

# MAKING VISIBLE THE PARADOX OF INVISIBILITY

Difficulties experienced by Indigenous people in proving their identity or obtaining a birth certificate may in part be remedied through using the *Victorian Charter of Human Rights and Responsibilities*. **By Dr Paula Gerber**

“Who as a child did not sometimes dream of the possibilities of invisibility? For that matter, who as an adult has not also sometimes wished it upon him or herself?”<sup>1</sup>

In his book *The Invisible Man*, HG Wells weaves an intriguing tale of a scientist who has made himself invisible. Wells, in common with many children and adults, was fascinated with the idea of invisibility. Unfortunately, for many Indigenous people born in Victoria, being invisible is a day-to-day occurrence and, just like the protagonist in *The Invisible Man*, they find the reality of invisibility far less enjoyable than the fantasy. The invisibility they face is not physical invisibility, but rather legal invisibility, stemming from an inability to establish their identity.

The invisibility that Indigenous people suffer was recently highlighted when participants in the Gippsland East Aboriginal

Driver Education Project could not get a driver's licence – not because they could not pass the test, or safely drive a car, but rather because they could not produce the proof of identity documentation required by VicRoads as a condition precedent to obtaining a driver's licence.<sup>2</sup> Sixty of the participants did not have a birth certificate, and the births of 10 of these had never been registered.

It is well known that there is significant under-registration of births in developing countries; indeed, in sub-Saharan Africa more than 70 per cent of births are not registered.<sup>3</sup> What is less well known is the problem of under-registration of Indigenous births in our own country. This is evidenced by the fact that the Australian Institute of Health and Welfare recorded 9900 births to Indigenous mothers in 2005, yet only 8600 such births were registered.<sup>4</sup> This article examines how the birth registration system in Victoria contributes to the invisibility of Indigenous

people, and considers whether the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) can be used to redress this problem.

## The problem

Birth registration can be described as a “gateway” event, conferring on a person the first official recognition by the state of their existence, and commencing a relationship between the individual and the state that continues for the life of that person. In Victoria, the process of birth registration and the issuing of birth certificates is administered by the Registry of Births, Deaths and Marriages (BDM) by virtue of the Registrar's powers under the *Births, Deaths and Marriages Registration Act 1996* (Vic). It essentially entails a two-step process:

- submitting a request that a birth be registered; and
- ordering a copy of the birth certificate and paying the fee.



Thus, a birth certificate is not *automatically* issued at the time of registration to the person registering the birth. A separate application form must be completed and a fee paid.<sup>5</sup>

To date, there has been no empirical research undertaken to assess the magnitude of the problem of non-registration of births of Indigenous children in Victoria. However, there is anecdotal evidence that it may be a significant problem. The Gippsland Community Legal Service has reported that many of their Indigenous clients, because they cannot produce a birth certificate, have experienced difficulties in obtaining a tax file number, registering to vote, opening a bank account, obtaining social security benefits, enrolling children in school, and/or getting a driver's licence.<sup>6</sup> Inquiries undertaken by the legal service revealed that this legal invisibility arises from either of two distinct causes:

- the birth was never registered; or
- the birth was registered but the parents did not seek a birth certificate at the time of registration, and now a certificate cannot be obtained, because the person seeking the certificate either cannot afford the fee or is unable to produce the proof of identity

documentation required by the Registrar of BDM.

### Birth not registered

In Victoria last year, approximately 2.5 per cent of all births went unregistered. It is believed that the majority of these were Indigenous. The research has not yet been undertaken to definitively explain these non-registrations, but initial investigations suggest they may be due to:

- lack of confidence in dealing with the authorities;
- marginalisation from mainstream services;
- lack of understanding of the requirements and benefits of birth registration;
- poor literacy levels; and
- low priority accorded to birth registration.<sup>7</sup>

Developing and delivering an education campaign designed to raise awareness of the advantages of birth registration, and taking steps to provide Indigenous communities with the skills they need to navigate the birth registration process, would help overcome these obstacles. Information sessions for Indigenous people were organised by the BDM in 13 rural and regional areas in May and June 2009.<sup>8</sup> It remains to be

seen whether this initiative will be successful in increasing the birth registrations of Indigenous children.

