

## REGISTERING THE BIRTHS OF INDIGENOUS AUSTRALIANS: HAS NEW SOUTH WALES GOT IT RIGHT?

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### I INTRODUCTION

It has only recently been shown that many Indigenous Australians<sup>1</sup> are unable to obtain primary evidence of their identity. This issue can only be identified by its absence as the benefits of legal recognition are taken for granted by most in the wider community. This article critiques the regulatory regime surrounding birth registration and certification in New South Wales ('NSW') and its failure to take into account the issues of access for Indigenous Australians.<sup>2</sup>

A birth certificate is the most important evidentiary document establishing legal identity and a gateway to the enjoyment of many citizenship and human rights. It is required to participate in the workforce, commence education, access government services, enrol to vote, open a bank account, and to obtain a driver's licence.<sup>3</sup>

This article focuses on regulatory theory as a theoretical framework and applies the concept of principles-based regulation to complement the right to birth registration in international human rights law.<sup>4</sup> Principles-based regulation is outcome-based rather than being driven by rules and process. Regulation in this context is defined as 'an authoritative set of rules, accompanied by some

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1 'Aboriginal and Torres Strait Islander' and 'Indigenous' are used interchangeably to refer to Australian Aboriginal and/or Torres Strait Islander peoples. Throughout this article, the author uses the term 'Indigenous Australians' to refer to Australia's first people. The author acknowledges that many communities prefer the term 'Aboriginal and Torres Strait Islander' and that Aboriginal people in NSW may prefer to be known by their state names, 'Goori', 'Koori', and 'Murri'.

2 'Regulation' in this article refers to the legally enforceable instruments surrounding birth registration that impose mandatory requirements on the community. A birth certificate is a voluntary, but essential part of this regime.

3 A birth certificate is required to obtain a Tax File Number, enrol in a public school and to access Centrelink and Medicare.

4 See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(2); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 28 ILM 1448 (entered into force 2 September 1990) art 7.

mechanism, typically a public agency, for monitoring and promoting compliance'.<sup>5</sup> Regulatory theory examines the purpose behind regulation as well as the instruments and techniques used to control social behaviour.

Regulation of birth registration seeks to promote equitable outcomes for all and enable access to all rights associated with citizenship. The regime also has a facilitative role, connecting the state with individuals. A regulatory perspective is valuable in examining whether low rates of birth registration in Indigenous communities can be attributed to faults in regulatory design. Initial examination suggests that a 'one size fits all' approach to regulation is ill equipped to deal with the diversity of the population that is regulated and the existing disadvantages experienced by Indigenous Australians.

This article begins with an analysis of the nature and context of birth registration problems experienced by Indigenous people. This includes a review of past literature on the topic, which has covered the Victorian legislative context and international human rights law extensively.<sup>6</sup> NSW has been chosen as a case study as it has the largest Indigenous population of all states and territories<sup>7</sup> and the regime lacks flexibility that other jurisdictions possess. Following an examination of the right to birth registration under international human rights law, it is argued that legal proof of existence in the form of a birth certificate is fundamental to the fulfilment of all other human rights.

Having established the nature of birth registration problems experienced by Indigenous Australians, a review of the current legislative and policy regime in NSW is conducted. Current processes and program innovation in NSW illustrate that the issue is more appropriately dealt with at a legislative level.

Regulatory concepts of compliance, trust, and risk are adopted in relation to the birth registration and certification regime in NSW. Understanding the social dimensions of regulatory policy involves considerations of *who* is to be regulated and who may be at greater risk of non-compliance. It suggests that there must be a proportionate regulatory and compliance response, using tools of information, education and guidance rather than punitive measures.

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5 R Baldwin, C Scott and C Hood, 'Introduction' in R Baldwin, C Scott and C Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 1, 3.

6 Andy Gargett, Paula Gerber and Melissa Castan, 'A Right to Birth Registration in the Victorian Charter? Seek and You Shall Not Find!' (2010) 36(3) *Monash University Law Review* 1; Melissa Castan, Paula Gerber and Andy Gargett, 'Indigenous Australians' Access to Birth Registration Systems: A Breach of International Human Rights Law?' (2011) 17(1) *Australian Journal of Human Rights* 55; Paula Gerber, Andy Gargett and Melissa Castan, 'Does the Right to Birth Registration Include a Right to a Birth Certificate?' (2011) 29 *Netherlands Quarterly of Human Rights* 434; Paula Gerber, 'Making Indigenous Australians "Disappear": Problems Arising from Our Birth Registration Systems' (2009) 34 *Alternative Law Journal* 157; Paula Gerber, 'Making Visible the Problem of Invisibility' (2009) 10 (October) *Law Institute Journal* 52; Joel Orenstein, 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (Paper presented at the Castan Centre Symposium on Indigenous Birth Registration and Birth Certificates, Monash University, 1 December 2009).

7 31.5 per cent of the total population of Indigenous Australians reside in NSW. See Australian Bureau of Statistics, *2015.0 – Census of Population and Housing – Counts of Aboriginal and Torres Strait Islander Australians, 2011* (21 June 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011>>.

Finally, the article examines the interrelationship between international human rights law and regulatory theory. It is proposed that a principles-based approach to regulation can support human rights norms regarding birth registration. Reforms are then suggested, characterised by the introduction of flexibility and discretionary provisions such as fee waivers. The author contends that in order to secure domestic implementation of human rights standards there must be automatic provision of a birth certificate upon the registration of a child. Principles-based regulation would render the process of registration as more than bureaucratic engagement with government for recording purposes, but as something part of securing one's basic citizenship and human rights.

## II BACKGROUND CONTEXT

### A Nature and Scale of the Problem

It is acknowledged that past government legislation and policies have left lasting intergenerational impacts.<sup>8</sup> The multiple disadvantages already experienced by Indigenous people can be compounded by the lack of tangible evidence of legal recognition. Without reform to the birth registration framework, the socioeconomic disadvantage already experienced by Indigenous people is further entrenched. The Australian Bureau of Statistics ('ABS') states that Indigenous people are much more likely than non-Indigenous people to have low incomes and be unemployed; they are also more likely to have poor literacy and numeracy skills.<sup>9</sup> On average 'Indigenous people experience poorer outcomes than non-Indigenous people in the areas of education, income, health, housing, crime and violence'.<sup>10</sup>

It is difficult to quantify the number of births that go unregistered and, given the voluntary nature of certification, impossible to estimate how much of the population does not have a birth certificate.<sup>11</sup> There are significant delays and omissions in registration despite the legislative requirement to register a birth within 60 days. ABS birth data, compiled from state and territory registries, record that a higher proportion of delayed registrations are Indigenous. In 2009, for example, the average interval between the occurrence and registration of

8 NSW Department of Community Services, 'Working with Aboriginal People and Communities: A Practice Resource' (Aboriginal Services Branch, February 2009) 5.

9 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2008* (30 October 2009) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4714.0/>>.

10 Steering Committee for the Review of Government Service, Parliament of Australia, *Overcoming Indigenous Disadvantage* (2011) [13.4] <[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0015/111714/39-key-indicators-2011-chapter13-all.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0015/111714/39-key-indicators-2011-chapter13-all.pdf)>. These outcomes are being addressed in Council of Australian Governments ('COAG'), *Closing the Gap in Indigenous Disadvantage* (2008) <[http://www.coag.gov.au/closing\\_the\\_gap\\_in\\_indigenous\\_disadvantage](http://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage)> ('the *Closing the Gap* strategy').

11 This is currently being investigated through an Australian Research Council ('ARC') Linkage Grant: Monash University, 'Closing the Gap on Indigenous Birth Registration' (Press Release, 15 November 2011) <<http://www.monash.edu.au/news/show/closing-the-gap-on-indigenous-birth-registration>>.

births to Indigenous women was 11.2 months compared to 2.5 months for non-Indigenous women.<sup>12</sup> Xu et al found that those who did not register their babies within the time requirement were less likely to register in the following years.<sup>13</sup>

Recent data tells us that 86.9 per cent of all births that occurred in NSW in 2011 were registered in that year, compared to 68.9 per cent of Indigenous births. 11.6 per cent of registrations in 2011 were for Indigenous births that occurred in 2005 and earlier compared with 2.1 per cent of the total population.<sup>14</sup> This figure accounts for a significant proportion of registrations occurring when a child is six years and older. Registration at this age is likely to have been prompted by school enrolments. There are also likely to be more births that occur in the State each year but are not recorded by the ABS.<sup>15</sup> The above figures are partly attributed to delays in parents completing birth registration forms to submit to the Registry.

## B Birth Registration and Indigenous Australians

There is a large amount of research on birth registration internationally, recognising the importance of implementing or improving civil registration systems in developing countries.<sup>16</sup> In comparison, there is relatively limited research that focuses on Australia. It might be assumed that in developed countries such campaigns are unnecessary. However, as Todres points out, those who are unregistered in these countries are often ‘overlooked and relegated to the margins of society.’<sup>17</sup> The work of Castan et al draws attention to the undocumented issue of legal invisibility facing Indigenous communities in Victoria where births have not been registered or, despite being registered, a birth certificate cannot be easily obtained.<sup>18</sup> Further, there is a consensus in the literature that Australia appears to be in breach of its international law

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- 12 Australian Bureau of Statistics, *3301.0 – Births, Australia, 2009* (3 November 2010) <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/F05105176414D283CA2577CF000DF11D?opendocument>>.
- 13 Fenglian Xu et al, ‘Under-Reporting of Birth Registrations in New South Wales, Australia’ (2012) 12(December) *BMC Pregnancy and Childbirth* 1, 7.
- 14 Australian Bureau of Statistics, *3301.0 – Births, Australia, 2011 Explanatory Notes* (25 October 2012) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3301.0Explanatory%20Notes12011>>.
- 15 Research indicates that the Midwives Data Collection compiled by the Australian Institute of Health and Welfare National Perinatal Statistics Unit consistently reports more live births than the Registry, which only collects data from Registries. See Xu et al, above n 13.
- 16 United Nations Children's Fund, ‘Birth Registration: Right From The Start’ (2002) 9 *Innocenti Digest* 1; Jonathan Todres, ‘Birth Registration: An Essential Step Toward Ensuring the Rights of All Children’ (2003) 10(3) *Human Rights Brief* 32; C Cody, ‘Count Every Child: The Right to Birth Registration’ (Campaign Report, Plan International, 2009). See also Plan International, *Publications* <<http://plan-international.org/birthregistration/resources/publications>>.
- 17 Todres, above n 16, 32.
- 18 Gerber, ‘Making Indigenous Australians “Disappear”’, above n 6; Gerber, ‘Making Visible the Problem of Invisibility’, above n 6; Orenstein, above n 6; Gargett, Gerber and Castan, ‘A Right to Birth Registration in the Victorian Charter?’, above n 6; Castan, Gerber and Gargett, ‘Indigenous Australians’ Access to Birth Registration Systems’, above n 6.

obligations<sup>19</sup> for both the birth registration and supply of birth certificates to Indigenous people.<sup>20</sup> Therefore, it is logical to draw upon the research already conducted by these authors as a point of comparison and the international human rights standards that state a person has the right to have their birth registered (and from this an implicit right to a birth certificate).

