# A RIGHT TO BIRTH REGISTRATION IN THE VICTORIAN *CHARTER*? SEEK AND YOU SHALL *NOT* FIND!

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*Many people have placed Victoria on a pedestal because it was the first (and still only) state in Australia to have enacted human rights legislation. The* Charter of Human Rights and Responsibilities Act 2006 *(Vic) replicates many of the rights protected in the International Covenant on Civil and Political Rights, but notably fails to include art 24(2) which recognises the right to birth registration. This omission is likely to have a disproportionately negative impact on Indigenous Victorians, who, it has recently been discovered, are experiencing difficulties in their dealings with the Registrar of Births, Deaths and Marriages. Many Indigenous people are being denied basic rights of citizenship such as obtaining a driver's licence or passport because they are unable to produce a copy of their birth certificate; the universally accepted proof of identity document. This article explores the problems faced by Indigenous Victorians in relation to birth registration and birth certificates, and analyses the extent to which the* Charter of Human Rights and Responsibilities Act 2006 *(Vic) can provide redress, notwithstanding the absence of a specific provision regarding the right to birth registration.*

## I INTRODUCTION

According to many, the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') is something we should be celebrating:[1] a landmark piece of legislation designed to significantly improve the promotion and protection of rights within Victoria.[2] Unfortunately, for many Indigenous Victorians, there

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1 Jeremy Gans states the *Charter* is 'feted by many ... as one of the most dramatic legal developments in the State's history': Jeremy Gans, 'The *Charter's* Irremediable Remedies Provision' (2009) 33 *Melbourne University Law Review* 105, 105. See also Hugh De Kretser, 'A Charter We Can Celebrate', *Herald Sun* (online), 7 January 2008 <http://www.heraldsun.com.au/opinion/a-charter-we-can-celebrate/story-e6frfifo-1111115258929>; Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 1st ed, 2009).

2 George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 903.

is little cause for celebration. The *Charter* was intended to give domestic effect to the rights set out in the International Covenant on Civil and Political Rights ('ICCPR'), but due to an erroneous assumption made at the time of its drafting, a key provision of the ICCPR was excluded. Those seeking to find a replication of art 24(2) of the ICCPR (a right to birth registration) in the *Charter*, will find their search in vain. This article explores how the deliberate omission from the *Charter* of a right to birth registration is having a disproportionately negative impact on Indigenous Victorians.

In our society, a birth certificate is recognised as the most important document in establishing one's identity. Without a birth certificate, it is difficult, if not impossible, to exercise basic rights of citizenship, such as obtaining a driver's licence, opening a bank account and collecting social security.[3] The inability to obtain a birth certificate appears to be a widespread problem for many Indigenous Victorians, and it is quite likely that Indigenous Australians living in other states and territories are encountering similar problems.[4] There appear to be two principal causes of this problem; namely that the birth was never registered, or that the birth was registered but the person is unable to subsequently obtain a copy of their birth certificate.[5]

The authors begin by identifying the nature and extent of the birth registration problems being experienced by Indigenous Victorians. This includes a review of the current legislative and policy regime relating to birth registration and birth certificates. This is followed by an examination of how various sections of the *Charter* might provide some redress for Indigenous Victorians. To this end the authors have heeded Noel Pearson's words that '[p]eople in situations like ours[6] must make do with the tools which are on hand … They are limited tools and to optimise results we must use them wisely and skilfully'.[7] The deliberate exclusion of a right to birth registration from the *Charter* is unfortunate, but not the end of the matter. Other rights in the *Charter* may help address the problem if they are employed 'wisely and skilfully'.[8] In particular, the authors propose that rights to recognition before the law, equality, non-discrimination, privacy, and the protection of children, can all potentially be engaged.

Due to the nature of the *Charter*, which is heavily reliant on comparative human rights jurisprudence, and its relative infancy, the authors utilise comparative jurisprudence to inform their analysis of the likely operation of the *Charter.*

3 Joel Orenstein, 'The Difficulties Faced by Indigenous Victorians in Obtaining Formal Identification' (2008) 7(8) *Indigenous Law Bulletin* 14, 14.

4 For example in 2005, 13 per cent of children born to Indigenous mothers in Australia did not have their births registered: Joel Orenstein, *Being Nobody — The Difficulties Faced by Aboriginal Victorians in Obtaining Identification*, Orenstein Lawyers and Consultants <http://www.orenstein.com.au/NACLC%20conf%20paper.pdf>.

5 Paula Gerber, 'Making Indigenous Australians "Disappear": Problems Arising From our Birth Registration Systems' (2009) 34 *Alternative Law Journal* 157, 157.

6 It should be noted that none of the authors are Indigenous.

7 Noel Pearson, 'Aboriginal Law and Colonial Law Since Mabo' in Christine Fletcher (ed), *Aboriginal Self Determination in Australia* (Aboriginal Studies Press, 1994) 157–8.

