



**Victorian Equal Opportunity  
& Human Rights Commission**

# Submission to the Victorian Law Reform Commission review of birth registration and birth certificates

1 November 2012

## **1. Introduction**

- 1.1 The Commission welcomes the opportunity to make a submission regarding the review of the process for birth registration and obtaining a birth certificate presently being conducted by the Victorian Law Reform Commission ('VLRC').
- 1.2 The Commission recognises the importance of reviewing the birth registration and certification scheme. Birth registration and certification are essential to individuals exercising their legal rights, being recognised as a person before the law and to engaging in vital activities in daily life. These include accessing education or health services, a driver's license, a loan, receiving child support, obtaining a tax file number, registering to vote, opening a bank account, securing employment or obtaining a passport.<sup>1</sup>
- 1.3 The Commission is an independent statutory body that has functions under the *Equal Opportunity Act 2010* (Vic), the *Racial and Religious Tolerance Act 2001* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'). Our functions include dispute resolution, providing education about human rights and equality of opportunity, undertaking projects and activities aimed at eliminating discrimination and promoting human rights, conducting research, and providing legal and policy advice. In addition, the Commission has a role in reporting to the Victorian Attorney-General on the operation of the Charter and, at the request of public authorities, conducting compliance reviews.

## **2. Structure of this submission**

- 2.1 The VLRC Consultation Paper's terms of reference state that the VLRC will consider and review the *Births, Deaths and Marriages Act 1996* (Vic), examining whether processes for registration and certification are efficient, effective and accessible to all the community. It proposes to identify practical solutions to problems that may exist in regard to the system. The Consultation Paper provides a detailed list of questions for organisations providing submissions to consider. Rather than directly addressing the questions raised in the Consultation Paper, this submission will instead respond to the human rights implications of themes raised by the paper's terms of reference. These themes include:
  - Human rights implications of the birth registration system
  - Barriers associated with the registration and certification process
  - How the process for birth registration and certification can be made more accessible

## **3. Birth registration and certification**

### ***The process***

- 3.1 Birth registration and certification is a two-step process. Parents or guardians are required to register the birth of a child within 60 days of birth. Normally registration forms are provided by a hospital or birth clinic and shortly afterward, sent to Births, Deaths and Marriages ('BDM'). There is no fee to register a birth. The Registrar of

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<sup>1</sup> P Gerber, 'Making Indigenous Australians 'Disappear': Problems arising from our birth registration system' in *Alternative Law Journal* Vol 34:3 (2009), page 158  
<http://www.law.monash.edu.au/castancentre/events/2009/alj-article.pdf>

BDM must accept late registrations. A financial penalty applies but is seldom imposed for non-registration.<sup>2</sup>

- 3.2 The Registrar issues birth certificates, subject to a prescribed fee of \$28.60 per application.<sup>3</sup> If certification is obtained at the same time as the application for birth registration, certification is automatic on payment of the fee. If the certificate is sought later, BDM require an applicant to fill in a separate application form and provide documents proving the identity of the person requiring a birth certificate.
- 3.3 A person may not have a birth certificate for various reasons:
- their birth was never registered; or
  - their birth was registered but a certificate was not sought, and is unable to be obtained because the person seeking the certificate:
    - is unable to afford the fee and/or
    - cannot satisfy the Registrar of proof of identity.<sup>4</sup>
- 3.4 The lack of a birth certificate may severely impede the exercise of basic rights and privileges of citizenship. While the system apparently works well for many applicants, it appears that there are some people who experience difficulties registering births and obtaining a birth certificate.

***Which groups of people find it hard to register and certify births?***

- 3.5 Problems associated with registration and certification may involve a range of groups in the community. There is, however, a lack of empirical research in this area. It is likely that people experiencing homelessness have difficulties with the system. Many issues surrounding obtaining identification documentation to support applications and costs involved in making applications may apply to homeless people. The PILCH Homeless Persons Legal Clinic has reported that on census night in 2006, about 20,500 Victorians were homeless, among them 6,800 children and young people. Causes of homelessness may also make it difficult for people to access birth registration and certification. Factors contributing to homelessness include, unemployment, poverty, shortage of public housing, discrimination, family violence, mental health issues, addictions and interactions with the criminal justice and child protection systems.<sup>5</sup>
- 3.6 People from non-English speaking backgrounds may be less aware of the rights and benefits provided by registration and certification than others within the community and less able to negotiate the certification process.
- 3.7 People with disabilities may need extra support with birth registration and certification. People with intellectual disability in particular may not be able to understand the steps involved and find it difficult to produce the required identification documentation. People experiencing intersectional disadvantage may find the system especially hard to navigate.

