

**Dr Paula Gerber's Submission to the
Community Consultation into a Charter of
Human Rights & Responsibilities for Tasmania**

16 December 2010

1. Introduction

Both the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the ACT *Human Rights Act 2004* omitted two important rights. These omissions significantly impact on the utility of those pieces of legislation. The purpose of this submission is to highlight those two flaws and urge the Tasmanian Government not to make the same mistake.

2. The Right to Birth Registration

The Victorian and ACT human rights legislation purport to give domestic effect to the International Covenant on Civil and Political Rights (ICCPR). Article 24(2) of the ICCPR is a very short but important provision. It provides that: “*Every child shall be registered immediately after birth and shall have a name.*”

Birth registration is the administrative process whereby a child's birth is officially recorded on a civil register. As Archbishop Desmond Tutu noted:

Birth registration is much more than an administrative procedure. It is a key event in a child's life. This is because birth registration acts as the starting point for engagement between the state and the individual. Registering a child at birth signifies the state's recognition of the child's existence and acceptance of its responsibility to ensure the child enjoys the rights and privileges that he or she is entitled to throughout life.¹

The right to birth registration as set out in Article 24(2) of the ICCPR was NOT included in the Victorian *Charter of Human Rights and Responsibilities*. The decisions to not include this right was based on the recommendation of the Committee which undertook the community consultation. That Committee's report stated that:

The Committee has not included ... the right to birth registration and to a name. While these rights were more relevant in the post-World War II context in which the ICCPR was drafted, they are less relevant for inclusion in a modern Victorian Charter.²

The assumption that the right to birth registration is not relevant in modern day Australia is erroneous. It has recently come to light that there are a significant number of Indigenous Australians whose births were never registered and who are now experiencing difficulties obtaining a birth certificate; a piece of paper that is

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

² Victorian Department of Justice, *Rights, Responsibilities and Respect: the Report of the Human Rights Consultation Committee* (2005), 45.

essential for obtaining important documentation such as a driver's license and passport.

Not having a birth certificate has a huge negative impact on an individual's ability to participate fully in society. This is well illustrated by the story of Bradley Hayes, a 31-year-old Indigenous man who grew up a ward of the state. For 30 years he was legally invisible; he could not obtain a birth certificate and in the eyes of the authorities, he simply did not exist. Mr Hayes battled to establish his legal identity, to allow him to enjoy what the majority of people take for granted, getting a driver's licence or registering a fishing boat. The inability to obtain a copy of his birth certificate was the constant stumbling block for Mr Hayes. After a ten year struggle, and with the help of a community legal centre, Mr Hayes finally obtained a birth certificate, and became legally visible. He jubilantly stated: 'Like I said to my kids, I'm somebody now, I'm not nobody anymore'.³

Unfortunately, Bradley Hayes is just one of countless Indigenous Australians who are experiencing difficulties with obtaining a birth certificate because their birth was never registered. In 2005, of the 9,900 children born to Indigenous mothers in Australia, 13% (1,300 children) were not registered.⁴ These numbers suggest that the lack of birth registration in Indigenous communities is a significant problem.

Preliminary investigations attribute the non-registration of births by Indigenous Australians to a lack of confidence in dealing with authorities, marginalisation from mainstream services, lack of understanding of the requirements and benefits of birth registration, poor literacy levels and low priority afforded to birth registration.⁵ It may also be that the now discredited government policies of removing Indigenous children from their parents, which created what has become known as the 'Stolen Generations', is a reason behind Indigenous Australians not registering the birth of their children. These policies may have left Indigenous Australians with a residual fear of government record keeping, particularly when it comes to their children. In this regard, birth registration could operate as an undiscovered site of inter-generational trauma. Intergenerational trauma being the 'trauma that is multigenerational and cumulative over time; it extends beyond the life span'.⁶

Regardless of the underlying cause of non-registration of births within the Indigenous community, it is clear that a right to birth registration is not irrelevant, as the Victorian Consultative Committee suggested. On the contrary, it is a very real and current issue for many of society's most vulnerable,⁷ and for this reason the Tasmanian

³ *The Age* 23 January 2009.