8 Ibid.

Particular focus is given to the jurisprudence of the United Nations Human Rights Committee ('HRC') as the treaty body responsible for the monitoring and implementation of the ICCPR, the European Court of Human Rights ('ECtHR') and case law emerging in the United Kingdom from the *Human Rights Act 1994* (UK), which heavily influenced the drafting of the procedural elements of the Victorian *Charter.*

This article also examines how the *Charter* might impact on the policies and practices of the Victorian Registrar of Births, Deaths and Marriages ('BDM Registrar'). It is suggested that both the interpretative provision — s 32 of the *Charter* — and the obligations imposed on public authorities — s 38 of the *Charter* — could operate to require reform of the current regime. Given the remedial weaknesses of the *Charter,* it is suggested that non-litigious avenues are more likely to lead to successful reform of the BDM Registrar's practices relating to the provision of services to Indigenous Victorians. Non-litigious avenues for using the *Charter* to provoke change are explored below.

The article concludes with a discussion of the future of the *Charter* and recommends that the *Charter* be amended to include a right to birth registration and the right to instigate a stand alone court action for a breach of the *Charter.* It is also argued that the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') should use its educative mandate under s 41(d) of the *Charter* to provide training and raise awareness regarding the problem of lack of access to primary identification documentation experienced by Indigenous Victorians.

## II BIRTH REGISTRATION AND BIRTH CERTIFICATES

In February 2009, Victoria was devastated by the Black Saturday bushfires which resulted in the deaths of 173 people. The enormous loss of life and property (over 2000 homes were destroyed) was compounded by the widespread destruction of personal identification documents. The problems that bushfire victims faced accessing services without proof of identification were so significant that it prompted the Australian Prime Minister to comment in Parliament that:

> When you meet personally the victims of this extraordinary disaster, the desperation is compounded for those who have lost every form of establishing who they are. It is something which, unless you have experienced it, is beyond imagining. It is not just the loss of memories and photos and entire family histories; it is the loss of certification of who you are and your legal personality.[9]

This lack of legal personality is something Indigenous people are all too familiar with. However, because it does not stem from a high profile, and undoubtedly

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 2009, 718 (Kevin Rudd, Prime Minister).

tragic, natural disaster it has not captured the attention of the Prime Minister. Yet an inability to certify who you are, and the problems that flow from that, are a daily reality for many Indigenous Australians. The problems are a direct consequence of lack of access to birth registration and/or a birth certificate, and were exposed by an initiative to help Indigenous people get driver's licences. The East Gippsland Driver Education Program was established to address problems around unlicensed driving and other road safety problems within Indigenous communities.[10] The initiative involved providing driver training and education to enable Indigenous people to acquire the skills necessary to obtain a driver's licence. Unfortunately, for many Indigenous people these efforts did not result in the desired outcome of obtaining a driver's licence, because they were unable to satisfy VicRoads' proof of identity requirements that are an integral part of obtaining a driver's licence. Indeed, it became apparent that the births of one in six of the program participants had never been registered, and 50 per cent of the participants did not have a birth certificate.[11]

Attempts to acquire birth certificates for these people proved extremely difficult due to the onerous and inflexible requirements administered by the BDM Registrar, pursuant to the *Births, Deaths and Marriages Registration Act 1996* (Vic) ('*BDM Act*'). Two prerequisites to obtaining a birth certificate are particularly problematic, namely: (a) the payment of a fee; and (b) providing satisfactory proof of identity documents. These difficulties are created by the highly bureaucratic process for the registration of births, and the issue of certificates. The purpose of the *BDM Act* is 'to provide for the registration of births ... in Victoria'.[12] When a child is born the responsible person[13] must give notice of the birth to the BDM Registrar.[14] A birth registration statement must be subsequently lodged by the parents with the BDM Registrar as registration is not automatic on notification.[15] A birth certificate is also not supplied automatically on registration, but involves the completion a separate application and payment of a prescribed fee.[16]

The BDM Registrar is empowered in appropriate cases to remit the whole or part of the fee.[17] However, preliminary indications are that the BDM Registrar rarely exercises her discretion to waive fees for Indigenous applicants.[18] The prescribed fee is currently $27.80.[19] While this amount may appear to be fairly modest, it

10 East Gippsland Shire Council, *Gippsland East Driver Education Project* (23 December 2009) <http://www.egipps.vic.gov.au/Files/GEADEP.pdf>.

11 Gippsland Community Legal Service, *Koori ID Project* (2008) (Copy on file with authors).

12 *Births Deaths and Marriages Registration Act 2006* (Vic) s 1 ('*BDM Act*').

13 A responsible person if a child is born in a hospital or brought to a hospital within 24 hours of birth is the CEO of the hospital, if otherwise the doctor or midwife present, or if no doctor or midwife was present any other person in attendance at the birth: ibid s 12(6).