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<sup>2</sup> Victorian Law Reform Commission, Birth Registration & Birth Certificates: A Community Law Reform Project, Consultation Paper (2012), pages 11, 14: The financial penalty is currently \$1408.

<sup>3</sup> VLRC Birth Registration & Birth Certificates Consultation Paper, page 12

<sup>4</sup> P Gerber, 'Making Indigenous Australians 'Disappear': Problems arising from our birth registration system' p. 158

<sup>5</sup> Charting the Right Course: PILCH Homeless Persons Legal Clinic Submission to the Inquiry into the Charter of Human Rights and Responsibilities (2011), page 5,

[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/submissions/83 -  
\\_PILCH\\_Homeless\\_Persons\\_Legal\\_Clinic.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/submissions/83_-_PILCH_Homeless_Persons_Legal_Clinic.pdf)

- 3.8 There is significant research regarding the difficulties some Aboriginal people in Victoria have encountered regarding registering births and obtaining a birth certificate. This submission therefore, will largely focus on Aboriginal people. Many barriers to access and possible solutions to address problems faced by Aboriginal people may also apply to other disadvantaged groups.
- 3.9 There is presently a lack of certainty surrounding the exact extent of Aboriginal community members affected, although data from the Registrar suggests that most non-registered births have come from areas with large Aboriginal populations, which may indicate that many families not registering a birth are from the Aboriginal community.<sup>6</sup>
- 3.10 Registration itself can be challenging for many people in the Aboriginal community to achieve, however, certification of a birth appears to be a particularly pressing concern. These issues are addressed at paragraphs 4.12 and 4.14.
- 3.11 The Commission acknowledges that the Registrar has pursued positive steps to improve aspects of the birth registration and certification system, for example, by providing outreach sessions at regional locations and establishing justice centres capable of witnessing identification documents. However, substantial changes may be needed to make the system more equitable.<sup>7</sup>

#### **4. Human rights implications of the birth registration system – *The Charter***

##### ***The Charter of Human Rights and the Equal Opportunity Act***

- 4.1 The *Charter of Human Rights and Responsibilities* is an Act of Parliament guaranteeing some basic human rights for all people in Victoria. The Charter places obligations on public authorities to uphold human rights. It provides a mechanism for dialogue regarding how human rights can be promoted and protected.<sup>8</sup>
- 4.2 Birth registration and certification is regulated by Victorian legislation including the *Births, Deaths and Marriages Act 1996* (Vic). The *Equal Opportunity Act 2010* ('EOA') and Charter therefore apply to the birth registration and certification system.
- 4.3 The EOA imposes a positive duty via section 15 to take reasonable and proportionate measures to eliminate discrimination as far as possible. The Registrar of BDM is bound by the EOA to uphold the right of service recipients not to be subjected to discrimination on the basis of a listed attribute. This provides a basis for the Registrar to take steps to address aspects of the registration and certification system that may disadvantage applicants.

<sup>6</sup> A Gargett, P Gerber, M Castan, 'A right to birth registration in the Victorian Charter? Seek and you shall not find!', (2011) 36(3) *Monash University Law Review*, pages 14, 15  
[http://monash.academia.edu/paulagerber/Papers/1521714/A\\_Right\\_to\\_Birth\\_Registration\\_in\\_the\\_Victorian\\_Charter\\_Seek\\_and\\_you\\_shall\\_NOT\\_Find\\_](http://monash.academia.edu/paulagerber/Papers/1521714/A_Right_to_Birth_Registration_in_the_Victorian_Charter_Seek_and_you_shall_NOT_Find_)

Note also: <http://www.monash.edu.au/news/show/closing-the-gap-on-indigenous-birth-registration>:  
Monash University's Faculty of Law, Indigenous Centre and Department of Forensic medicine are currently undertaking a major project, started in November 2011 investigating problems encountered by the Aboriginal community when registering and seeking birth certification. They aim to quantify the number of unregistered births and understand why Aboriginal people are experiencing difficulties engaging with the system.