### ***1 Birth Registration in Victoria***

The problem of unregistered births has not been widely documented and research must still be undertaken to examine the full extent of the problem. The Victorian Law Reform Commission ('VLRC') has recently commenced a community law reform project to review aspects of the *Births, Deaths and Marriages Registration Act 1996* (Vic) ('the Act') with specific reference to the barriers experienced by Indigenous communities.<sup>21</sup> In Victoria, as with most jurisdictions, the registration of a birth and the issuing of a birth certificate are separate processes, requiring distinct applications.

Two distinct issues arise for Indigenous Victorians in relation to the operation of the Victorian Act; first, a birth may have never been registered or, second, it was registered but the child does not have a birth certificate. The Act imposes responsibility upon parents of a child to lodge a birth registration statement following the birth of a child and then to pay a prescribed amount along with a separate application to obtain a certificate. Although there are fines for non-registration, there appears to be no incentive for individuals to complete this next step. The Registrar has the discretion in appropriate cases to remit whole or part of the fee; however, this discretion is rarely exercised.<sup>22</sup> Recently, the Victorian Registry has introduced policies that assist with the fees for birth, death and marriage certificates. Eligibility criteria stipulate that the applicant must be Koori, Aboriginal or Torres Strait Islander and they hold a Pension Concession Card or Health Care Card.<sup>23</sup>

The Victorian Registry's proof of identification requirements operate as a significant barrier to access.<sup>24</sup> When applying for a birth certificate at the same time as registering a birth, no further proof of identification is required. However,

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19 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 28 ILM 1448 (entered into force 2 September 1990), ratified by Australia in December 1990; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ratified by Australia in August 1980. Violations of rights in these treaties are not justiciable in Australian courts except in Victoria and the Australian Capital Territory where human rights legislation exists.

20 Castan, Gerber and Gargett, 'Indigenous Australians' Access to Birth Registration Systems', above n 6, 80.

21 Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Consultation Paper (2012).

22 Gerber, 'Making Indigenous Australians "Disappear"', above n 6, 160.

23 It is unclear whether the total cost of a certificate will be waived: Victorian Registry of Births, Deaths and Marriages, *Koori Services: Apply for a Certificate* (30 October 2013) <<http://www.bdm.vic.gov.au/home/koori+services/apply+for+a+certificate/>>.

24 Castan, Gerber and Gargett, 'Indigenous Australians' Access to Birth Registration Systems', above n 6, 64.

when an individual does it after this point in time, policy dictates that three separate documents establishing identity must be provided.<sup>25</sup> This creates a 'vicious cycle' where a birth certificate will not be issued unless a person can produce the necessary identification. Such identification can *only* be obtained with a birth certificate.<sup>26</sup> These requirements have been termed 'onerous and inflexible'.<sup>27</sup>

A number of other reasons have been suggested as to why Indigenous parents are not registering the births of their children, despite the legal requirement to do so.

These include an inability to pay the prescribed fee; low priority is afforded to birth registration; and lack of confidence in dealing with authorities and marginalisation from mainstream services.<sup>28</sup>

## 2 *Experience of Government Services and Bureaucracy*

We must also acknowledge the experiences of Indigenous people in dealing with government services and the history of disadvantage that has been compounded by social policies. Baldry, Green and Thorpe summarise the impact of socially prevailing prejudices against and stereotypes of Indigenous Australians as they play out in experiences of human and social services.<sup>29</sup> Such attitudes of public servants result in culturally inappropriate provision of services, such as housing and health, and discrimination towards Indigenous people.<sup>30</sup> These effects are described as 'socially systemic' due to their consistent reporting across the literature.<sup>31</sup> It is anticipated that similar effects occur due to Registry practices and policies, particularly in a regime that contains culturally inappropriate regulations. Such effects can be seen as a lack of understanding of Indigenous culture and kinship networks. Feelings of helplessness, shame and alienation from services may also contribute to the undervaluing of birth registration and certificates in Indigenous communities.

### C **The Right to Birth Registration and Certification in International Human Rights Law**

The right to birth registration has been recognised in two human rights treaties. However, it is less clear whether such a right includes a right to a birth certificate. Article 24(2) of the *International Covenant on Civil and Political Rights* ('ICCPR') requires that '[e]very child shall be registered immediately

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25 Gargett, Gerber and Castan, 'A Right to Birth Registration in the Victorian Charter?', above n 6, 5.

26 Ibid.

27 Ibid 4.

28 Castan, Gerber and Gargett, 'Indigenous Australians' Access to Birth Registration Systems', above n 6, 56; Orenstein, above n 6, 14.

29 Eileen Baldry, Sue Green and Katrina Thorpe, 'Urban Australian Aboriginal Peoples' Experience of Human Services' (2006) 49 *International Social Work* 364.

30 Ibid 365.

31 Ibid.

after birth and shall have a name'<sup>32</sup> and article 7 of the *Convention on the Rights of the Child* ('CROC') provides that '[t]he child shall be registered immediately after birth.'<sup>33</sup>

There has been some elaboration on this right in the *General Comments*<sup>34</sup> of the Committee on the Rights of the Child ('CRC'). 'However, there is yet to be any commentary specifically exploring the meaning of Article 7, although as Gerber, Gargett and Castan note, any discussion that has been made about this right consistently indicates that it should be 'interpreted in a broad purposive manner and affirm the right operates as a gateway to the attainment of other rights.'<sup>35</sup> *General Comment Number 11* states that birth registration should be free and universally accessible.<sup>36</sup> Experts have called for similar comments to be made for birth certificates, as it is legal evidence of registration that provides protection for an individual.<sup>37</sup> One of the only circumstances that this has occurred is in *General Comment Number 10* stating that 'every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age.'<sup>38</sup>

The CRC also recognises that Indigenous children are at greater risk of non-registration. A report by the Secretary-General of the United Nations identified that Indigenous children 'suffer extreme forms of exclusion and discrimination, which result in a denial or curtailment of their access to, inter alia, education, health, birth registration and protection.'<sup>39</sup> The Special Rapporteur on the right to education has also expressed concerns about the impact of the lack of birth registration on the realisation of Indigenous children's right to education, particularly where a birth certificate is required for admission to school.<sup>40</sup>

The most recent articulation of the right occurred when the United Nations Human Rights Council adopted a resolution on birth registration in 2012. It

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32 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

33 *CROC*, opened for signature 20 November 1989, 28 ILM 1448 (entered into force 2 September 1990).

34 United Nations Human Rights Committee (HRC) (1989) *General Comment No 17: Rights of the Child (Article 24)* UN Doc HRI/GEN/1/Rev.6 [144]; United Nations Committee on the Rights of the Child, *General Comment No 11: Indigenous Children and Their Rights Under the Convention*, 50<sup>th</sup> sess, UN Doc CRC/C/GC/11 (12 February 2009); United Nations Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007) [39].

35 Gerber, Gargett and Castan, 'Does the Right to Birth Registration Include a Right to a Birth Certificate?', above n 6, 449.

36 United Nations Committee on the Rights of the Child, *General Comment No 11: Indigenous Children and Their Rights Under the Convention*, 50<sup>th</sup> sess, UN Doc CRC/C/GC/11 (12 February 2009).

37 Gerber, Gargett and Castan, 'Does the Right to Birth Registration Include a Right to a Birth Certificate?', above n 6.

38 United Nations Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007) [39].

39 United Nations General Assembly, *Status of the Convention on the Rights of the Child: Report of the Secretary-General*, 67<sup>th</sup> sess, UN Doc A/67/225 (3 August 2012) 4.

40 See Vernor Muñoz Villalobos, *Report of the Special Rapporteur on the Right to Education, Addendum: Mission to Malaysia*, 11<sup>th</sup> sess, UN Doc A/HRC/11/8/Add.2 (20 March 2009) [33].

represents the first in its history dedicated to the issue of birth registration and legal identity.<sup>41</sup> This resolution adopts strong language and recognises the importance of birth registration as a means for providing ‘an official record of the existence of a person and the recognition of that individual as a person before the law’<sup>42</sup>. It urges states to identify and remove physical, administrative and other barriers that impede access to birth registration.<sup>43</sup> The resolution emphasises the obligations imposed on state parties, however it does nothing to acknowledge the importance of a birth certificate. The author believes that the resolution provided an opportunity to state that the right encompasses a right to a readily accessible birth certificate. The statement that unregistered individuals ‘have limited or no access to services and enjoyment of all the rights to which they are entitled’<sup>44</sup> is equally true in Australia if an individual is registered but does not possess a birth certificate.<sup>45</sup>

In an analysis of recent jurisprudence from the Human Rights Committee and the CRC, Castan, Gerber and Gargett suggest that the delays experienced by Indigenous people in obtaining a birth certificate may amount to a violation of article 24(2) of the *ICCPR*<sup>46</sup>. They argue that inadequate attention is being paid by Australia to the right of birth registration and a birth certificate in its periodic reports.<sup>47</sup> There is a strong argument that in light of the Human Rights Committee’s decision in *Monaco v Argentina*<sup>48</sup> and the CRC’s *Concluding Observations*, that the right to a birth certificate is implicitly protected.<sup>49</sup> There is consensus in the literature that an ‘explicit and unequivocal articulation’ of this right as part of the right to birth registration is needed by way of a General Comment on behalf of the CRC.<sup>50</sup>

What is compelling and relevant to the situation in Australia is the CRC’s *Concluding Observations* on Australia’s Fourth Periodic Report. The Committee stated that they were concerned about the difficulties specifically faced by Aboriginal persons in relation to birth registration. They also noted with concern the obstacles to both registering a birth and obtaining a birth certificate. These represent a significant step in addressing this issue, as recognition and

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41 United Nations Human Rights Council, *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law*, 19<sup>th</sup> sess, UN Doc A/HRC/19/L.24 (16 March 2012).