14 Ibid s 12.

15 Ibid ss 14–15.

16 Ibid s 46.

17 Ibid s 49.

18 Gerber, 'Making Indigenous Australians "Disappear"', above n 5, 158.

19 Victorian Registry of Birth Deaths and Marriages, *Application for a Victorian Birth Certificate* (8 May 2011) Department of Justice <http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMApplication_Forms/$file/Birth_App.pdf>.

is proving economically prohibitive for many Indigenous parents seeking to obtain a birth certificate for their child at registration. It also prohibits subsequent applications for birth certificates later in life, especially when a parent may be seeking birth certificates for several children at the same time.

Although the BDM Registrar has shown a disinclination to waive fees for Indigenous applicants who struggle to find spare cash to meet this charge, she did issue a blanket waiver of all fees for survivors of the Black Saturday bushfires, regardless of their financial position.[20] It is unfortunate that it appears to take a tragic natural disaster before the BDM Registrar is willing to be flexible regarding the fees charged for obtaining a copy of one's birth certificate.

If a person seeks to obtain a birth certificate after the time of registration, BDM Registrar policy dictates that three separate documents establishing identity must be supplied.[21] This current proof of identity requirement also operates as an impediment to Indigenous Victorians obtaining a copy of their birth certificate. Many of the forms of identification required by the Registrar can only be obtained by a person who already has a birth certificate, for example a driver's licence and passport. This creates a 'vicious circle' where a birth certificate will not be provided by the BDM Registrar because a person cannot produce the necessary identification, identification which can only be obtained with a birth certificate.[22] Furthermore, the identification documents required by the BDM Registrar must include at least one document with the applicant's current address, for example a rate notice or utility bill.[23] This is effectively a barrier to a young person who has not yet established their own residence, and also prevents people experiencing homelessness from obtaining a copy of their birth certificate. The BDM Registrar has thus far refused to accept the form of identification most readily available to Indigenous people, namely, proof of Aboriginality documentation.[24]

The office of the BDM Registrar is located in Melbourne; consequently Indigenous people living outside of the state capital must apply by mail or internet. The BDM Registrar requires that for all applications not made in person at the Melbourne Registry office, the identity documents must be certified by a police officer. This requirement is problematic given the widely recognised dysfunctional relationship between some Indigenous people and the police.[25] There seems to be

20 Victorian Registry of Birth Deaths and Marriages, *Bushfires February 2009 Application for a Replacement Birth, Marriage or Change of Name Certificate* (24 December 2009) Department of Justice <http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMApplication_Forms/$file/Form%20Bushfire09.pdf>.

21 *BDM Act* s 47 confers the power of the Registrar to maintain written policies for the access of the register including the issue of certificates. It is this policy that prescribes the identification requirements. For the proof of identity policy for a birth certificate application see Victorian Registry of Birth Deaths and Marriages, *Application for Victorian Birth Certificate,* above n 19.

22 Paula Gerber, 'Making Visible the Problem of Invisibility' (2009) 83(10) *Law Institute Journal* 52, 54.

23 Victorian Registry of Birth Deaths and Marriages, *Application for Victorian Birth Certificate*, above n 19.

24 This constitutes a signed document bearing the seal of an Aboriginal organisation: Orenstein, *Being Nobody*, above n 4.

25 See generally Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 1st ed, 2001).

no reasonable explanation why lawyers and others who are recognised as being fit and proper persons to witness affidavits and other legal instruments could not also be authorised to certify copies of identification documents for the BDM Registrar's purposes.

The inflexibility of BDM Registrar policy that confronts Indigenous people fighting against what Prime Minister Rudd described as 'beyond imagining' — the loss of legal certification of identity — can be juxtaposed with the flexible practices that the BDM Registrar adopted when the survivors of the Black Saturday bushfires were confronted with the same problem of not being able to prove their identity. Not only were all fees automatically waived, but bushfire victims were required to provide only minimal information, and no proof of identity documents. A separate form was developed for bushfire victims seeking a copy of their birth certificate, on which applicants merely had to write their driver's licence number, passport number or Medicare number on the form, *if* they had such information.[26] Applicants had to declare that the information provided by them was true and correct, and that they understood that giving false and misleading information was a serious offence.[27] The authors cannot think of any plausible reason why survivors of the Black Saturday bushfire are treated so differently to Indigenous Victorians, when both are faced with the same problem of not being able to prove their identity.

## III THE VICTORIAN *CHARTER*

The overriding purpose of the *Charter* is to protect and promote human rights in Victoria.[28] As noted by Walters and McGregor:

> the Charter creates a system of checks and balances addressing the protection of human rights in relation to the interpretation of all existing Victorian legislation, the drafting of new legislation and the decision making processes of Victorian public authorities.[29]

The *Charter* is the first instrument that expressly protects human rights in an Australian state.[30] In *Tomasevic v Travaglini*,[31] Bell J suggested the adoption and usage of the term *Charter* to describe the legislation 'serves to emphasise its historic significance'.[32] The *Charter* 'marks a decisive departure in Victoria from the long-held notion that the best protection for human rights is the good sense of

26 Victorian Registry of Birth Deaths and Marriages, *Bushfires February 2009 Application*, above n 20.

27 Gerber, 'Problem of Invisibility', above n 22, 55.

28 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1 ('*Charter*').