<sup>7</sup> VLRC Birth Registration & Birth Certificates Consultation Paper, page 17

<sup>8</sup> Putting Principle into Practice: VEOHRC Submission to the Four-Year Review of the Charter, (2011) page 29

- 4.4 Discrimination based on 18 listed personal attributes, including race, is unlawful under the EOA. In the context of the birth registration and certification system, it is possible that indirect discrimination on the basis of race may be a relevant consideration. Providers of services must not impose a requirement, condition or practice that is likely to have the effect of disadvantaging a person with a protected attribute.
- 4.5 The Registrar of BDM is a public authority under section 4(1) of the Charter, (a public official) and has an obligation to act in a way that is compatible with the human rights set out in the Charter. This means the Registrar has a duty to uphold the human rights of recipients of services, for example, those applying for and obtaining birth registration and certification. Responding to this provision creates an opportunity for the Registry to pursue reforms promoting human rights.

### ***The right to birth registration and the Charter***

- 4.6 The Charter presently does not include the right of every child to be registered immediately after birth and to have a name (Article 24(2) of the *International Covenant on Civil and Political Rights* 'ICCPR'). The Human Rights Consultation Committee ('Committee') considered that these rights were more relevant in the post-World War II context and 'less relevant for inclusion in a modern Victorian Charter' in recommending not including this right within the Charter.<sup>9</sup>
- 4.7 In the Commission's submission to the Four-Year Review of the Charter, we emphasised our support that the Charter be extended to include the right to birth registration, noting that significant obstacles within the system may operate to impede the access of various groups, in particular, Aboriginal people<sup>10</sup>. The decision of the Committee to exclude the right of birth registration from the Charter did not contemplate these barriers.
- 4.8 Although the right to birth registration is not a right set out in the Charter, the Charter may be relevant to arguing for reforms to be made to the birth registration system.
- 4.9 The Charter also permits consideration of our international law obligations in the context of policy potentially limiting human rights. Section 5 of the Charter sets out that a right or freedom not included in the Charter, recognised under any other law (including international law, among other sources of law) must not be taken to be abrogated or limited only because the right or freedom is absent from the Charter or is only partly included. Furthermore, section 32(2) states that International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

### ***The link between birth registration and certification***

- 4.10 The capacity to register a birth lacks meaning unless it is automatically accompanied by certification integral to securing the capacity to exercise our rights as citizens and access the benefits of citizenship. Commentators argue that the right to birth registration implicitly includes the right to a birth certificate. A birth certificate provides substance to the right to birth registration. Birth registration

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<sup>9</sup> Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee (2005), page 45: <http://www.liv.asn.au/PDF/News/HumanRightsFinalReport2006>

<sup>10</sup> Putting Principle into Practice: VEOHRC Submission to the Four-Year Review of the Charter, (2011) pages 73, 77, 78

alone does not fully protect a person's human rights without a birth certificate. A certificate is tangible evidence of a government's legal recognition of a child's existence.<sup>11</sup>

- 4.11 The current policy may impede the capacity to acquire a birth certificate. Individuals whose births are registered but lack certification may find it difficult to access proof of identity documentation later in life. These people may struggle to be recognised as a legal personality because they cannot prove their legal identity. This is a potential breach of the right to recognition as a person before the law.<sup>12</sup>

Without a birth certificate, a 31-year-old father could not register his fishing boat in his own name, obtain a passport, go to licensed premises until he was in his 20s or get a driver's licence to take his children to school. He described the 9-year battle to register his birth as a hellish merry-go-round. To obtain a birth certificate he needed photo identification and for this, he needed a birth certificate.<sup>13</sup>

### ***Barriers to registration and certification***

#### **Registration**

- 4.12 The Castan Centre for Human Rights Law has noted a number of reasons leading to non-registration of births by many Aboriginal families. These include marginalization from mainstream services, a lack of confidence in engaging with authorities, low literacy levels and a lack of awareness of the benefits of birth registration and the requirements to give effect to it. The Castan Centre suggests that the discredited policies that permitted Indigenous children to be removed from their parents, creating the Stolen Generations, has contributed to a hesitance of some families to register births which may trigger memories of intergenerational trauma.<sup>14</sup> The Victorian Aboriginal Legal Service has stated that many clients mistrust authority to the extent that they do not want their details to be recorded on any formal system.<sup>15</sup>

