formal systems. For instance, for similar reasons some Aboriginal and Torres Strait Islander peoples are not registered on the electoral roll.
- Sense that it is too difficult to trace their birth certificates, especially for those who were affected by policies that lead to Stolen Generations.
- Prefer to have nothing to do with Victoria Police, even though if they live in the country the only way to get a birth certificate by post is to have a Police Officer formally certify their identity documents.<sup>2</sup>
- Fear being reported to Child Protection for not having registered a child's birth yet.

<sup>1</sup>Gerber Paula 'Making Indigenous Australians 'disappear': Problems arising from our birth registration systems, *Alternative Law Journal* 34:3 (2009), page 158.

<sup>2</sup>Orenstein Joel 'The Difficulties faced by Aboriginal Victorians in obtaining identification' *Indigenous Law Bulletin*, October 2008 Volume 7, Issue 8, page 14.

- Experience hidden costs in making an application for a birth certificate that are above the fee (ie: taking time off work and travel).
- Are of low socio-economic status and the documentation required to prove identity weights forms of identity that are easier for people of higher socio-economic status to provide. For instance, a homeless person does not have proof of residential address, or person living in poverty may not have a passport.

## **LEGAL SOLUTIONS**

The Aboriginal and Torres Strait Islander community have a love/ hate relationship with the legal system. The legal system can be described as alienating to Aboriginal and Torres Strait Islander peoples. At the same time, some Aboriginal and Torres Strait Islander peoples recognise that to fix problems in their lives, they need to engage with it (ie: play the white man's game).

VALS argues in line with the work of organisers of this symposium that problems with identity faced by the Aboriginal and Torres Strait Islander community breach human rights law at domestic and international levels. International law mandates that everyone has the right to have their birth registered.<sup>3</sup> Birth registration is a fundamental human right.

I will discuss how current law could be used to uphold human rights and how changes to law might achieve this also. Much of the content below is sourced from the work of Paula Gerber and Joel Orenstein.

### **Convention on the Rights of the Child - Article 7**

A legal solution could be to argue that Victoria's current birth registration system is in breach of Article 7 of the CROC. The Convention states:

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

According to Gerber, Victoria is meeting the first limb of this requirement in having legislation requiring birth registration within 60 days of birth.<sup>4</sup> However, for 2.5% of the population, this legislation is not working effectively and this raises the question is Australia is breach of Article 7 of the CROC because the legislative mandate is not exercised in practice consistently.<sup>5</sup>

The problem of the gap between legislative provision and practice appears to be that it is assumed in Australia that there is a level playing field when it comes to birth registration and institutional discrimination at a systemic level does not occur. Instead, such problems are seen to exist overseas in developing countries. Evidence of this is in the fact that the Australian Government's report is silent on how well it is implementing the CROC in terms of steps taken to prevent the non-registration of children immediately after birth in view of possible social or

<sup>3</sup>Gerber Paula (2009) above no 1, page 158.

<sup>4</sup>Gerber Paula (2009) above no 1, page 158.

<sup>5</sup> Gerber Paula 'making Indigenous Australians 'disappear': Problems arising from our birth registration systems, *Alternative Law Journal* 34:3 (2009), page 158.

cultural obstacles. Instead, all that is mentioned is that Australia supports attempts to this end in Bangladesh.<sup>6</sup> This is despite the fact that problems for Indigenous populations with the birth registration system were seen to be so significant to merit a specific General Comment on Indigenous Children and their Rights under the CROC.<sup>7</sup>

The General Comment states: “*State parties should take special measures in order to ensure that indigenous children, including those living in remote areas, are duly registered. Such special measures, to be agreed following consultations with the communities concerned, may include mobile units, periodic birth registration campaigns or the designation of birth registration offices within indigenous communities to ensure accessibility.*”<sup>8</sup>

Evidence that problems with the birth registration system are assumed to occur overseas is the fact that the Charter of Human Rights and Responsibilities (Vic) does not include Article 24(2) of the International Covenant on Civil and Political Rights [ICCPR] which is a similar and more succinct description of the rights around identity in the CROC.<sup>9</sup> The reason given for this was that in Australia “issues of birth registration are not less relevant now than Post-World War 11 context”. VALS is disappointed by this as the Charter is supposed to protect civil and political rights.<sup>10</sup> The Charter is scheduled to be reviewed next year and VALS will be arguing this point. VALS is keenly watching the National arena around whether Australia gets a Bill of Rights and what it contains. A Bill may provide means to complain about the birth registration system.

#### **Article 24(4) International Covenant on Civil and Political Rights**

A legal solution could be to argue that Victoria’s current birth registration system is in breach of Article 24(2) of the ICCPR. The Covenant states: “*Every child shall be registered immediately after birth and shall have a name.*”<sup>11</sup> Delays in prompt effective action to provide identity arguably breach this section and there is international case law on this. In the case of *Monaco v Argentina* where it was found that proceedings, relating to custody and identity of an orphaned child were not finalised after ten years, violated Article 24(2) “which is designed to promote recognition of the child’s legal personality”.<sup>12</sup>

#### **Section 38 Charter of Human Rights and Responsibilities Act 2006**

A legal solution could be to argue that Victoria’s current birth registration system is in breach of section 38 of the Charter of Human Rights and Responsibilities. This section requires the Registrar of Births, Deaths and Marriages, as a Public Authority, to act in a way that is compatible with human rights.<sup>13</sup> It states: “*it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right*”.<sup>14</sup>

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<sup>6</sup>Gerber Paula (2009) above no 1, page 160.