29 Brian Walters and Simon McGregor, 'The Charter of Human Rights and Responsibilities: A Practitioner's Guide' (Paper presented to Victorian Bar, 10 August 2007) [13] <http://www.hrlrc.org.au/files/MGRXS16G5E/Walters%20-%20Guide%20to%20Charter.pdf>.

30 The *Charter* is Australia's second human rights instrument following the *Human Rights Act 2004* (ACT).

31 *Tomasevic v Travaglini* (2007) 17 VR 100.

32 Ibid 113.

our parliamentary representatives, as constrained by the doctrine of responsible government, and the common law as applied by the judiciary'.[33] In this regard, a Charter of rights is conceived to assist in the creation of a more pluralistic democratic society as it operates to nullify the excesses of 'majoritarianism' that can result in violations of the human rights of the weak and vulnerable. The linkage between the *Charter* and the democratic institutions of the state was recognised in the Second Reading Speech:

> This bill further strengthens our democratic institutions ... The bill will promote better government, by requiring government laws, polices and decisions to take into account civil and political rights ...[34] This will help us become a more tolerant society, one which respects diversity and the basic dignity of all.[35]

The structure and operation of the *Charter* is based on the dialogue model of rights protection as seen in the *Human Rights Act 2004* (ACT), *Human Rights Act 1998* (UK) ('HRA'), and the *New Zealand Bill of Rights Act 1990* (NZ). These Acts can be distinguished from the US style Bill of Rights, as they do not give the court the power to strike out legislation that is found to be inconsistent with human rights, and therefore under the *Charter*, parliamentary supremacy is retained.

## A *Limitation Clause*

In enacting the *Charter*, Parliament intended that no rights were absolute and they must be balanced against each other, and against other competing interests in society.[36] Section 7(2) gives effect to this intention. It is central to the operation of the *Charter*, and establishes a general limitation clause on all *Charter* rights. In this regard the *Charter* departs from the HRA which does not contain a general limitation clause. Section 7 establishes two criteria for permissible limitations of all *Charter* rights. First, the limitation, or interference, must be lawful. Second, it must be demonstrably justified as a reasonable limit in a free and democratic society. A lawful interference is one required by positive law and expressed in precise and specific language.[37] The *BDM Act* does not precisely and specifically limit any *Charter* rights, and therefore cannot be engaged to justify a limitation. Section 7(2)(a)–(e) of the *Charter* sets out a non-exhaustive list of factors to be considered for the second criteria: demonstrably justified as a reasonable limit in a free and democratic society. It is generally accepted that this gives rise to a proportionality test.[38] Further, this element is a codification of the criteria adopted in comparative jurisprudence in making proportionality the test when considering

33 Alistair Pound and Kylie Evans, *An Annotated Guide to The Victorian Charter of Human Rights and Responsibilities* (Lawbook Co, 2008) 1.

34 As the *Charter* currently stands it only offers protection for civil and political rights.

35 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289–95 (Rob Hulls, Attorney-General).

36 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.

37 *Sunday Times v United Kingdom* (1979) 2 EHRR 245, [49].

38 Pound and Evans, above n 33.

a limitation of rights.[39] It is beyond the scope of this article to consider the full implications of this limitation clause. A few points should, however, be noted. It is suggested that rights like privacy that have an internal limitation should not be read as containing a limitation additional to that set out in s 7(2).[40] Further, it is recommended that the operation of the limitation provision is to balance individual rights with other *Charter* rights and society more generally. It is difficult to envisage a situation, in which a person's right to recognition before the law with which the authors assert flows from birth registration and a birth certificate, could be reasonably limited.

## B *Comparative Jurisprudence*

In the last twenty years, Australian courts have increasingly relied upon human rights law to inform the development of domestic jurisprudence.[41] It is an acceptable cannon of statutory interpretation that courts can use international human rights law to assist in the interpretation of any ambiguities within statutory provisions.[42] Of course, there are limits, and international human rights law is only relevant to inform interpretation of existing legislation or common law rights, and does not create any freestanding rights.[43] In *Royal Women's Hospital v Medical Practitioners Board of Victoria*,[44] the President of the Victorian Supreme Court of Appeal, Maxwell P, urged practitioners to utilise international human rights law. His Honour emphasised the following points:

1. The court will encourage practitioners to develop human rights-based arguments where relevant to a question in the proceeding.
2. Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.
3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise.[45]

39 Ibid.

40 Ibid.

41 See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 626. It should be noted that some members of the High Court have cast doubt over the correctness of the decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

42 See *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81, 89–90 (Gleeson CJ), 97–8 (Kirby P).

43 See, eg, *Collins v State of SA* (1999) 74 SASR 200, where it was held that the practice of 'double bunking' in prisons was deemed a violation of art 10 of the ICCPR but this did not give rise to a cause of action in South Australia.