### Birth registered, but no certificate issued

Many Indigenous parents do not complete the second step in the birth registration process, i.e. they do not order a copy of the birth certificate of their child. This may be because they cannot afford to pay the fee, or they do not see the need for acquiring such a document. It appears that many Indigenous people only seek a copy of their birth certificate when they find they need to prove their legal identity, e.g. when they wish to get a driver's licence or open a bank account. This is when the problems arise.

The first problem an Indigenous person may encounter when seeking a copy of their birth certificate is that they do not know, or have incorrect information regarding, the details of their birth. It can be an extremely time-consuming and expensive exercise to try and locate a birth certificate when the person does not know the precise date of the birth or the name under which they were registered.

The waiver of fees for those suffering financial distress is a simple way to help overcome one of the obstacles that contributes to the legal invisibility of Indigenous people in this state.

The second obstacle they are likely to encounter is in satisfying the onerous proof of identity requirements mandated by the BDM. Those requirements currently involve producing three forms of identification from within prescribed classes of documents. Some of the documents that are acceptable forms of ID (for example a driver's licence) can only be obtained if the person already has a birth certificate, making the satisfaction of this requirement extremely difficult. Thus, a vicious circle is created whereby the Registrar will not provide the birth certificate unless the person seeking it can produce forms of ID that can only be acquired with a birth certificate!

Furthermore, if the person seeking a copy of their birth certificate cannot personally attend the BDM registry office – and the only Victorian one is in Melbourne, thereby discriminating against people in rural and regional Victoria – then the ID documents must be certified by a police officer. Given that police and Indigenous communities often have a tense relationship, this requirement poses yet another barrier to Indigenous people trying to get a copy of their birth certificate.

Even if an Indigenous person can satisfy the proof of ID requirements, they may not be able to afford to pay the prescribed fee. Although the Registrar has legislative power to waive fees,<sup>9</sup> this discretion is rarely exercised.<sup>10</sup> The power to waive fees is not widely publicised by the BDM, and as a result many people do not know that they can apply for a waiver. It has been noted that one strategy for increasing birth registrations is for governments to “revise applicable laws or regulations with a view toward simplifying the process of birth registration, [and] removing existing economic barriers (e.g. charges for birth certificates).”<sup>11</sup>

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### The solution?

One of the questions that needs to be asked is: do the policies and procedures of the BDM comply with the provisions of the Charter? By virtue of the Charter, the Registrar of BDMs

is a public authority (s4), and is therefore required to perform official duties in a way that is compatible with the human rights set out in that legislation (s38).

The intention of Parliament when enacting the Charter was that it give effect to the rights set out in the International Covenant on Civil and Political Rights (ICCPR).<sup>12</sup> However, not all the rights in the ICCPR have been included in the Charter. Specifically, Article 24(2) was not included in the Charter. This article provides that “every child shall be registered immediately after birth”. The Consultation Committee that drafted the Charter declared that this provision was deliberately left out, noting that:

“The Committee has not included the article 24 provisions concerning the right to birth registration and to a name. While these rights were more relevant in the post World War II context in which the ICCPR was drafted, they are less relevant for inclusion in a modern Victorian Charter.”<sup>13</sup>

This indicates that the committee was out of touch with the plight that many Indigenous people face when it comes to birth registration, with the Victorian Indigenous community being the ones that suffer for that mistake.

Section 44 of the Charter requires that:

- “(1) The Attorney-General must cause a review to be made of the first 4 years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2011.
- (2) A review under subsection (1) must include consideration as to whether (a) additional human rights should be included as human rights under this Charter, including but not limited to, rights under . . . the Convention on the Rights of the Child . . .”

As part of this review process the Attorney-General should consider including a section giving effect to Article 24(1) of the ICCPR, or alternatively giving effect to Article 7 of the Convention on the Rights of the Child, which is in similar terms. The incorporation of such a provision would be recognition that the right to birth registration and a birth certificate are still live issues for the Indigenous

community, and should therefore form part of the Charter.

Although the Charter fails to include an express right to birth registration and a birth certificate, other rights in the Charter may be useful tools in the battle to overcome this problem. For example, s8(1) states that “every person has the right to recognition as a person before the law”. This means that a person has a right not to be legally invisible. The inability to obtain a birth certificate means that a person is unable to enjoy all the rights of citizenship and is unable to be fully recognised as a person before the law. The Registrar of BDMs, by failing to facilitate the legal recognition of all persons born in Victoria, is arguably in breach of s8(1).<sup>14</sup>

Section 17 of the Charter may also be relevant. 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.”