⁴ Orenstein J 'Being Nobody – The Difficulties Faced by Aboriginal Victorians in Obtaining Identification', Speech delivered at National Association of Community Legal Centres Conference, 14-17 September 2009.

⁵ Gargett A, Gerber P, Castan M 'A Right to Birth Registration in the Victorian Charter? Seek and You Shall Not Find!' (2010) 36(3) *Monash University Law Journal* forthcoming; Gerber P 'Making Indigenous Australians "Disappear": Problems arising from our birth registration system' (2009) 34(3) *Alternative Law Journal* 158; Gerber P 'Making Visible the Problem of Invisibility' (2009) 83(10) *Law Institute Journal* 52; Orenstein J 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (2008) 7(8) *Indigenous Law Bulletin* 14; and

⁶ Cox D 'Working with Indigenous survivors of sexual assault' (2008) 5 *ACSSA Wrap* 1, 3.

⁷ It would be logical to assume that Indigenous Australians are not the only ones encountering birth registration difficulties. Homeless people and newly arrived immigrants from non-English speaking backgrounds are other

Government is urged to ensure that this aspect of the ICCPR is included in the Tasmanian Charter.

3. Human Rights Education

There is an ancient Chinese proverb that says:

If you are thinking a year ahead, sow a seed.

If you are thinking ten years ahead, plant a tree.

If you are thinking one hundred years ahead, educate the people.

The Tasmanian Government has an opportunity to create landmark legislation that will have an impact on Tasmanian society for generations to come. It is incumbent on the Government to think long term and ensure that all Tasmanians are educated about human rights and the Charter.

Education about human rights is the foundation on which a human rights respecting culture is built. If citizens do not know about human rights, it makes it difficult, if not impossible, to have a society in which human rights are respected. It is therefore essential that the proposed Tasmanian Charter require that there be widespread education about the human rights and the Charter.

The only reference to education about human rights in the Victorian Charter is s 41, concerning the functions of the Commission. It provides: *'The Commission has the following functions in relation to this Charter ... (d) to provide education about human rights and this Charter'*. This is a flaw in the Victorian Charter. The Victorian Equal Opportunity and Human Rights Commission does not have the authority or capacity to oversee human rights educations within schools. The content of school-based education is the responsibility of the Department of Education. That department has no specific mandate to educate students about human rights and the Charter. To ensure that Tasmania does face a similar problem of having no one with responsibility for ensuring that school students learn about the Charter and human rights, the proposed Charter should contain a provision clearly articulating that children have a right to learn about human rights. This should be in addition to the Commission's responsibility to engage in broad community education about the Charter. Below are some examples of a provision mandating human rights education in international instruments:

Universal Declaration of Human Rights

Article 26(2)

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and

friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

International Covenant on Economic, Social and Cultural Rights

Article 13(1)

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Convention on the Rights of the Child

Article 29(1)

States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

I encourage the Tasmanian Government to include in the Charter:

- (i) a requirement that the Commission provide community education and awareness about human rights and the Charter; and
- (ii) a specific section setting out the right of school students to learn about human rights and the Charter.

The inclusion of both (i) and (ii) above, maximises the chances of the Charter playing a pivotal role in the creation of a society where human rights are known, understood and respected.

4. Conclusion

Tasmania is in the fortunate position of being able to learn from the experience of the two other Australian jurisdictions that have enacted human rights instruments. Victoria and the ACT both made the mistake of not including Article 24 of the ICCPR (right to birth registration) in their legislation. This has negatively impacted on Indigenous Australians, many of who are not registering the birth of their children and as a result encountering difficulties when they seek a birth certificate. The effect of this can be social exclusion and an inability to enjoy all the rights and privileges that flow from a birth having been registered and a birth certificate issued.

Both the Victorian *Charter* and the ACT *Human Rights Act* contain only narrow mandates relating to education about human rights. As a result, the Commissions in these jurisdictions are limited to providing broad based community education about human rights and there is no one with responsibility for ensuring that school students learn about the Charter and human rights.

To avoid making the same mistake as the Victorian and ACT Governments, Tasmania is urged to include, in the proposed Charter, provisions mandating a right to birth registration and a right of children to be educated about the Charter and human rights.



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