44 (2006) 15 VR 22.

45 Ibid 38.

Interestingly these comments were made prior to the enactment of the *Charter*, and arguably, the *Charter* has made this call for greater use of international human rights jurisprudence even more compelling.

Part 2 of the *Charter* sets out the rights to be protected, and are based on those in the ICCPR.[46] The *Charter* was enacted against the backdrop of comparative human rights law, and 'although the *Charter*'s ambit is wide, the mechanisms introduced therein are not internationally novel, and most of the rights have been the subject of considerable international jurisprudence'.[47] The ICCPR provided the foundation for the rights included in the *Charter*, while the European Convention of Human Rights ('ECHR'), and the HRA, were also influential. Section 32(2) of the *Charter* specifically states that the interpretation of *Charter* rights may be informed by international law and judgments of domestic, foreign and international courts and tribunals.[48] Consequently, comparative jurisprudence will be influential in giving effect to the *Charter.* This has been affirmed in early *Charter* cases.[49] However, comparative jurisprudence is persuasive only; it neither binds courts nor obliges judges to consider it.[50]

## C *Birth Registration and the* Charter

The actual drafting of the text of the *Charter* was largely guided by the model Bill recommended in the Community Consultation Committee's Report.[51] In that report, the Committee commented on the right to birth registration as protected under ICCPR art 24(2):

> 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.*[52]

As a consequence of this recommendation the right to birth registration was omitted from the *Charter.*[53] Whilst it is axiomatic that the majority of Victorians have their births registered and appear to encounter no problems obtaining a birth certificate, the same does not hold true for many Indigenous people. The

46 Pound and Evans, above n 33; Julie Debeljak, 'Mission Impossible: "Possible" Interpretations Under the Victorian Charter and Their Impact on Parliamentary Sovereignty and Dialogue' in M Smith (ed), *Human Rights 2006: The Year in Review* (Castan Centre for Human Rights Law, 2007).

47 Walters and McGregor, above n 29, [13].

48 *Charter* s 32(2).

49 See *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [30] (Bell J) ('*Kracke*'); *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009) (Bell J) ('*Lifestyle Communities*').

50 *Charter* s 32(2) uses the term may rather than must.

51 *Kracke* [2009] VCAT 646 (23 April 2009) (Bell J).

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

53 For discussion on the omission of other rights from the *Charter* that are particularly relevant to Indigenous Victorians see: Melissa Castan and David Yarrow, 'A Charter of (Some) Rights … For Some?' (2006) 31 *Alternative Law Journal* 132.

*Charter* is intended to protect the human rights of all Victorians.[54] The right to birth registration was not left out of the *Charter* because it is not important to the Victorian community, but rather because it was wrongly assumed to not be an issue in 21st century Victoria.

The omission reveals a complete lack of awareness of the birth registration problems experienced by Indigenous Victorians, and is a serious 'error of judgment, to the detriment of the Indigenous population' of Victoria.[55] The current situation faced by many Indigenous Victorians potentially gives rise to a tenable claim of a violation of art 24(2) of the ICCPR.[56] It follows, that if the *Charter* had replicated art 24(2), it would have been a very useful tool in addressing the issue. In particular, it could have been used to inform the administration of policy, and potential law and regulatory reform relating to birth registration and birth certificates. Despite this omission, the authors assert that there are other rights in the *Charter* which may assist in redressing the problems some Indigenous Victorians face when trying to get a birth certificate.

## IV THE ENGAGEMENT OF OTHER *CHARTER* RIGHTS

### A *Generous Interpretation*

Before examining other *Charter* rights, it is worth noting that the rights in the *Charter* are to be given a broad, purpose based, interpretation. This reflects the approach adopted by the ECtHR and the UK courts. In their seminal text, Beatson et al suggest that a broad interpretation of rights is 'one of the most significant' overriding interpretative principles of the Convention. Rights must be interpreted in a 'manner that makes them "practical and effective" rather than "theoretical and illusory"'.[57] Consequently, a narrow legalistic interpretation of rights has been avoided in preference to a board purposive approach.[58] Bell J's leading judgement in *Kracke v Mental Health Review Board* ('*Kracke*')[59] indicated approval of this view:

54 See Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289–95 (Rob Hulls, Attorney-General).

55 Gerber, 'Making Indigenous Australians "Disappear"', above n 5, 161.

56 This provision does not include a specific reference to a right to a birth certificate. However, an analysis of Concluding Observations from both the HRC and the Committee on the Rights of the Child suggest that a right to obtain a birth certificate is implicit in the right to birth registration: see, eg, Human Rights Committee, *Concluding Observations on Ireland*, 93rd sess, UN Doc CCPR/C/IRL/CO/3 (30 July 2008) para 8; Human Rights Committee, *Concluding Observations on Bosnia and Herzegovina*, 88th sess, UN Doc CCPR/C/BIH/CO/1 (22 November 2006) para 22; Human Rights Committee, *Concluding Observations on Thailand*, 84th sess, UN Doc CCPR/CO/84/THA (8 July 2005) para 22.