#### **Certification**

- 4.13 Birth certification is a pressing concern, as the system requires certification in addition to registration, to exercise basic rights as a member of the community. The cost associated with certification can be a disincentive to Aboriginal people if they live at or below the poverty line, especially for parents making multiple applications. If certification is not sought at the time of birth registration, significant documentation substantiating a person's identity is required for a birth certificate to be provided. This is reportedly often challenging for Aboriginal applicants to comply with.<sup>16</sup> Proof of identity documents that are presently acceptable to BDM (for

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<sup>11</sup> A Gargett, P Gerber, M Castan, *Does the Right to Birth Registration Include a Right to a Birth Certificate?* Netherlands Quarterly of Human Rights, Vol. 29, No. 4, 2011, pages 435, 436.; <http://www.corteidh.or.cr/tablas/r27590.pdf>

<sup>12</sup> *Does the Right to Birth Registration Include a Right to a Birth Certificate?* Page 444

<sup>13</sup> J Topsfield, *The unbearable heaviness of being no-one*, The Age, January 23, 2009 <http://www.theage.com.au/national/the-unbearable-heaviness-of-being-no-one-20090122-7nx5.html#ixzz28BXdaHJH>

<sup>14</sup> Monash University Castan Centre for Human Rights Law, 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, 2011, pages 2,3 [http://www2.ohchr.org/english/bodies/crc/docs/ngos/CCHRL\\_Australia\\_CRC59.pdf](http://www2.ohchr.org/english/bodies/crc/docs/ngos/CCHRL_Australia_CRC59.pdf)

<sup>15</sup> Victorian Aboriginal Legal Service Co-operative Ltd, Presentation by Frank Guivarra at Castan Centre for Human Rights Law Symposium on Indigenous Birth Registration and Birth Certificates – Potential Legal Solutions, 2009, page 1: <http://www.law.monash.edu.au/castancentre/events/2009/guivarra-paper.pdf>

<sup>16</sup> *Does the Right to Birth Registration Include a Right to a Birth Certificate?*, Page 439



example, driver's license, passport or evidence of a residential address) are often unavailable. BDM does not accept health care cards or Proof of Aboriginality documents provided by recognised Aboriginal organisations, which Aboriginal people are more likely to possess. For applicants aged over 18 years, one identity document must nominate a current residential address, a hurdle also relevant to homeless people or those living with friends or extended family. Aboriginal people often have complex family histories. A person's name can change depending on where they have lived in the extended community. Displacement of communities and a lack of clarity surrounding family histories can also shroud a person's identity.<sup>17</sup>

Half of 120 candidates in a Driver Education project lacked birth certificates and were consequently unable to provide proof of identity documents to VicRoads, to apply for licenses. A central aim of this project was to reduce unlicensed driving and negative interactions with police. Projects of this kind have revealed that the significant time taken to obtain identification, especially birth certificates, often occurs at the expense of a project's core aims. Without licenses, community members are marginalized, especially in rural and regional areas, as they cannot lawfully drive and are unable to take advantage of opportunities for employment.<sup>18</sup>

Two 15-year-old girls were taxed at the highest rate on traineeships (and therefore withdrew from the program) because a lack of a birth certificate meant that they were unable to apply for tax file numbers.<sup>19</sup>

- 4.14 These barriers are argued by some critics to go as far as amounting to 'civic death' or a denial of the identity of Aboriginal Australians as people:

*"The myth of terra nullius was rejected in 1992, however for many Aboriginal Australians, the echo of terra nullius remains as they continue to be effectively legally invisible."*<sup>20</sup>

### ***The right to equality and recognition before the law***

- 4.15 The Charter protects 20 human rights. Individuals have the right, for example, to recognition and equality before the law:

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

- 4.16 Dr Paula Gerber describes birth registration as a "gateway" event, conferring on a person the first official recognition by the State of their existence and commencing a relationship between them that continues over their life. Without this recognition, a person is legally invisible. We have a right to enjoy all the benefits of citizenship and to be recognised as a person before the law.<sup>21</sup>

<sup>17</sup> J Orenstein, 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (2008), 7(8) *Indigenous Law Bulletin*, pages 16-17: <http://orenstein.com.au/NACLC%20conf%20paper.pdf>

<sup>18</sup> A Gargett, P Gerber, M Castan, 'A right to birth registration in the Victorian Charter? Seek and you shall Not find!', (2011) 36(3) *Monash University Law Review*, page 4

<sup>19</sup> The Difficulties Faced by Aboriginal Victorians in Obtaining Identification, page 15.