42 *Ibid* 2.

43 *Ibid*.

44 *Ibid*.

45 Further, it is also a potential breach of art 16 of the *ICCPR* (‘everyone shall have the right to recognition everywhere as a person before the law’) and the discrimination provisions of arts 2(1) and 26: see *ICCPR* arts 2(1), 16, 26.

46 Castan, Gerber and Gargett, ‘Indigenous Australians’ Access to Birth Registration Systems’, above n 6, 72

47 *Ibid* 70.

48 Human Rights Committee, *Views: Communication No 400/1990*, 53<sup>rd</sup> sess, UN Doc CCPR/C/53/D/400/1990 (27 April 1995) (‘*Monaco v Argentina*’).

49 Castan, Gerber and Gargett, ‘Indigenous Australians’ Access to Birth Registration Systems’, above n 6, 69.

50 Gerber, Gargett and Castan, ‘Does the Right to Birth Registration Include a Right to a Birth Certificate?’, above n 6, 458.



recommendations made by the CRC clearly demonstrate that current practices are in need of reform and do not comply with international human rights law. The CRC specifically noted in their *Concluding Observations* that it ‘further urges the State party to issue birth certifications *upon the birth of a child and for free*.’<sup>51</sup>

The conclusions of Castan, Gerber and Gargett are valuable to build on the importance of international human rights law in establishing a right to birth registration (and a birth certificate) and deficiencies in Victorian legislation. Some reliance must be placed on the literature in drawing conclusions on the practical effect of the legislative regime.<sup>52</sup> This is an issue characterised by its absence in mainstream society. Indeed, it is only when it comes to enrolling in school or obtaining a tax file number, for example, that the difficulties of not having a birth certificate come to light.<sup>53</sup> Although the purpose of prescribed fees and proof of identification requirements may be perceived as necessary to prevent identity fraud or misuse of certificates, they appear to indirectly discriminate against Indigenous Victorians. These issues are also likely to be experienced in NSW. Part Two has illustrated that Australia’s international obligations require reform of the birth registration and certification system.

### III ANALYSIS OF BIRTHS, DEATHS AND MARRIAGES LEGISLATION IN NEW SOUTH WALES

The *Births, Deaths and Marriages Registration Act 1995* (NSW) (‘the *BDM Act*’) and the *Births, Deaths and Marriages Registration Regulation 2011* (NSW) (‘the *BDM Regulation*’) provides the statutory basis for the registration of births and issuing of birth certificates in NSW. The Registry of Births, Deaths and Marriages Website (‘the *BDM Website*’)<sup>54</sup> describes the importance of birth registration, stating that it is a ‘simple process creating an official public record of your child’s identity’ and ‘one of the few officially accepted ways to identify your child to most government and private organisations.’<sup>55</sup> However, an analysis of the *BDM Act*, *BDM Regulation* and registry policies will prove that engaging with these processes can be long and complex and may operate as indirect barriers for Indigenous Australians.

One of the general functions of the Registrar as stated in the *BDM Act* is to ensure the registration system operates efficiently, effectively and

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51 United Nations Committee on the Rights of the Child, *Concluding Observations: Australia*, 60<sup>th</sup> sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [36] (emphasis added).

52 This is due to a lack of comprehensive research on the extent of unregistered Indigenous births across Australia as well as the limited anecdotal evidence available to researchers by those who have experienced practical difficulties when trying to get a birth certificate.

53 See, eg, the case study of AH and TH in Orenstein, above n 6, 15.

54 NSW Registry of Births, Deaths and Marriages, *Home* (17 October 2013) <<http://www.bdm.nsw.gov.au>>.

55 NSW Registry of Births, Deaths and Marriages, *Registering a Birth* (2 September 2013) <[http://www.bdm.nsw.gov.au/bdm\\_bth.html](http://www.bdm.nsw.gov.au/bdm_bth.html)>.

economically.<sup>56</sup> There is nothing to elaborate on how one should interpret ‘effectively’ and whether this imports relevant and necessary human rights considerations. Further, it is not a purpose of the *BDM Act* to be ‘accessible’ to all in the community.

### A Notification and Registration of Births

The *BDM Act* identifies the registration of births and the issue of certified information from the Register as two primary objects.<sup>57</sup> All births are registered according to two sources of information: a Birth Registration Statement (‘BRS’) supplied by the parents and a notification. Every birth in NSW must be accompanied by a notification.<sup>58</sup>

Within seven days after the birth of a child in NSW, a ‘responsible person’<sup>59</sup> must give notice of the birth to the Registrar.<sup>60</sup> If a homebirth occurred where neither a midwife nor doctor was present it becomes increasingly difficult for that birth to be notified. If the birth occurred in a location other than a hospital without a registered doctor or midwife in attendance and the child was *not* taken to hospital within 24 hours of the birth, two independent witnesses (not the parents) must have seen the birth occur and be prepared to sign statutory declarations that contain specific statements relating to the birth.<sup>61</sup> It is only after this process that a BRS will be sent out to the parent.

Such protracted administrative processes are not supportive of measures that work to improve the health inequality experienced by Indigenous mothers and babies. It is widely acknowledged that Indigenous mothers experience poorer maternal health outcomes.<sup>62</sup> This is exacerbated if they are living in regional or remote areas and are marginalised from mainstream services.<sup>63</sup> Access to culturally appropriate maternal and infant health services is essential but lacking in many areas. Registry policies around unsupervised homebirths further discourage parents from engaging with government administration after the birth of their child.

Parents of a child are jointly responsible for having the child’s birth registered,<sup>64</sup> which requires completion of a BRS<sup>65</sup> within 60 days after the date

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56 *BDM Act* s 6.

57 *BDM Act* ss 3(a), (f).

58 *BDM Act* pt 3, div 1.

59 A ‘responsible person’ is the chief executive officer of the hospital or, if the child was not born in a hospital, a doctor or midwife responsible for the professional care of the birth mother at birth: *Ibid* s 12(5).

60 *BDM Act* s 12 and *BDM Regulation 2011* (NSW) s 4.

61 NSW Registry of Births, Deaths and Marriages, *Registering a Homebirth* (2 September 2013) <[http://www.bdm.nsw.gov.au/bdm\\_bth.html](http://www.bdm.nsw.gov.au/bdm_bth.html)>.

62 NSW Health, ‘NSW Aboriginal Maternal and Infant Health Strategy: Evaluation’ (Final Report, 2005).

63 Malinda Steenkamp et al, ‘A Population-Based Investigation into Inequalities amongst Indigenous Mothers and Newborns by Place of Residence in the Northern Territory, Australia’ (2012) 12 (June) *BMC Pregnancy and Childbirth* 1.

64 *BDM Act* pt 3 div 2.

65 *BDM Act* s 14.

of the birth.<sup>66</sup> The maximum penalty for non-compliance is 10 penalty units.<sup>67</sup> However, the Registrar must accept a birth registration statement even after the end of the 60 day period.<sup>68</sup> The BDM Website covers the procedures for late registration of births. This is more complex, involving ‘strict verification of the child’s details and more proofs of identification required’.<sup>69</sup> The process requires parents to present some form of identification to prove their identity. This includes a birth certificate, passport, Centrelink statement or Certificate of Aboriginality.<sup>70</sup> Additionally one of the following forms of identification must be shown to prove the identity of their child: Medicare card, pre-school/school report, medical certificate, Centrelink letter or immunisation certificate.<sup>71</sup>

It seems that if parents experience difficulties in registering the birth of their child within the time limit, then the procedure for late registrations further exacerbates the hurdles for registration. The documents required to prove the identity of the child are unlikely to exist in the first place because most require the production of a birth certificate. This creates a catch-22 situation and there is no room for discretion on the part of the Registry if such documents are not available. This policy is inconsistent with the statement on the BDM Website, stating that ‘it is the State’s priority to support parents to register their child.’<sup>72</sup>

The process for late registrations will create further difficulties for parents who choose to register their child upon school enrolment. NSW Department of Education and Communities policy now requires parents to produce their child’s birth certificate when enrolling in a NSW public school.<sup>73</sup> Registry policy should ensure that late registration processes are simple and streamlined for parents as they have the potential to delay the entry of a child into the schooling system. This is a particular issue for Indigenous children, who already face significant barriers in accessing education.<sup>74</sup>

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66 *BDM Act* s 16(1).

67 One penalty unit equals \$110. The maximum penalty is therefore \$1100: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

68 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 16(2).

69 NSW Registry of Births, Deaths and Marriages, *Late Registration of a Birth* (2 September 2013) <[http://www.bdm.nsw.gov.au/bdm\\_bth.html](http://www.bdm.nsw.gov.au/bdm_bth.html)>.

70 A Certificate of Aboriginality is issued by a Land Council or Aboriginal organisation and is commonly used when applying for Aboriginal specific services and programs.

71 NSW Registry of Births, Deaths and Marriages, above n 69.

72 *Ibid.*

73 New South Wales Department of Education and Training, *Application to Enrol in a NSW Government School* <<http://www.schools.nsw.edu.au/media/downloads/gotoschool/enrolment/detsef.pdf>>.