57 Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 135.

58 See *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 [11].

59 [2009] VCAT 646 (23 April 2009) (Bell J).

> As Lord Wilberforce put it in *Minister of Home Affairs v Fisher*,[60] human rights drafting uses a 'broad and ample style which lays down principles of width and generality'. This requires a generous interpretation, one that avoids 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.[61]

It is important to keep this principle at the forefront when examining the extent to which rights within the *Charter* can be engaged to address the birth registration and birth certificate problems encountered by Indigenous Victorians.

## B *Recognition Before the Law*

The inability to obtain proof of identity documentation creates a problem of legal identity; without this essential documentation Indigenous people can be impeded from acting as a legal personality. Section 8(1) of the *Charter* provides that 'every person has the right to recognition as a person before the law'.[62] It is modelled on art 16 of the ICCPR. Nowak suggests:

> The right of each newborn child to immediate registration ... in a state register of births is closely related to the right to his or her identity, which follows from the protection of privacy and the right to recognition before the law guaranteed by article 16. Only by registration is it guaranteed that the existence of a new born child is legally recognized.[63]

There is no equivalent provision in the ECHR, and the minimal HRC jurisprudence does not provide significant guidance.[64] However, the HRC's General Comment on the non-discrimination of women provides, in relation to art 16, that State Parties must take measures to eradicate laws and policies that inhibit women from functioning as full legal persons.[65] Nowak argues that without the right of legal personality, people could be 'derided as a mere legal object'.[66] He suggests that without the recognition of this right, a person could be deprived of all other rights, including the right to life. He cited two disturbing examples where non-recognition of legal personality resulted in further rights violations, namely the extreme treatment of Jews in Nazi Germany, and black people during the Apartheid regime in South Africa.[67] The authors suggest that the lack of proof of identity many Indigenous Victorians experience because of their inability to obtain a birth certificate equates to a lack of legal recognition

60 [1980] AC 319, 328.

61 *Kracke* [2009] VCAT 646 (23 April 2009) [30] (Bell J).

62 *Charter* s 8(1).

63 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2nd ed, 2005) 559–60.

64 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004).

65 Human Rights Committee, *General Comment No 28: Equality of Rights between Men and Women (Article 3)*, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) para 19.

66 Nowak, above n 63, 369.

67 Ibid.

as a person and therefore constitutes a violation of this right. Non-registration equates to non-recognition of a person before the law. A birth certificate is the primary documentary evidence of a person's recognition before the law.[68] The BDM Registrar's inflexible policies, that prevent some Indigenous Victorians from obtaining a birth certificate, amount to possible violations of s 8(1) of the *Charter.* Unfortunately, the jurisprudence on this right is underdeveloped and has never been comprehensively tested. Thus, the strength of this argument is weakened by lack of precedent.[69]

### C *Equality and Non-Discrimination*

Because it appears that Indigenous Victorians are experiencing problems with the birth registration system in significantly greater numbers than the rest of the population, it is appropriate to consider the provisions of the *Charter* relating to equality and non-discrimination. Section 8(2) of the *Charter* is modelled on art 2(1) of the ICCPR and states that 'every person has the right to enjoy his or her human rights without discrimination'.[70] The corresponding provision in the ECHR is art 14. All of these provisions are regarded as non-freestanding rights because they prohibit discrimination only in relation to the enjoyment of other rights set out within the same instrument.[71] The prohibition on discrimination in the 'enjoyment' of a right creates a lower permissible threshold of differential interference than needed to establish an interference with a human right. To this end, the House of Lords, has consistently found that it may not be necessary to establish a breach of another human right, rather it is enough for discrimination to come within the ambit of a right.[72] However, as Lord Nicholls stated the term 'ambit' is 'not free from difficulty'.[73] It has been suggested that 'even the most tenuous link' will suffice to bring differential treatment within the ambit of an enumerated right.[74] However, a number of judges in *M v Secretary for Work and Pensions* doubted that a tenuous link would enliven the equality provision.[75] In that case, Lord Walker suggested the ambit of some rights will be well defined like freedom of association, whereas with rights that are more open-ended, like the right to private and family life, the ambit will be less clear.[76]

68 Nicola Sharp, 'Universal Birth Registration — A Universal Responsibility' (Child Rights Information Network, 2005).

69 Joseph, Schultz and Castan, above n 64; Gerber, 'Making Indigenous Australians "Disappear"', above n 5.

70 *Charter* s 8(2).

71 Pound and Evans, above n 33; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2nd ed, 2009) vol 1, [7.63].

72 See *R (Clift) v Home Secretary* [2007] 1 AC 484, [12]–[13]; Pound and Evans, above n 33.

73 *Ghaidan v Godin-Mendoza* [2004] AC 557, [10]–[11] (Lord Nicholls) ('*Ghaidan*').