<sup>20</sup> M Castan, P Gerber, A Gargett, 'Indigenous Australians' access to birth registration systems: a breach of international human rights law?', (2011) 17(1) *Australian Journal of Human Rights* 55-89 (Page 55)

<sup>21</sup> P Gerber, Making Visible the Problem of Invisibility, (LIJ) 2009, p52, 54

- 4.17 It appears that Aboriginal people may be experiencing problems associated with the birth registration and certification system in contrast to many others in broader society. Available information suggests that the system's legislative and policy framework may operate to indirectly discriminate against Aboriginal people.

### ***Right to Privacy***

- 4.18 Section 13 of the Charter sets out that we have a right to privacy and reputation: a person has the right (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. This provision originates from Article 17(1) of the ICCPR. The human right to privacy includes anything integral to a person's dignity, autonomy or identity. Privacy should be given a broad interpretation along the lines of 'private life'. Decisions on the right to privacy made under the European Convention on Human Rights may be considered when determining the scope of the right.<sup>22</sup>
- 4.19 European case law suggests that the right may impose positive obligations on States. For example, in a United Kingdom case involving a transgender person seeking for their birth certificate to reflect their post-operative gender, the European Court found that there was a positive obligation on the UK government to record the post-operative gender status on the birth certificate.<sup>23</sup>
- 4.20 There is a strong link between birth registration and the realisation of identity rights as discussed above. Access to information significant to the development of personal identity may come within the scope of the right to privacy. It is possible that the right to privacy could therefore encapsulate the right to birth registration.<sup>24</sup>

### ***Protection of families and children***

- 4.21 The Charter provides in section 17 that we are entitled to the protection of families and children, including that: (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.
- 4.22 Children have access to numerous specialist services including education and health services, for example, enrolment in school or forms of healthcare. Children have special protection within the jurisdiction of the Children's Court. Without proof of identity, children may not be able to access such services.<sup>25</sup> This may potentially breach s.17(2) of the Charter.

A 16-year-old Aboriginal boy, who lived out of home after the death of his father lacked a birth certificate and was consequently unable to access his entitlement to youth allowance. A consequence of not having money was that he came into contact with the criminal justice system charged with theft, criminal damage and failing to pay infringement notices.<sup>26</sup>

A single mother of 6 children under the age of 12, whose only income was the pension, had registered all her children's births but only obtained birth certificates for the oldest two children. School policy requires that she supply copies of birth certificates to enrol her younger children. The Child Support Agency has also requested copies as evidence of paternity in order to collect child support from her ex-partner. She does not have the

<sup>22</sup> A Right to Birth Registration in the Victorian Charter? Seek and You Shall *Not* Find! Page 15

<sup>23</sup> Christine Goodwin v. The United Kingdom (GC), no. 28957/95

<sup>24</sup> A Right to Birth Registration in the Victorian Charter? Seek and You Shall *Not* Find! Page 16

<sup>25</sup> A Right to Birth Registration in the Victorian Charter? Seek and You Shall *Not* Find! Page 16

<sup>26</sup> The Age, *The unbearable heaviness of being no-one*, January 23, 2009



application fee required by the Registry. The younger children are unable to attend school and she is unable to receive child support.<sup>27</sup>