74 The Closing the Gap strategy has major targets for Indigenous Schooling, particularly in closing the gap in education outcomes between Indigenous and non-Indigenous students: Ministerial Council for Education, Early Childhood Development and Youth Affairs and Education Services Australia, *Aboriginal and Torres Strait Islander Education Action Plan 2010–2014* (2010) <[http://www.mceecdya.edu.au/verve/\\_resources/A10-0945\\_IEAP\\_web\\_version\\_final2.pdf](http://www.mceecdya.edu.au/verve/_resources/A10-0945_IEAP_web_version_final2.pdf)>.

## B Certification

The Registrar may issue a birth certificate to an individual<sup>75</sup> and detailed requirements are found on the BDM Website and the Application for a Birth Certificate form.<sup>76</sup> If a parent or individual seeks to obtain a birth certificate *after* the time of registration, they must provide at least three forms of identification from various categories. An authorised individual listed on the application must also certify the forms of identification. It is much the same situation as discussed above, where many forms of identification required by the Registrar are those that can only be obtained with a birth certificate. Further, a fee of \$51 must be paid in order to receive a certificate.<sup>77</sup> The *BDM Act* contains a provision to remit whole or part of a fee<sup>78</sup> but there is little available information as to how this is used in practice and under what circumstances.

## C BDM Regulation

The *BDM Regulation* sets out the information to be given to the Registrar when registering a birth as well as the fees charged by the Registry. Section 62 of the *BDM Act* contains the regulation making power that is used when the *BDM Regulation* is repealed every five years.<sup>79</sup> The process of developing a Regulatory Impact Statement ('RIS') when the *BDM Regulation* is due to be repealed will be discussed later in Part Five in light of the social impacts of the regulatory regime.

## D Policies and Practices of the Registry

The BDM Website briefly mentions the existence of an Indigenous Access Program that holds information days to increase birth registration and assist Indigenous people to apply for certificates. However, there is no other publically available information regarding the dates and location of information days. Victoria ran a similar initiative in 2009 in regional areas.<sup>80</sup> Attendees were asked to bring three original identity documents; these included a credit card, rental statement and an ATO letter.<sup>81</sup> These accepted forms of identity are more appropriate as most do not require a birth certificate to obtain them in the first

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75 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 49.

76 NSW Registry of Births, Deaths and Marriages, Attorney-General & Justice, *Application for a Birth Certificate* <<http://www.bdm.nsw.gov.au/PDF%20forms/01-Birth-0713.pdf>>.

77 NSW Registry of Births, Deaths and Marriages, *Birth Certificates* (27 August 2013) <[http://www.bdm.nsw.gov.au/bdm\\_bth/bdm\\_bct.html](http://www.bdm.nsw.gov.au/bdm_bth/bdm_bct.html)>. Comparatively speaking, the fee for a birth certificate in NSW is rather high. In Victoria it currently sits at \$29.20. See Victorian Registry of Births, Deaths and Marriages, *Application for a Victorian Birth Certificate* <[http://www.bdm.vic.gov.au/resources/acb1f469-75ac-4b89-be2f-372a96a614c2/birth\\_app.pdf](http://www.bdm.vic.gov.au/resources/acb1f469-75ac-4b89-be2f-372a96a614c2/birth_app.pdf)>.

78 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 55.

79 *Subordinate Legislation Act 1989* (NSW) s 10.

80 Previously available at Victorian Registry of Births, Deaths and Marriages, *Aboriginal Community Information Days* <<http://online.justice.vic.gov.au/CA2574F700805DE7/Print/657A11A56C113B08CA257981001CD122?OpenDocument>> (copy on file with author).

81 Previously available at Victorian Registry of Births, Deaths and Marriages, *Registering a Birth* (2009) <[http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMContentSite-PDFs/\\$file/4060\\_BDM%20Aboriginal%20C5Flyer\\_Final.pdf](http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMContentSite-PDFs/$file/4060_BDM%20Aboriginal%20C5Flyer_Final.pdf)> (copy on file with author).

place. The Australian Capital Territory, Victorian and NSW Registries have also developed educational materials such as posters and flyers specifically for the Indigenous community.<sup>82</sup> Discussions of regulatory theory in Part Five will attest to the benefits of educational programs for encouraging compliance with regimes.

The BDM Website mentions the availability of Indigenous staff to deal with enquiries.<sup>83</sup> This is a welcome addition as further research indicates that the Northern Territory, Queensland and Western Australian Registries do not have Indigenous staff or liaison officers to assist the community.<sup>84</sup>

The NSW Registry does have a Memorandum of Understanding with Link-Up<sup>85</sup> to assist members of the Stolen Generations, allowing the use of alternate forms of identification and the ability to waive fees.<sup>86</sup> This would be of assistance to a proportion of the community but would be of greater use if it were more widely available. There are initiatives by other registries in Australia that are promising. Other forms of secondary identification in the Northern Territory, such as identification letters from Aboriginal communities and Larrakia Nation identification cards, can be accepted at the discretion of Registry staff.<sup>87</sup>

Part Two of this article demonstrated that international human rights law supports universal birth registration and the automatic provision of a birth certificate upon registration. An analysis of the NSW legislative framework does not support this position nor does the framework emphasise the importance of registration as the process of becoming legally visible within the community. In the following Part, anecdotal evidence of unregistered births in parts of NSW will serve to further highlight the procedural barriers in the current legal framework. It is the work of community organisations that act as the only point of intervention, expending significant amounts of time and money to remedy this issue.

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82 Ibid; The Office of Regulatory Services (ACT), *Birth Registration for Aboriginal and Torres Strait Islander Persons*, Department of Justice and Community Safety <[http://www.ors.act.gov.au/resources/attachments/Birth\\_Registration\\_for\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Persons.pdf](http://www.ors.act.gov.au/resources/attachments/Birth_Registration_for_Aboriginal_and_Torres_Strait_Islander_Persons.pdf)>; NSW Registry of Births, Deaths and Marriages, *Aboriginal & Torres Strait Islanders* (27 August 2013) <[http://www.bdm.nsw.gov.au/bdm\\_ats.html](http://www.bdm.nsw.gov.au/bdm_ats.html)>.

83 NSW Registry of Births, Deaths and Marriages, above n 82.

84 Clayton Utz, *Birth Registration Regulatory Framework Overview* (2012) (unpublished, copy on file with author).

85 Link-Up provides a range of services to members of the Stolen Generations, their families and foster and adoptive families.

86 NSW Registry of Births, Deaths and Marriages, above n 82.

87 Clayton Utz, above n 84; Northern Territory Registry of Births, Deaths and Marriages, *Births, Deaths and Marriages* (13 August 2013) <<http://www.nt.gov.au/justice/bdm/#id.>>.

#### IV INVESTIGATION INTO CURRENT PROCESSES AND PROGRAM INNOVATION IN NEW SOUTH WALES

The most comprehensive discussion surrounding birth certificates in the Indigenous community is related to identification for driver licensing and sporting programs. This Part will examine the situations where BDM processes amount to hurdles for Indigenous Australians. There are serious flow-on effects that non-registration or lack of a birth certificate can have on an individual, limiting their capacity to participate in economic, cultural and social activities. In all cases, it is clear that there is far greater need for culturally appropriate registration and certification processes for the Indigenous community to overcome this inequity. The projects discussed below identify an acceptable system of administering and issuing birth certificates to Indigenous people to overcome inequity in access to mainstream social activities.<sup>88</sup>

##### A Community Birth Certificate Projects

The Dubbo Aboriginal Birth Certificate Pilot ('Dubbo Pilot') in 2006 was developed after the NSW Sport and Recreation ('NSWSR') team recognised the lack of definitive identification among Indigenous people was a significant barrier to participation in community activities.<sup>89</sup> Similarly, a birth certificate drive held at the Minimbah Aboriginal Primary School, Armidale, in Northern NSW in November 2011 began when it was discovered 95 per cent of students did not have a birth certificate and 60 per cent had not even had their births registered.<sup>90</sup>

It is clear that the current model of service delivery for the Registry is inappropriate for the Indigenous residents of Dubbo, Brewarrina, Walgett and Bourke. At the end of the 12 month Pilot, 750 birth registrations were administered and 500 families were assisted by the project.<sup>91</sup> In Armidale, the Minimbah Project saw around 100 adults and children have their births registered

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88 Mark Horton, Submission No 85 to House of Representatives, *Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System* (8 March 2010) 2.

89 A birth certificate was necessary to participate in sporting activities and to be covered by insurance: House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 73 [3.116]. See also 'Birth Certificate Scheme Targets Dubbo Indigenous Population', *ABC News* (online), 12 March 2008 <<http://www.abc.net.au/news/stories/2008/03/12/2187060.htm>>; Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives *Reference: Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System* (Brisbane), 4 May 2010.

90 Natalie Croxon, 'Birth Certificates a Sign of Citizenship', *The Northern Daily Leader* (online), 14 February 2013 <<http://www.northerndailyleader.com.au/story/1302847/birth-certificates-a-sign-of-citizenship/>>. See also *Minimbah BDM Sampler* (Minimbah Primary School, UNE Students in Free Enterprise and Social Ventures Media, 2012) <<http://vimeo.com/album/1924601/video/41475275>>.

91 Horton, above n 88, 9.

or apply for certificates. Three more registration days were held in November 2012 where almost 300 registrations occurred.<sup>92</sup>

A number of cultural and economic factors were identified by NSW SR as challenges to gaining identification. These included collective family child raising, individuals being known by different names dependent on location and situation, being intimidated by the courthouse, transient lifestyles impacting on safekeeping of paperwork, distance and lack of transport to Registry locations and poor literacy and numeracy amongst certain communities.<sup>93</sup>

Innovation was required to work around the barriers in the birth registration and certification regime, revealing deficiencies in the legal framework. Trust was a significant factor in the success of the Dubbo Pilot, creating 'street level, culturally applicable access'.<sup>94</sup> The labour and time intensive model of doorknocking homes enabled direct interaction with families and occurred in a neutral location. The culturally appropriate nature of communicating with families in this way touches on the importance of understanding culture and regulation. Freiberg states that 'the wider the gap between cultural norms and practices and formal laws, the greater the risk of non-compliance'.<sup>95</sup> Non-compliance is also related to experiences of serious disadvantage historically and contemporaneously by Australian social policies.