74 Ibid.

75 *M v Secretary for Work and Pensions* [2006] AC 91, [4] (Lord Bingham), [14] (Lord Nicholls), [59]–[60] (Lord Walker), [124] (Lord Mance); see also Beatson et al, above n 57, 262–3.

76 *M v Secretary for Work and Pensions* [2006] AC 91, [61]–[62].

Section 8(3) of the *Charter* provides that 'every person is equal before the law and is entitled to the equal protection of the law without discrimination'.[77] This is modelled on art 26 of the ICCPR. Although Protocol No 12 added an equivalent provision into the ECHR, it has not been adopted in the UK under the HRA.[78] Section 8(3) of the *Charter* is a significant extension of the protection against discrimination, as it confers a freestanding right prohibiting discrimination before the law.[79] Thus, unlike the HRA, the *Charter*'s prohibition on discrimination is not restricted to the enjoyment of only those human rights enshrined in the *Charter.* However, this freestanding right does not extend to a general protection against discrimination; it is confined to prohibiting discrimination in the operation of the law.[80]

Section 8(4) of the *Charter* carves out an important exception to the non-discrimination provisions. It stipulates that actions taken to advance a group who have been disadvantaged because of discrimination, do not constitute discrimination under the *Charter.* In this regard, if the BDM Registrar adopted special measures to address birth registration and birth certificate issues in Indigenous communities, the discrimination provisions of the *Charter* would not be enlivened.

Discrimination under the *Charter* is limited to the definition applied under the *Equal Opportunity Act 1995* (Vic) (*'EO Act'*).[81] Consistent with the ICCPR and the ECHR, the definition in the *EO Act* includes indirect discrimination.[82] As a consequence, the *Charter* is designed to ensure substantive equality; Bell J in *Lifestyle Communities*[83] stated '[e]quality is not just about treating like cases alike. Important as it is, that is just formal equality. The true purpose of the human right to equality is substantive equality, which is something much deeper'.[84] However, unlike the ICCPR and the ECHR, the *EO Act* exhaustively enumerates the prohibited grounds for discrimination.[85] Whilst this captures many of the grounds covered under the ICCPR and ECHR, including, importantly race, there is not a flexible broad category of 'other status'. As a consequence of this definitional difference, Pound and Evans suggest that comparative jurisprudence may be unhelpful for the development of *Charter* jurisprudence

77 *Charter* s 8(3).

78 Pieter van Dijk et al (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia, 4th ed, 2006); Clayton and Tomlinson, above n 71.

79 Human Rights Committee, *General Comment 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) paras 12, 26.

80 *Broeks v The Netherlands*, Communication No 172/1984, UN Doc CCPR/C/OP/2 (1990) para 196.

81 *Charter* s 3(1).

82 *Equal Opportunity Act 1995* (Vic) s 7 read in conjunction with s 9. For authority on the ICCPR's prohibition on indirect discrimination, see Human Rights Committee, *General Comment 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) para 6; *Althammer v Austria*, Communication No 998/2001, UN Doc CCPR/C/78/D/998/2001 (2003). For authority of the ECHR's prohibition on indirect discrimination, see *DH v Czech Republic* (2008) 47 EHRR 3; *R(L) v Manchester City Council* [2002] 1 FLR 43.

83 *Lifestyle Communities* [2009] VCAT 1869 (22 September 2009) (Bell J).

84 Ibid [113].

85 *Equal Opportunity Act 1995* (Vic) s 6.

on discrimination.[86] However, it is suggested that the preferred approach is that while the *EO Act* defines discrimination, comparative jurisprudence will still be useful in informing the operation of these rights. In *Lifestyle Communities*, Bell J adopted this approach to rely upon comparative jurisprudence to inform the content of s 8 of the *Charter*, whilst still recognising that the definition of discrimination is limited by the *EO Act*.[87] Consequently, the authors contend that as long as a ground of discrimination prohibited under the *EO Act* is established, then comparative jurisprudence can be used to inform the content and operation of the non-discrimination rights.

It appears that the BDM Registrar's current legislative and policy framework is operating in such a way as to discriminate against Indigenous people. As such, it may constitute indirect discrimination. This should engage s 8(2) as it will impact the enjoyment of *Charter* rights, namely the right to recognition before the law,[88] the right to privacy[89] and the additional protective rights of children.[90] The legal arguments raised in this article regarding the engagement of these other *Charter* rights should also apply to s 8(2), as the points raised by the authors fall 'within the ambit of a [*Charter*] right'.[91] It also appears that the discrimination is occurring by virtue of the *BDM Act* and BDM Registrar's policies and therefore s 8(3) may also be engaged.