## **5. Human rights implications of the birth registration system – *International Law***

### ***Birth registration***

- 5.1 In March 2012, the United Nations Human Rights Council unanimously adopted a resolution dedicated to the issue of birth registration and legal identity without discrimination. The resolution, among other things, emphasised the importance of birth registration as a means for providing an official record of a person's existence and recognition as a person before the law. The resolution expressed concern that unregistered individuals have limited or no access to services and enjoyment of their rights, noting that registering a person's birth is a vital step towards his or her protection. The resolution urged States to identify and remove physical, administrative and any other barriers that impede access to birth registration, paying attention to barriers including poverty, disability, multicultural contexts and other vulnerable situations. Australia also voted in support of the resolution, indicating its acknowledgement of a broad acceptance of the need for effective birth registration at an international level.<sup>28</sup>
- 5.2 Birth registration is recognised as a fundamental human right under international law. Under Article 24(2) of the ICCPR every child shall be registered immediately after birth and shall have a name. Article 7(1) of the *Convention on the Rights of the Child* ('CROC') provides that the child shall be registered immediately after birth and shall have the right from birth to a name. Inclusion of the word 'immediately' in these articles underlines the importance of States ensuring prompt recognition of a child's existence in order to facilitate enjoyment of rights granted to citizens.<sup>29</sup>
- 5.3 The CROC Committee has noted its concern in a General Comment regarding Indigenous children and their rights under the Convention, that Indigenous children remain without birth registration to a greater extent than non-indigenous children. The Committee asserts that Governments should therefore take special measures in order to ensure that Indigenous children, including those living in remote areas, are registered. Special measures and public awareness campaigns should be undertaken in consultation with communities. It suggested that such measures may include mobile units, periodic birth registration campaigns or the designation of birth registration offices within Indigenous communities.<sup>30</sup>

### ***Birth certification***

- 5.4 The CROC Committee has also indicated that it regards birth certification as an intrinsic aspect of the right to birth registration in Concluding Observations regarding State Parties having a duty to issue birth certificates as part of facilitating

<sup>27</sup> J Orenstein, *The Difficulties Faced by Aboriginal Victorians in Obtaining Identification*, page 16

<sup>28</sup> Human Rights Council, *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law*, 19th sess, UN Doc A/HRC/RES/19/9 (3 April 2012): <http://blog.unwatch.org/wp-content/uploads/Birth-Registration.pdf>

<sup>29</sup> P Gerber, 'Making Indigenous Australians 'Disappear': Problems arising from our birth registration system', page 160

<sup>30</sup> Committee on the Rights of the Child, General Comment No11, *Indigenous children and their rights under the Convention*, UN Doc CRC/C/GC/11, Para 41 – 43: [http://www2.ohchr.org/english/bodies/crc/docs/GC.11\\_indigenous\\_New.pdf](http://www2.ohchr.org/english/bodies/crc/docs/GC.11_indigenous_New.pdf)

birth registration. In relation to Papua New Guinea, the Committee noted concern at the lack of a comprehensive decentralized birth registration system and at the fact that parents have to pay fees to get a birth certificate for their children. It urged for increased efforts to register all children at birth, including through awareness-raising campaigns and suppression of any fees.<sup>31</sup> Concluding Observations regarding Gambia observed that children do not easily obtain birth certificates, necessary for access to education. The Committee recommended facilitating the issue of birth certificates by combining the birth registration process with automatic issue of a free birth certificate'.<sup>32</sup>

- 5.5 General Comment 10 on Juvenile Justice sets out that the CROC Committee regards proof of age as a crucial outcome of upholding the right of children to birth registration which protects their rights more broadly:

*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... Every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age.*<sup>33</sup>

- 5.6 Article 21(1) of the *United Nations Declaration on the Rights of Indigenous Peoples* sets out that Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. Article 21(2) provides that States should take effective and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Australia formally endorsed the Declaration on 3 April 2009.<sup>34</sup>

- 5.7 As highlighted above, the capacity to produce a birth certificate is often a prerequisite to being able to undertake a range of essential activities related to education and health including registering a child in school or accessing immunizations. Although the Declaration is an aspirational document, voted on by the UN General Assembly and not legally binding<sup>35</sup>, the moral force of the Declaration can support advocacy for the development of policy supporting an equitable process of birth certification, which may result in greater access of Aboriginal people to education and health services.<sup>36</sup>

## **6. How the process for birth registration and certification can be made more accessible**

- 6.1 In 2009, in response to the victims of the Black Saturday bushfires who had lost all their possessions, the Registrar of BDM pursued a flexible policy by creating a

<sup>31</sup> Committee on the Rights of the Child, Concluding Observations regarding Papua New Guinea, UN Doc. CRC/C/15/Add.229 (2004), paras 33–34: [http://www.bayefsky.com/pdf/papua\\_t4\\_crc\\_35.pdf](http://www.bayefsky.com/pdf/papua_t4_crc_35.pdf)

<sup>32</sup> Committee on the Rights of the Child, Concluding Observations regarding Gambia, UN Doc. CRC/C/15/Add.165 (2001), at [30]–[31]:

<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CRC.C.15.Add.165.En?Opendocument>