There are many services that the state provides to children because they are needed by virtue of the fact that they are children. Education and health care are two examples that readily spring to mind. If children are unable to enrol in a school, or receive a medical service such as vaccination,<sup>15</sup> because they cannot prove their identity, this may amount to a breach of the right enunciated in s17.<sup>16</sup>

Thus the absence of an express right to birth registration in the Charter is not the end of the matter. The Registrar of BDMs may be breaching other rights in the Charter by not facilitating the birth registration of Indigenous children and/or the obtaining of their birth certificate.

### Conclusion

More research is required to identify the cause and extent of the problem of legal invisibility being experienced by many Indigenous Victorians. But what is clear, at this early stage of investigation, is that the legal invisibility that some Indigenous people, including children, are enduring constitutes a breach of their human rights that needs to be remedied sooner rather than later.

A good starting point would be for the Registrar of BDMs to adopt a more flexible approach in dealing with the Indigenous community – in terms of both fees and proof of ID requirements. The tragic bushfires earlier this year demonstrated that the Registrar is capable of such flexibility. The Registry developed a special application form to facilitate victims of the bushfires obtaining a copy of

their birth or marriage certificate. Applicants were required to provide only minimal information, and when it came to proof of ID, the form merely stated: "If you have any identification documents please complete" (emphasis added) and then had a space for the applicant to write in their driver's licence number, passport number or Medicare number. The applicant then had to declare that the information in the form was true and correct, and that they understood that giving false and misleading information is a serious offence. There was no requirement for payment of a fee. It is recommended that the Registrar consider adopting a similarly flexible approach when it comes to Indigenous Australians seeking a copy of their birth certificate.

The author also recommends that the Victorian government, as part of its four-year review of the Charter, consider enacting an amendment that gives all Victorians an express right to have their birth registered, and a birth certificate issued to them. ●

DR PAULA GERBER is a deputy director of the Castan Centre for Human Rights Law, a senior lecturer at the Monash University Law School, and a sessional member at VCAT. She has a special interest in human rights law, in particular children's rights.

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1. Christopher Priest, 'Introduction' to HG Wells' *The Invisible Man* ([1897] 2005), Penguin Books, p. xvii.
2. "Aborigines lack proof of identity", *The Age*, 23 January 2009.
3. Jonathan Todres, "Birth registration: an essential first step toward ensuring the rights of all children" (2003) 10 *Human Rights Brief* 32.
4. Note 2 above.
5. At the time of writing, the fee is \$26.60.
6. Gippsland Community Legal Service, *The Koori ID Project*, May 2008, p. 3.
7. Joel Orenstein, "The difficulties faced by Aboriginal Victorians in obtaining identification" (2008) 7(8) *Indigenous Law Bulletin* 14.
8. <http://online.justice.vic.gov.au/CA2574F700805DE7/page/About+us-News+archive?OpenDocument&1=70-About+us~&2=60-News+archive~&3=~> (accessed on 21 May 2009).
9. *Birth, Deaths and Marriages Registration Act 1996* (Vic) s49.
10. Note 7 above, at 15.
11. Note 3 above, at 35.
12. Carolyn Evans & Simon Evans, *Australian Bills of Rights: The law of the Victorian Charter and the ACT Human Rights Act* (2008), LexisNexis Butterworths, NSW, p. 3.
13. Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The report of the Human Rights Consultation Committee*, Victorian Department of Justice, November 2005, p. 45.
14. Arguments could also be raised about discrimination against Indigenous Australians in the enjoyment of this right, but that is beyond the scope of this article.
15. It has been observed, with respect to the corresponding provision in the ICCPR, that "such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be [for the enjoyment of] economic, social and cultural" rights. General Comment No. 17: Rights of the Child (Art. 24), Human Rights Committee, 7 April 1989, para 3.
16. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd edn, 2005), NP Engel Publishers, Arlington, USA, p. 547.



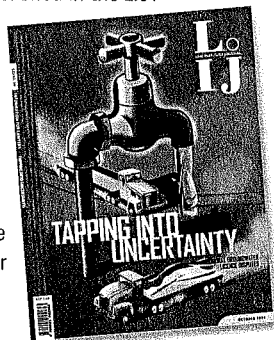
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