Flexibility was key to the success of the projects, with the Registry accepting alternative documentation to establish identity.<sup>96</sup> This is crucial to procedural fairness as well as encouraging compliance. Finally, the provision of funds covering the cost of the registration and issuing of certificates overcame the most significant obstacle experienced by individuals.<sup>97</sup> These changes to procedure, documentation and communication processes were said to be crucial to the success of the Dubbo Pilot. This was coupled with a greater understanding of culture and kinship networks as well as a high level of trust.<sup>98</sup>

The provision of a birth certificate officially recognises an individual as a citizen and resident of NSW. It assists one to participate in the community and access the rights and privileges that such identification grants. On another level, the projects impacted on the provision of services by agencies through recognition of the resident population numbers. For the State it was anticipated

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92 University of New England students involved in the Minimbah Project travelled to Canberra in early 2013 to raise awareness of the difficulties in acquiring a birth certificate. See Enactus, 'Visit to Parliament House to Campaign for Free and Automatic Birth Certificates for all Australian Children' *Enactus UNE: Creating Positive Sustainable Change in our Community* (18 February 2013) <<http://blog.une.edu.au/sife/2013/02/18/visit-to-parliament-house-to-campaign-for-free-and-automatic-birth-certificates-for-all-australian-children/>>.

93 Horton, above n 88, 7.

94 Ibid 9.

95 Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 104.

96 Documentation was accepted from other agencies such as the Aboriginal Lands Council and Aboriginal Health Service: see Horton, above n 88, 9.

97 \$20 000 from the Department of Attorney General & Justice for the Dubbo Pilot and \$20 000 from New England Mutual for the Minimbah Project.

98 The Pilot also saw the Registry engage Indigenous staff: Horton, above n 88, 9.

that, if the Dubbo Pilot was extended, population numbers could increase by up to 25 per cent, thereby affecting the levels of GST received.<sup>99</sup>

## B Driver Education Programs

The barriers created by the regulatory regime of birth registration and certification are also identified in driver education programs. These programs often provided assistance to participants to help them obtain a birth certificate. One program assisting Indigenous people living in the Far North Coast of NSW developed a ‘systematic approach to assisting people to obtain a birth certificate ... as the first steps in the process of becoming a licenced driver.’<sup>100</sup> Many reports comment on the difficulties of not having appropriate personal identification for driver licensing<sup>101</sup> and the process and cost of applying for certificates to satisfy proof of identity requirements.<sup>102</sup> Blagg and Anthony found these requirements and uses of different names in various identification documents to be a key reason provided for driving offending.<sup>103</sup>

It is the lack of birth certificates that proves to be a major issue in Indigenous communities in NSW, particularly in rural and regional areas. This is most evident in the high rates of unlicensed drivers, particularly young people. Driver licence sanctions disproportionately affect Indigenous people in these areas.<sup>104</sup> In Western NSW, young Koori children who did not have a birth certificate were ashamed to admit so and did not apply for their learner’s permit; consequently

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99 Ibid 15.

100 *Executive Summary: On the Road: Evaluation of a NSW Aboriginal Community Based Driver Licensing Program* <[http://www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/vwFiles/On%20the%20Road%20Executive%20Summary.pdf/\\$file/On%20the%20Road%20Executive%20Summary.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/On%20the%20Road%20Executive%20Summary.pdf/$file/On%20the%20Road%20Executive%20Summary.pdf)> 4. See also R Q Ivers et al, ‘Development of a Community Based Aboriginal Driver Licensing Service: The AstraZeneca Young Health Programme’ (Paper presented at Australasian College of Road Safety (ACRS) Conference, The Menzies Sydney, 9–10 August 2012); Rebecca Ivers et al, ‘Road Safety and Driver Licensing in Aboriginal People in Remote NSW’ (Paper presented at Coalition for Research to Improve Aboriginal Health Conference, Sydney, 5–6 May 2011).

101 Yvonne L M Helps and Jerry Moller, ‘Aboriginal People Travelling Well Literature Review: Driver Licensing Issues, Seat Restraint Non-Compliance, Aboriginal Health, Aboriginal Disability’ (Research and Analysis Report, Australian Transport Safety Bureau, November 2007) 3.1.1.

102 Elliott & Shanahan Research, ‘An Investigation of Aboriginal Driver Licensing Issues’ (Research Report, December 2008) 30.

103 This report examined the rise in minor driving offences (unlicensed drivers) in remote communities in the NT after the introduction of the Intervention: Thalia Anthony and Harry Blagg, Grant CRG 38/09-10 Report to the Criminology Research Advisory Council, *Addressing the “Crime Problem” of Northern Territory Intervention: Alternate Paths to Regulating Minor Driving Offences in Remote Indigenous Communities*, June 2012, 8. See also E Somssich, ‘Overcoming the Cultural Divide Part II – Lessons Unlearned’ (Paper presented at the Joint ACRS-Travelsafe National Conference, Canberra, 2008) 354 and for further illustration see Thinking Transport, ‘Gippsland East Aboriginal Driver Education Project (GEADEP)’ (Overview Report, August 2009) <<http://www.thinkingtransport.org.au/sites/www.thinkingtransport.org.au/files/GEADEP%20Overview%20August%202009.pdf>>; and Orenstein, above n 6.

104 Department of Attorney General & Justice, ‘A Fairer Fine System for Disadvantaged People: An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme’ (Report, May 2011) 14.



they drove unlicensed and were fined frequently.<sup>105</sup> Research indicates that nearly a quarter of all Indigenous appearances in the NSW Local Court are for road traffic and motor vehicle regulatory offences.<sup>106</sup> The flow-on effects from a lack of formal identification can result in limiting access to employment opportunities and increasing the chances of coming into contact with the criminal justice system.<sup>107</sup>

### C House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Report on Indigenous youth in the criminal justice system exposed some of the difficulties that resulted from a lack of formal identification.<sup>108</sup> The Dubbo Pilot and examples from other submissions<sup>109</sup> led the Committee to recommend a more innovative approach be introduced to encourage birth registrations and to make birth certificates recognised as valued documents.<sup>110</sup>

The recommendations of the Committee represent perhaps the only high-level statement from a government body of the issues surrounding birth registration in Indigenous communities. It is, however, discouraging to note that the Commonwealth's response to the report simply acknowledged the importance of this issue but left the primary responsibility to the state and territory registries.<sup>111</sup> It would be of greater benefit for the Commonwealth Government to take a stronger stance on the importance of birth registration and certificates and acknowledge that there are barriers that indirectly discriminate against Indigenous Australians.<sup>112</sup>

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- 105 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Reference: Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System (Brisbane)*, 4 May 2010, <<http://www.aph.gov.au/binaries/hansard/reps/commtee/r12980.pdf>> 24.
- 106 Boris Beranger, Don Weatherburn and Steve Moffat, 'Reducing Indigenous Contact with the Court System' (Issue Paper No 54, NSW Bureau of Crime Statistics and Research, Parliament of NSW, 2010) 3; Legal Aid NSW, Submission No 9 to the Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, November 2012, 2.
- 107 Legal Aid NSW, above n 106, 2.
- 108 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time*, above n 89.
- 109 Janet Hunt, Submission No 22 to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*, 22 November 2009.
- 110 See recommendations in full: House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time*, above n 89, [3.120], [3.122] Recommendation 6.
- 111 Australian Government, 'Government Response to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Report', *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*, November 2011, 9.
- 112 Commonwealth Attorney-General Mark Dreyfus supports reform to the regulatory system and stated in April 2013 that he will raise the issue with his State and Territory counterparts but no progress has occurred since this statement: ABC News, *Dreyfus Joins Push for Free Birth Certificates* (4 April 2013) <<http://www.abc.net.au/news/2013-04-04/dreyfus-to-push-for-free-birth-certificates/4608932?section>

The barriers caused by the birth registration and certification regime in NSW are only exposed through the work of other agencies and these are addressed indirectly through innovative service delivery. Reform to the regulatory regime would address these issues, particularly if they were in line with regulatory best practice and human rights standards. In order to illustrate this, the following Part will discuss and explain regulatory theory. Examining the issue from this perspective will highlight the importance of trust in bringing about the desired regulatory outcome of the Registry.

## V REGULATORY THEORY AND BIRTH REGISTRATION

Understanding the regulatory framework surrounding birth registration in NSW is instrumental to understanding how behaviour and attitudes to birth registration are shaped. In its current form, the regulatory process is long and complex and can serve to alienate Indigenous Australians. It does not encourage compliance with the legal requirement of registering a child's birth nor does it promote trust in government, particularly considering the long history of government control over Indigenous people.

Regulation can be an important tool for governments seeking to achieve key strategic policy objectives and to respond to community needs. However, there is increasing awareness that inappropriate or poorly designed regulation can place an undue burden on the community as a whole.<sup>113</sup> In light of this observation, the regulatory regime around birth registration and certification will be evaluated to determine the extent to which the benefits might be outweighed by the costs in the form of fees and inflexible proof of identity requirements.

Regulation covers a 'diverse set of instruments used by government to influence or control the way people behave in order to achieve ... social policy objectives'.<sup>114</sup> According to regulatory theory, state regulation implies that governments act on behalf of their citizens for the 'collective good', the welfare of the community or in the 'public interest'.<sup>115</sup> The framework surrounding birth registration and certification is purposive, in that the registration of births intends to bring about a desired social outcome that is beneficial to the state and attempts to be beneficial to individuals. As Freiberg notes, it is this intention that provides the grounds for a 'discrete and deliberative act'.<sup>116</sup> It is therefore not the purpose of this article to examine whether there should be regulation of birth registration and certificates but rather *how* this regulation should occur and whether reform is required.