<sup>33</sup> Committee on the Rights of the Child, General Comment No 10: Children's rights in juvenile justice, UN Doc. CRC/C/GC/10 (2007), para 39: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

<sup>34</sup> *Australian Human Rights Commission*, Social Justice Report 2011, page 18  
[http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport11/pdf/sjr2011.pdf](http://www.hreoc.gov.au/social_justice/sj_report/sjreport11/pdf/sjr2011.pdf)

<sup>35</sup> M Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439, pages 2, 27:  
[http://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/mdocs/07Davis\\_UNDeclarationRIP%20%282008%29%209%20%282%29.pdf](http://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/mdocs/07Davis_UNDeclarationRIP%20%282008%29%209%20%282%29.pdf)

<sup>36</sup> *Australian Human Rights Commission*, Social Justice Report 2011, page 43

simplified form and waiving all fees.<sup>37</sup> It must be acknowledged that an unprecedented natural disaster triggered the Government's swift response in this case; however, a lack of legal personality is something that Aboriginal people are observed to often be experiencing indefinitely and in many cases, due to causes beyond their control.<sup>38</sup>

- 6.2 Reform to the birth registration and certification system will provide an opportunity to promote and protect human rights. This is highly desirable, to meaningfully and respectfully include people who otherwise risk legal invisibility. It is important to note that a range of groups within the community may be affected by barriers to registration. The Commission recommends that the Victorian Law Reform Commission take note of the discussion raised in this submission and consider the following recommendations:

***Recommendations:***

1. The Registrar of Births Deaths and Marriages should ascertain the numbers of Aboriginal community members facing barriers to registration and certification who are yet to register.
2. The Registrar should also assess the experiences of people from other vulnerable groups interacting with the birth registration and certification system and ascertain the numbers of people affected.
3. The Registrar should review the birth registration and certification process to ensure that the system is accessible to people with disabilities, including people with intellectual disability.
4. The Registrar should collaboratively develop strategies with the Aboriginal community to ensure that families within the Aboriginal community are aware of the benefits associated with registering a birth and being issued with a certificate. The Registrar should consult with the Aboriginal community to develop or expand culturally appropriate solutions to non-certification, for example, supporting birth registration units within regional Aboriginal communities, employing Aboriginal staff, and mobile units regularly accessing remote areas.
5. The Government should consider how the process for registering a birth and obtaining certification can be streamlined to be made accessible, for example, by legislating for the automatic issue of a birth certificate once a birth has been registered, rather than maintaining the present two-step process.
6. Fees for birth certification should ideally be waived. Alternatively, costs associated with certification should be minimised by a combination of legislation and policy to facilitate waivers. Legislation could provide for certain categories of automatic waiver, for example if a person is in possession of a Health Care Card, and that the Registrar has a further discretion to waive fees in certain circumstances not covered by the legislation. A policy could clarify:
  - (a) in what circumstances fees will be waived, for example if people are experiencing financial hardship; and
  - (b) that there is a presumption in favour of waiver.

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<sup>37</sup> P Gerber, 'Making Indigenous Australians 'Disappear': Problems arising from our birth registration system' in *Alternative Law Journal* Vol 34:3 (2009), p161

<sup>38</sup> A Gargett et al, 'A right to birth registration in the Victorian Charter? Seek and you shall not find!', pages 3-4

A public and objective set of criteria for discretion should be available and clearly communicated, to guide both the Registrar and general public about eligibility for fee waiver.

7. Recognising the barriers experienced by many Aboriginal applicants obtaining identification documentation should justify the development of flexible policy regarding the types of documentation required by Aboriginal applicants. This could permit the Registrar to accept 'Proof of Aboriginality' documents supplied by Aboriginal organisations.
8. The four-year review of the Charter in 2011 considered, among other things, whether additional human rights should be included. The Government's response to the four-year review indicated that it would seek specific legal advice to assess the risks and benefits associated with including further rights contained in the ICCPR.<sup>39</sup> Such review should permit amendment of the Charter to enact a right to birth registration and a birth certificate, giving effect to article 24(2) of the ICCPR.

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<sup>39</sup> Parliament of Victoria, Scrutiny of Acts and Regulations Committee Review of the Charter of Human Rights and Responsibilities Act 2006, Victorian Government Response, 4 March 2012, p3:  
[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20120314\\_sarc.govtresp.charterreview.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20120314_sarc.govtresp.charterreview.pdf)

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