<sup>7</sup>Gerber Paula (2009) above no 1, page 160.

<sup>8</sup>Gerber Paula (2009) above no 1, page 161.

<sup>9</sup>Gerber Paula (2009) above no 1, page 161

<sup>10</sup>Gerber Paula (2009) above no 1, page 162.

<sup>11</sup>Gerber Paula (2009) above no 1, page 161.

<sup>12</sup>Communication No 400/1990, 3 April 1995, CCPR/C/53/D/400/1990, paragraph 10.5 as cited in Gerber Paula (2009) above no 1, page 161.

<sup>13</sup>Gerber Paula (2009) above no 1, page 162.

<sup>14</sup>Charter of Human Rights and Responsibilities Act (Vic) 2006

## **Section 8(1) (Recognition and equality before the law) - Charter of Human Rights and Responsibilities Act 2006**

A legal solution could be to argue that Victoria's current birth registration system is in breach of section 8(1) of the Charter. Whilst it does not contain an express right to birth registration, it is relevant here as it states: *'every person has the right to recognition as a person before the law'*. This means everyone is entitled to protection of the legal system or to exercise their legally recognised rights. VALS agrees with Gerber that there should be a test case using this section as there is limited jurisprudence on the matter, partly because the Charter is relatively new.<sup>15</sup>

In her article, Gerber quotes Smith who says: *"The lack of birth registration and/or a birth certificate that some indigenous Australians face arguably amounts to civil death, and a violation of the fundamental right to be recognized as a person before the law."*<sup>16</sup>

Gerber concludes that arguably the Registrar of Births has breached section 8(1) of the Charter by failing to facilitate the legal recognition of all persons in Victoria – either by failure to register all births, or by failing to facilitate the provision of a birth certificate.<sup>17</sup> In order to argue that a breach of the Charter has occurred, there needs to be grounds, other than a breach of section 8(1), for a complaint. It is not possible to initiate a complaint purely on the basis of the Charter.

## **Article 17 - Charter of Human Rights and Responsibilities Act**

A legal solution could be to argue that Victoria's current birth registration system is in breach of Article 17 of the Charter. It states:

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.<sup>18</sup>

Arguably, people are not able to enjoy protections because their births have not been registered.<sup>19</sup>

## **Complaint regarding Systemic Issues**

It is possible to make complaints about systemic discrimination to the Victorian Equal Opportunity and Human Rights Commission which has a reporting role in relation to the Charter.

Such complaints can also be made to the **Special Rapporteur on the Situation of Human Rights and Fundamental of Indigenous Peoples** at an international level. This could be an avenue for redress by the Aboriginal and Torres Strait Islander community.

## **Births, Deaths and Marriages Registration Act 1996 (Vic)**

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<sup>15</sup>Gerber Paula (2009) above no 1, page 162.

<sup>16</sup> Rhonda KM Smith *Textbook on International Human Rights* (3<sup>rd</sup> ed, 2007) 236.

<sup>17</sup>Gerber Paula (2009) above no 1, page 162.

<sup>18</sup>Gerber Paula (2009) above no 1,page 167.

<sup>19</sup> Gerber Paula (2009) above no 1, page 167.

According to PLAN, a children's organisation working with communities in developing countries to achieve universal birth registration, there are numerous strategies to address issues with the birth registration system. One such strategy is to revise laws/regulations “with a view toward simplifying the process of birth registration and removing economic barriers”.<sup>20</sup> In the Victorian context, this means reviewing the Births, Deaths and Marriages Registration Act 1996 (Vic).

VALS argues that the Births, Deaths and Marriages Registration Act 1996 (Vic) could be simplified by:

- Making birth registration/obtaining a birth certificate one step process, not a two process.
- Not requiring a fee for birth certificates.
- Reducing the requirements for identification documentation. There is a precedent for this in relation to the recent bushfires.<sup>21</sup>
- Facilitating registration rather than penalizing non-registration
- Following the confirmation of Aboriginality process (signed document bearing the seal of an Aboriginal organisation).<sup>22</sup>
- Decentralising registration of births.

## **NEED FOR SOLUTIONS/CONCLUSION**

In closing, I would like to say that there is need for legal and non-legal solutions for flaws in the birth registration system. There are good programs for the Aboriginal and Torres Strait Islander community that facilitate birth registration, such as ‘Welcome Baby to Country’.

The unspoken point about legal options at both a domestic and international level is that the legal solutions are not possible without adequate legal aid funding for Aboriginal and Torres Strait Islander peoples. We need to seriously consider the legal options so that Aboriginal and Torres Strait Islander peoples do not find themselves in a situation where an abusive partner, whose name the electricity account is in, has the electricity cut off when he is kicked out of the house, leaving the remaining partner in the house, without a birth certificate, to have the electricity reconnected. We want to see the solution of Aboriginal and Torres Strait Islander peoples getting a birth certificate so that they can feel like ‘somebody now’.

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<sup>20</sup> Jonathan Todres “Birth registration: an essential first step toward ensuring the rights of all children” (2003) 10 *Human Rights brief* 32 as in Gerber Paul ‘ Making Visible the Problem of Invisibility’ Law Institute Journal, October 2009, page 54.

<sup>21</sup>Gerber Paula (2009) above no 1, page 55.

<sup>22</sup> Orenstein Joel (2008) above no 2, page 16.