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113 Government of Victoria, *Victorian Guide to Regulation* (Department of Treasury and Finance, 2011) 1.

114 Australian National Audit Office, *Administering Regulation, Better Practice Guide* (March 2007) 1.

115 Freiberg, above n 95, 5.

116 *Ibid* 4.

An integral part of the regulatory process is assessing the effectiveness of the regulatory arrangement in achieving policy objectives.<sup>117</sup> The general consensus by government is that regulation should be designed to meet these objectives with minimal costs to the community.<sup>118</sup> The role of the Registry is said to ‘register NSW life events accurately and securely for all time, ensuring their integrity and confidentiality’ and to meet the ‘varied and valid needs of our customers by providing a range of certificates, products and information services that help establish a range of legal entitlements’.<sup>119</sup> This suggests that the policy objective of the birth registration and certification scheme in NSW is focused on providing services to the individual. To assess whether the current system yields greater net benefits to the community as a whole via a cost-benefit analysis is difficult. This analysis would conclude that a majority of births registered in NSW equals a successful regulatory regime. Where the evidence reveals that Indigenous people experience difficulties in accessing the regime it becomes an even greater problem to accurately assess its success.

The regulatory tool of birth registration is valuable for the state, allowing the collection and dissemination of statistical information and access by other government agencies. This population information assists in determining the allocation of government services and federal funding through the Commonwealth Grants Commission.<sup>120</sup> The use of fees for the issue of birth, death and marriage certificates also functions as a source of revenue to the state.<sup>121</sup> Certification on the other hand is a tool that is valuable for citizens, making one legally visible and ensuring the rights and privileges enjoyed by everyone in the community. Whilst the priority of the Registry is to encourage everyone to register the birth of his or her child, the benefit of the registration is not passed on *until* a certificate is issued. The purpose of ‘citizenship (statehood) is undermined’<sup>122</sup> by processes that impose compliance costs such as fees and other certification policies.

### A Regulatory Risk and Compliance

The regulatory processes around birth registration and certification are unique in that they do not regulate one group or market but attempt to regulate the whole of society. This significantly increases the scope of ‘regulatory risk’, which can be defined as an actual or potential event or circumstance that

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117 There is no publically available information on what evaluation strategy the Registry adopts and whether it has any key performance indicators.

118 Australian National Audit Office, above n 114.

119 NSW Registry of Births, Deaths and Marriages, *About Us* (27 August 2013) <[http://www.bdm.nsw.gov.au/bdm\\_abt.html](http://www.bdm.nsw.gov.au/bdm_abt.html)>.

120 NSW Department of Attorney General & Justice, ‘Regulatory Impact Statement – Births, Deaths and Marriages Registration Regulation 2011’ (Impact Statement, June 2011) 6.

121 During the 2010–11 financial year the forecast dividend to the NSW Government was \$2.71 million: *Ibid.*

122 Olivia Rundle and Samantha Hardy, ‘Australian Birth Certificates: The Best Interests of No One at All’ (2012) 26 *Australian Journal of Family Law* 116, 117.

interferes with the achievement of a regulation policy objective.<sup>123</sup> In the case of birth registration there appears to be a higher risk of non-compliance in groups that are marginalised from government services or have a complex history of relations with government. These factors can decrease people's willingness to comply. A common source of non-compliance is the 'failure of affected groups to understand the law.'<sup>124</sup> To address this issue, more appropriate compliance strategies should be put in place such as education and encouragement. A regulator's response to non-compliance must be proportionate to the risks posed and in these circumstances flexibility should be a key feature of the Registry's response.<sup>125</sup>

Regular monitoring of regulatory risk would enable the Registry to adjust policies to reflect changing priorities. There is no information as to how the Registry currently responds to non-compliance and how often in practice parents are fined for non-registration. The regime makes it particularly difficult as the onus is on the parent to complete the BRS and submit it to the Registry, with the consequences of non-registration only being felt later on in a child's life (eg, enrolling at school, applying for a tax file number, drivers licence or passport).<sup>126</sup>

Although the regulatory framework *prima facie* brings collective benefits to the community, it is inaccessible to some members by reason of faults in regulatory processes. A good compliance regime should contain sufficient incentives to comply and affected parties should be encouraged to comply with regulatory requirements voluntarily.<sup>127</sup> Onerous and inflexible requirements offer no incentive to an individual to obtain a birth certificate post the time of registration. In its present form the regulatory framework does not align compliance and self-interest and there remains a gap between when the state benefits and when the individual is to benefit. In order to be perceived as legitimate it must provide some benefit to the individual. Ideally this would come in the form of automatic provision of a free birth certificate upon registration.

## **B Trust in Government**

Trust is a powerful regulatory tool that can bring about better regulatory outcomes as it can improve compliance. As Freiberg notes, public trust is encouraged when authorities make their decisions through procedures that members of the public view as fair.<sup>128</sup> The Victorian State Services Authority states that it is likely that citizens' 'satisfaction with public services influence trust in government.'<sup>129</sup> It is the inflexible practices of the Registry that work to break down public trust and law abiding behaviour.

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123 Australian National Audit Office, above n 114, 8.

124 Government of Victoria, above n 113, 28.

125 *Ibid* 64.

126 Orenstein, above n 6.

127 *Ibid*.

128 Freiberg, above n 95, 16.

129 State Services Authority of Victoria, 'A Matter of Trust: Trust in Government' (Working Paper No 2, State Services Authority, 2007) v.

The NSW Registry seems to be an anomaly amongst government institutions in that it does not have any policies that make concessions for those that are economically disadvantaged. This does not sit well with the general redistributive goals of government through other regulatory systems such as taxation and social security. There is a view within the community that ‘certain goods and services are fundamental or essential and should be provided free of charge to all (or at least concessional rates to those most in need).’<sup>130</sup> There does not appear to be a strong argument as to why this view should not be adopted for the goods and services provided by the Registry, or at least the most fundamental service – the provision of a birth certificate.

Murphy and Tyler observe that ‘fair procedures communicate respect and value; unfair procedures communicate disrespect, marginality or even exclusion from a valued group.’<sup>131</sup> Marginality and mistrust amongst disadvantaged members is increased through the lack of discretion. In the regulatory context trust is crucial because ‘it lowers the transaction costs’ both economic and social for the Registry,<sup>132</sup> it is seen as an unlimited and efficient resource.

The automatic provision of a birth certificate upon registration would be beneficial from a regulatory perspective, as the Registry would be perceived to be acting in good faith. This is similar to Tyler’s ‘proactive model of social regulation’ that is based upon encouraging and maintaining public trust in the character and motives of legal authorities.<sup>133</sup> He notes that individuals are influenced by the behaviour of legal authorities during a personal encounter that then affects their overall confidence in the legitimacy of legal authorities and further forms the basis on which they decide to comply in future encounters.<sup>134</sup> This is more complex when considering the historical relationship between the State and Indigenous people. As Reilly states, historically, government power is responsible for the extent to which Indigenous rights have been affected and protected.<sup>135</sup> Government agencies must therefore work hard in these communities to undo the institutionalisation of mistrust and marginalisation.

### C Expressive Function of the Regulatory Regime

Beyond the facilitative role of the law in regulating birth registration is considering the way in which it may give expression to particular values.<sup>136</sup> Given that having one’s birth registered is the gateway to enjoying many rights

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130 Government of Victoria, above n 113, 9.

131 K Murphy and T R Tyler, ‘Procedural Justice and Compliance Behaviour: The Mediating Role of Emotions’ (2008) 38 *European Journal of Social Psychology* 652, 653.

132 Freiberg, above n 95, 14.

133 Tom Tyler, ‘Trust and Law Abidingness: A Proactive Model of Social Regulation’ (2001) 81 *Boston University Law Review* 361, 362.

134 *Ibid.*

135 Alexander Reilly, ‘Finding an Indigenous Perspective in Administrative Law’ (2009) 19 *Legal Education Review* 271.

136 Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 5.

within the community and is a human right in itself, it is critical that the expressive function is maintained. The legal frameworks around birth registration can promote the enjoyment of other rights even though they are not explicitly provided for in the *BDM Act* or *BDM Regulation*. In proposing this expressive function it is essential that public education campaigns are designed that acknowledge the practical importance of a birth certificate and to introduce policies such as giving the Registrar discretion over proof of identity requirements.

Current laws and practices of the Registry do not express the importance of registration in the community. The *BDM Act* itself should state the value and practical importance of a birth certificate to an individual as it carries both legal and social meanings. This proposal relies on making statements about the importance of registration and birth certificates as opposed to simply controlling behaviour directly and inflexibly.<sup>137</sup> Presently the regulatory regime is inflexible, imposing standardised fees and proof of identity requirements. This does not adequately deal with diverse circumstances of NSW residents or changes over time. Further, the time lags that are inherent in making and amending legislation exacerbate this problem.

#### D Regulatory Reform and Regulatory Impact Statements

Governments use RIS as part of the regulation-making process.<sup>138</sup> It is the presence of this process that allows us to examine the justifications behind some of the policies of the Registry, particularly the rationale for charging and increasing fees. The *Subordinate Legislation Act 1989* (NSW) requires that statutory rules (regulations) be reviewed every five years and in accordance with Schedule 2 of the Act a RIS must be prepared for all new statutory rules. When due for repeal, the Department of Attorney General and Justice must review the *BDM Regulation*, its social and economic impacts, and whether it is still needed.<sup>139</sup> The *BDM Regulation* has been reviewed three times since RIS' have been introduced in NSW, most recently in 2011.

The 2011 RIS<sup>140</sup> states that the Registry is an off-budget government agency that is classified as a controlled 'for profit' commercial entity of the Department of Attorney General and Justice. Given this classification, the Registry must cover all its operating and capital costs from the revenue generated from its services (issuing various certificates). It states that the Registry's rationale for setting fees is to meet the 'cost of providing Registry services and for capital investment to maintain and improve services to the NSW community'.<sup>141</sup> The document emphasises the importance of birth certificates as 'documentary

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137 Cass R Sunstein, 'On the Expressive Function of the Law' (1995–6) 144 *University of Pennsylvania Law Review* 2021, 2024.

138 See Colin Kirkpatrick and David Parker, *Regulatory Impact Assessment: Towards Better Regulation?* (Edward Elgar, 2007).

139 Better Regulation Office, 'Guide to Better Regulation' (NSW Premier and Cabinet, November 2009).

140 NSW Department of Attorney General & Justice, above n 120.

141 *Ibid* 5.

evidence of an identity ... that can assist them to obtain a range of legal, social and financial entitlements<sup>142</sup> but also suggests that their provision is dependent on the charging of a fee. This undermines the importance of birth certificates to the community.

RIS' have generally proposed to remake the *BDM Regulation* with regard to fees and to rationalise the information collected. When it has been proposed to remake the Regulation with fee increases, the justification is that 'the Registry can continue the practice of not charging fees to register new births, deaths and marriages'.<sup>143</sup> A review of repealed Regulations (including historical versions) shows a steady increase in fees from \$29 in 2001<sup>144</sup> to \$51 at present.<sup>145</sup>

On average, 215 000 new births, deaths, marriages, adoptions and changes of name, sex and relationships are registered each year and the Registry receives approximately 560 000 applications for certificates.<sup>146</sup> A modest proportion (nearly 20 per cent) of these certificates would be issued at birth/upon registration as the ABS states in 2011 there were 99 054 births registered in NSW.<sup>147</sup> Reform to the regulatory regime resulting in the automatic provision of a birth certificate upon registration would encourage timely registration of births. Although 20 per cent is a significant shortfall in revenue, a proportion of this amount is likely to be made up through other avenues, for example, the sale of commemorative certificates.<sup>148</sup>

Admittedly it is not feasible for *every* certificate issued by the Registry to be free and as the RIS states, if this were to happen, governments would have to make up the shortfall from lost revenue through direct budget allocation. Similarly, services provided by the Registry would be reduced or resources from other sources diverted from current uses.<sup>149</sup> The Registry states that its fees are levied on an equitable and predictable basis however concessions are not provided. Automatic provision would still allow the Registry to fulfil its legislative requirements as well as making its services more *accessible* to NSW residents, particularly Indigenous Australians. Such a regime will allow NSW parents to promptly obtain a birth certificate to establish their child's identity or to obtain entitlements to benefits. It would also result in reduced administrative costs in relation to collecting fees.

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142 Ibid 6.

143 Ibid 10.

144 *Births, Deaths and Marriages Registration Regulation 2001* (NSW) (repealed) sch 1.

145 This amount has been taken from the Registry Website: NSW Registry of Births, Deaths and Marriages, above n 61. However, the amount listed in *Births, Deaths and Marriages Registration Regulation 2011* (NSW) (Current version for 1 July 2013 to date (accessed 11 July 2013)) sch 1 is \$44.

146 NSW Department of Attorney General & Justice, above n 120.

147 Including 5 614 (5.7 per cent) Aboriginal and Torres Strait Islander births: Australian Bureau of Statistics, *Births, Australia, 2011: Table 10.1 Births of Aboriginal and Torres Strait Islander Peoples, Summary – New South Wales – 2006 to 2011* (25 October 2012) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3301.02012?OpenDocument>>.

148 The NSW Registry produces commemorative certificates that can be purchased at an additional cost: NSW Registry of Births, Deaths and Marriages, above n 61.

149 NSW Department of Attorney General & Justice, above n 120, 7.

The use of RIS is helpful when assessing the rationale behind reforms. However, there are some shortcomings in the review process. The public consultation for these reviews is not likely to be wide ranging, primarily involving other government departments and registries. This may be because it is not well publicised or seen as ‘interesting’ by the general public, or there simply may be little public engagement in any of the reviews conducted by the Department of Attorney General and Justice. Secondly, the assessment of the costs and benefits of the proposal is narrow in that it only focuses on the ‘big picture’, predominantly the economic, not societal costs. It also does not identify *who* in the community will reap the benefits or costs of the regulation but rather whether the proposal ‘maximises the net benefit to society’.<sup>150</sup> There are other methods that can be used to assess the effectiveness of a regulatory regime, such as academic research that evaluates regulatory effectiveness and contains cross-jurisdictional comparisons as well as the experience of other jurisdictions with different regulatory frameworks.<sup>151</sup>

The competing interests of the Registry and its classification as a ‘for profit’ commercial entity complicate proposals for reform. According to regulatory theory, however, there are other methods available to encourage registration. It may not be a case of reducing the extent of regulatory activity for the Registry but changing their authority to encourage compliance. Because Indigenous people make up a small percentage of the community, according to standard lines of regulatory evaluation, the total benefits to the community will always outweigh the costs. In this context, it becomes a no-win situation. Not having a birth certificate excludes a person from many rights and privileges taken for granted by society. It is important, therefore, to revisit the language and process of regulatory evaluation in a way that complements human rights standards. Ideally one would want a significant change in the policy and practices of the Registry as this aspect creates an indirect barrier for Indigenous Australians. This will be discussed in detail in the following Part with models for reform.

## VI MODELS FOR REFORM – REGULATION AND INTERNATIONAL HUMAN RIGHTS LAW

It is only with the intervention of dedicated and sponsored community organisations in NSW that action to remedy the omissions of Indigenous birth registration has been taken. This article proposes that a rights based approach be introduced to the regulatory regime to protect and promote the right to birth registration and access to a birth certificate. Such an approach would focus on flexibility and discretion. A regime that is consistent with human rights can also reflect best practice principles concerning regulatory quality, performance, and compliance.

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<sup>150</sup> Government of Victoria, above n 113, 53.

<sup>151</sup> *Ibid.*



## A Principles-Based Regulation: A New Approach

Principles-based regulation ('PBR') enables regulatory theory to be compatible with principles from international human rights law.<sup>152</sup> Black, Hopper and Band notes that the term 'principles' can be used to suggest that 'these rules are implicitly higher ... than more detailed rules: they express the fundamental obligations that all should observe.'<sup>153</sup> With this in mind, the Registry would be guided by outcomes that align with current human rights standards rather than driven by process and rules that inhibit these standards.

PBR would characterise the process of registration as more than bureaucratic engagement with government for recording purposes, but a part of securing ones basic citizenship and human rights. This would also require the process to be streamlined rather than requiring two distinct applications. This is an acknowledgement that birth registration alone achieves little and it is a birth certificate that is crucial to an individual's full participation in society.<sup>154</sup>

The current rules-based framework allows the regime to be administered consistently and provides certainty for the Registry. However, it is not always appropriate for certain groups of regulated individuals, such as Indigenous Australians. The technical nature of the regime manifests itself by 'regulatory unresponsiveness', namely the 'failure to consider arguments that exceptions to the rules should be made.'<sup>155</sup> Rather than anticipating that some people in the community may not have the required identification documents, the framework simply denies the benefits of certification to these individuals. A PBR approach 'facilitates regulatory flexibility' through a statement of general principles that can be applied to new and changing situations.<sup>156</sup>

Key distinctions between the two approaches are demonstrated in Table 1 below. The current process in NSW is italicised in the first column whilst the favoured PBR human rights approach is examined in the second column.

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152 PBR is more commonly used where those that are regulated are autonomous firms, such as the financial services industry in the United Kingdom. Julia Black, Martyn Hopper and Christina Band, 'Making a success of Principles-based regulation' (2007) 1 *Law and Financial Markets Review* 191.

153 Ibid 192.

154 Gerber, Gargett and Castan, 'Does the Right to Birth Registration Include a Right to a Birth Certificate?', above n 6, 441.

155 Freiberg, above n 95, 271.

156 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 1, 235 [4.7].

Table 1: Rules-based vs. principles-based approaches<sup>157</sup>

<b>Rules-based</b>	<b>Principles-based</b>
Complies with a specific set of procedural requirements (eg, checklist of dos and don'ts) <i>Exhaustive list of acceptable proof of identity documents, multiple and confusing forms.</i>	Emphasises 'doing the right thing' by appropriate means <i>A regime that encourages birth registration with an emphasis of the importance of a birth certificate.</i>
Comply or else <i>Strict time limits for registration and penalties for non-registration.</i>	Comply or explain <i>Discretion. Compliance focuses on encouragement and education, not penalties.</i>
Follows the letter of the law <i>Regulations are reviewed every 5 years, often with fee increases for certificates.</i>	Follows the spirit of the law <i>Responsive to those in the community that face barriers interacting with birth registration and certification processes.</i>
Represents the minimum of ethical standards <i>Use of a RIS as a minimum level of policy analysis in examining social burden of proposed regulations.</i>	Includes and extends the legal domain to issues that law does not address <i>Possibility of fee waivers or concessions; culturally appropriate policies and practices such as outreach in rural, regional and remote communities</i>
Mandatory <i>Exhaustive list of identity documents.</i>	Discretionary <i>Flexibility in acceptable proof of identity documents</i>
Tends to be fear driven <i>Focuses on time limits, penalties, and identify theft.</i>	Tends to be values driven <i>Promotes and protects human rights; emphasises the value of registration and the benefits flowing from it.</i>
Tends to consider issues in black and white <i>Limited alternatives if one cannot satisfy Registry policies.</i>	Considers issues in the 'grey' areas <i>Collaborative approach with different agencies regarding identification if certificate is obtained after the time of registration.</i>
More explicit, detailed, prescriptive <i>Two-step process for registration and certification</i>	More implicit, broad <i>Automatic issue of a birth certificate once a birth has been registered.</i>

## B Proposed Reforms

An ideal reform to the framework would see rules-based regulation integrated with human rights principles. The presence of these principles would ensure that the regime could adapt upon identifying the difficulties that individuals encounter, with the goal of creating an accessible process for obtaining a birth certificate. A regime that reflects human rights standards would allow the introduction of greater discretion on the part of the Registrar. This would include the introduction of a detailed policy regarding fee waivers, the availability of

<sup>157</sup> Table adapted from Surendra Arjoon, 'Striking a Balance Between Rules and Principles-Based Approaches for Effective Governance: A Risks-Based Approach' (2006) 68 *Journal of Business Ethics* 53, 58.

concession rates or ideally a free birth certificate issued upon registration. This approach would target the rules that currently act as an impediment to many Indigenous parents. Such reforms would help to ensure that Australia complies with article 7 of the *CROC*.

At a legislative level, the Registrar's General Functions outlined in section 6 of the *BDM Act* should be amended to ensure that the system is 'accessible'. The objectives should also state the importance of birth registration as a human right and the importance of a birth certificate to enable an individual to enjoy basic citizenship and human rights. The framework for reviewing regulations in NSW (Regulatory Impact Statements) should also reflect this changing priority. Proposed regulations should also consider their ability to interfere or restrict human rights as well as their economic burden.

The difficulties of access for Indigenous Australians must also be acknowledged. Ideally this would be in the form of a fee waiver accompanied by eligibility criteria, as it exists in other jurisdictions such as Victoria<sup>158</sup>. Healthcare, pension and concession cardholders or others receiving Centrelink (such as Youth Allowance or ABSTUDY) would be eligible for a fee waiver. Further information regarding eligible categories would be available on the BDM Website. The Law Institute of Victoria states that a fee waiver 'is important to ensure that socially and economically disadvantaged people are not precluded from accessing what they otherwise have a right to access as a citizen or resident.'<sup>159</sup> There must also be residual discretion on the part of the Registrar to assess on a case-by-case basis if an individual does not fit within the above categories, such as in situations of hardship. This discretion may come under the existing power in section 55.

Alternatively, the Registry could automatically issue a birth certificate upon registration. The high number of registrations and applications for certificates illustrated in Part Four is direct evidence that a free birth certificate is a significant incentive to register a child's birth. Automatic provision is in line with the CRC's concluding observations, urging that Australia issue birth certificates upon the birth of a child and for free.<sup>160</sup> This would also reduce the administrative costs of the Registry in handling and processing money transactions and would be less time consuming and costly than assessing applications for a fee waiver.<sup>161</sup> The Registry figures in Part Five suggest that only a small proportion of certificates issued are those obtained by parents at the time of registration. Further, Indigenous births account for roughly 5 per cent of

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158 Victorian Registry of Births, Deaths and Marriages, *Koori Services: Apply for a Certificate*, above n 23.

159 Law Institute of Victoria, Submission No 6 to the Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, November 2012, 2.

160 United Nations Committee on the Rights of the Child, *Concluding Observations: Australia*, 60<sup>th</sup> sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) 9.

161 The International Commission of Jurists, Victoria Branch, Submission No 5 to VLRC Consultation Paper, *Birth Registration and Birth Certificates*, November 2012.

all births in NSW each year.<sup>162</sup> Issuing free certificates to this proportion of the population would not create a large deficit in the Registry's annual profit.

More prescriptive regulation may be required when considering matters of identity fraud. However there are still ways to assist those faced with the barriers of proving one's identity whilst ensuring the Register remains secure. This may occur where an individual is seeking to obtain a copy of their birth certificate later on and do not have appropriate documentation. The Department of Transport in Western Australia introduced a Verification of Identity form to assist participants living in remote areas to apply for a driver's licence where they are genuinely unable to meet the standard proof of identity requirements.<sup>163</sup> Flexibility in accepting proof of identity documents could also be extended to include certificates of Aboriginality. Both would work to break the vicious cycle that currently exists.<sup>164</sup> This reform adequately balances the Registry's competing interests of keeping the Register secure and ensuring everyone in the community has access to its services.

On a practical level, changes should be made to the Birth Certificate Application Form. It currently does not state the importance of a certificate as a proof of identity document. To a new parent it may be considered as just another step in the administrative process of registration. The significance of obtaining a birth certificate is also undermined by the fact that one third of the flyer is devoted to a 'commemorative certificate' and on the application itself it is listed before a standard certificate. The flyer does not emphasise that a 'commemorative certificate' cannot be used as an official identity document, which may confuse applicants. More substantial information should be provided about the consequences of not registering one's child's birth and obtaining a standard birth certificate.<sup>165</sup> It is inappropriate for what is in essence a financial benefit to the Registry to be included on the same form for a standard birth certificate.

Finally, as past government policies and laws have failed to consider an Indigenous perspective and have contributed to contemporary disadvantage, policy and service delivery must be considered as part of regulatory reform. Program innovation in Part Four demonstrated the need for outreach services and the importance of developing a relationship of trust in encouraging compliance. Changes to service delivery in the form of outreach are also in recognition of many in the community to whom traditional service models are inappropriate. This may include those who are homeless, itinerant, or transient, or live in remote

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162 Australian Bureau of Statistics, *Births, Australia, 2011*, above n 147.

163 Department of Transport, 'Aboriginal People and Ethnic Minority Groups accessing our Driver Licensing Services: Substantive Equality Framework Assessment' (Review Report, Parliament of Western Australia, 2012) 21. See also Department of Transport (WA), *Verification of Identity for Driver's Licence Application* <[www.ors.wa.gov.au/Documents/Indigenous/ors-indigenous-ddl-proof-of-identity.aspx](http://www.ors.wa.gov.au/Documents/Indigenous/ors-indigenous-ddl-proof-of-identity.aspx)>.

164 This occurs where the categories of acceptable identification can generally only be obtained with a birth certificate.

165 Castan Centre for Human Rights Law, 'Submission No 10 to the Victorian Law Reform Commission', *Birth Registration and Birth Certificates*, November 2012, 8.

communities.<sup>166</sup> The NSW Roads and Traffic Authority 'Action Plan' demonstrates that services can meet the needs of the Indigenous community by embedding specific initiatives. These include developing culturally appropriate public education resources to inform and assist Indigenous people and to develop strategies to increase Indigenous people's access to gaining a licence through culturally appropriate programs.<sup>167</sup>

It is within the means of the Registry to adopt similar initiatives and a framework that complements standards for birth registration as enunciated in international human rights law. Instead of prescribing processes in the form of inflexible administrative rules, the Registry should redefine the outcomes they wish to achieve; namely an accessible and effective system of birth registration.

## VII CONCLUSION

This article has sought to demonstrate that the regulatory framework surrounding birth registration and certification creates barriers that indirectly discriminate against Indigenous Australians. It has done this by examining the NSW legal frameworks governing birth registration and birth certificates, their practical implementation, and their impacts on the Indigenous community. The following factors were identified as barriers to registration and certification: service delivery; difficulties with providing adequate proof of identity documents; and difficulties in paying for a certificate once all other barriers are overcome. In examining this regime, the author has focused on the interrelationship between regulatory theory and international human rights law concerning the right to registration and access to birth certificates.

Regulatory theory has been adopted as a theoretical framework as its concepts provide justifications for reform. Further, under international human rights law Australia has an obligation not only to provide a legal mechanism that facilitates birth registration, but also to ensure that it is implemented in *practice*.<sup>168</sup> In their current form, the frameworks operate to impede the realisation of citizenship and human rights. The right to birth registration<sup>169</sup> provides an overarching framework to guide and assist individuals to develop an appreciation of the importance of registration. This appreciation is not possible

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166 Mary Spiers Williams and Robyn Gilbert, 'Reducing the Unintended Impacts of Fines' (Current Initiatives Paper 2, Indigenous Justice Clearinghouse, January 2011) 3.

167 Roads and Traffic Authority of NSW, 'Aboriginal Action Plan 2009-2012' (Report, October 2011) [1.2], [1.6]. See also Department of Transport, Western Australia, 'Aboriginal People and Ethnic Minority Groups Accessing Our Driver Licensing Services: Substantive Equality Framework Assessment' (Report, 24 September 2012).

168 Castan, Gerber and Gargett, 'Indigenous Australians' Access to Birth Registration Systems: A breach of International Human Rights Law?', above n 6, 79.

169 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(2) and *Convention on the Rights of the Child*, opened for signature 20 November 1989, 28 ILM 1448 (entered into force 2 September 1990) art 7.

without encouraging compliance through the automatic provision of a certificate; it is the certificate that provides substance to the right of birth registration.<sup>170</sup>

It is clear that individuals who have not been registered or are registered but for some reason are unable to obtain a birth certificate do not have equal access to health care, education and other social services. The procedural barriers that prevent individuals from accessing these entitlements are a form of indirect discrimination. It must also be acknowledged that there is a need to adequately balance the Registry's competing interests of keeping the Register accurate and secure with the need for flexibility and ensuring everyone in the community has access to its services. The reforms in the previous part would greatly assist the Registry to eliminate or significantly reduce the barriers preventing Indigenous people from registering births or obtaining a birth certificate. As a key government service, the Registry has the responsibility to ensure access and equity to all NSW residents. At present, the existence of these barriers has unquantifiable societal costs.

This is an issue that manifests itself through many ways in our community – inaccurate registration data can skew fertility and population statistics affecting service delivery and funding, families and communities sharing driver's licences or Medicare cards can distort criminal and medical statistics. All of these can contribute to a distorted image of the health and wellbeing of Indigenous Australians and have wider implications on society.

Right to recognition before the law relies on evidence of birth registration. However, possessing a birth certificate is something that is taken for granted in society. It is a prerequisite to enjoying many citizenship rights, such as participating in the workforce, beginning education, accessing government services, opening a bank account and getting a driver's licence amongst others. As the VLRC notes, '[a] person's identity is not dependent on the issue of a government document. A person has identity by reason of that person's existence.'<sup>171</sup> It is no longer acceptable that an individual could have limited rights because they do not possess such a document.

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170 Gerber, Gargett and Castan, 'Does the Right to Birth Registration Include a Right to a Birth Certificate?', above n 6, 435.

171 Victorian Law Reform Commission, 'Registration Project Reveals Exclusion' (2013) 87(1–2) *Law Institute Journal* 76. See also Victorian Law Reform Commission, *Consulting on Birth Registration and Certificates* (3 April 2013) <<http://www.lawreform.vic.gov.au/publications-and-media/speeches/consulting-birth-registration-and-certificates>>.