The recent ECtHR case of *DH v Czech Republic*[92] provides guidance as to what constitutes differential treatment so as to establish indirect discrimination. In that case the ECtHR found that Roma children were being discriminated against by being disproportionately placed in 'special schools' where they were taught a more basic curriculum, the effect of which was to deny them access to the mainstream educational curriculum. To establish the differential treatment, the Court relied upon statistical data evidencing discrimination. Although the data was acknowledged as being 'not entirely reliable', the Court accepted it as evidence of discrimination as it established a dominant trend.[93] There is an urgent need to obtain comprehensive empirical data establishing the extent of non-registration of Indigenous births and lack of access to birth certificates by Indigenous communities in Victoria. However, the available BDM Registrar data indicates that non-registration appears to be most prevalent in areas with large Indigenous populations.[94] In 2008, 2.5 per cent of all births in Victoria were not registered, equating to 1841 children.[95] This figure is based on the difference between birth notifications received and births registered. As a consequence it

86 Pound and Evans, above n 33, 87.

87 *Lifestyle Communities* [2009] VCAT 1869 (22 September 2009) [162]–[163] (Bell J).

88 *Charter* s 8(1).

89 Ibid s 13.

90 Ibid ss 10(2)(b), 10(3), 17(2), 24(1).

91 See above n 72.

92 (2008) 47 EHRR 3; Clayton and Tomlinson, above n 71.

93 *DH v Czech Republic* (2008) 47 EHRR 3, [178], [180], [187], [188], [191].

94 Victorian Registry of Birth Deaths and Marriages, *Indigenous Access Project Update* (Victorian Department of Justice, 2009).

95 Ibid.

is likely that this is an under-representation of non-registered births, as it only includes births where a notification was received, excluding, for example, home births. Initial evidence suggests the majority of those 2.5 per cent of unregistered births may be Indigenous, since the majority of the unregistered births come from geographical regions with high Indigenous populations.[96] Furthermore, anecdotal data from the East Gippsland Driver Education Program where the birth of one in six participants had never been registered, and 50 per cent of participants did not have a birth certificate, is arguably analogous to the statistical data accepted by the Court in *DH v Czech Republic*, and therefore constitutes evidence of discriminatory treatment. It is therefore suggested that until further research is undertaken, this preliminary data can be used to support the contention that the BDM Registrar's policies and practices constitute indirect discrimination in violation of the non-discrimination provisions of the *Charter.*

## D *Privacy*

Section 13 of the *Charter* states that a person has the right 'not to have his or her privacy ... unlawfully or arbitrarily interfered with'. This is derived from art 17(1) of the ICCPR. In its conception as a human right, privacy includes anything that is integral to a person's dignity, autonomy and identity.[97] There is an interesting textual distinction between the ECHR, the ICCPR and the *Charter.* The ECHR refers to the right to 'private life', whereas the ICCPR and the *Charter* refer to 'privacy'. Pound and Evans suggest that private life may be a broader concept than privacy.[98] However, as noted above, rights should be given a broad interpretation, and therefore, the authors suggest that the preferable view is that the textual difference should not translate into a substantive distinction. This view is supported by the Victorian Law Reform Commission who in a recent Consultation Paper stated, in reference to the right to privacy, that:

> The provisions of the European Convention are similar to those of the ICCPR. Decisions made under the European Convention are clearly relevant when determining the scope of the right to privacy of the *Charter.*[99]

The approach of construing privacy and private life as substantively the same was also implicitly applied by Bell J in *Kracke*.[100] Although this interpretation should be the preferred, the issue awaits authoritative judicial determination.

Assuming the term 'privacy' is to be construed as equivalent to 'private life', the ECtHR jurisprudence is particularly useful, as that court has developed extensive

96 For example Shepparton, Traralgon West and Mildura: see Gerber, 'Making Indigenous Australians "Disappear"', above n 5, 159.

97 *Coeriel and Aurik v The Netherlands*, Communication No 453/1991, UN Doc CCPR/C/52/D/453/1991 (1994) para 10.2.

98 Pound and Evans, above n 33, 111.

99 Victorian Law Reform Commission, *Surveillance in Public Places: Consultation Paper*, Consultation Paper No 7 (2009) 110; see also Nowak, above n 63, XXIII.

100 *Kracke* [2009] VCAT 646 (23 April 2009) [593], [598] (Bell J).

jurisprudence on this right.[101] The ECtHR case law indicates that the right imposes positive obligations on states.[102] Of particular relevance is *Goodwin v United Kingdom*[103] ('*Goodwin*'), where the ECtHR found that there was a positive obligation on the UK government to facilitate the recognition of a transsexual's post-operative gender status on their birth certificate.[104] This signalled a departure from an earlier approach where a number of similar applications failed because court members could not agree that the applicants' interest in having their birth certificates amended, outweighed the burden on states to amend their registration systems.[105] It is contented that if there is an obligation to change the gender status on a transsexual's birth certificate, then by necessary implication there must be a positive obligation to furnish a person with a birth certificate. It appears that if the right to privacy entails an obligation on the state to alter a birth certificate it must, logically, also include a positive obligation to provide a birth certificate. Furthermore, it should encompass birth registration as without the registration of a birth, there can be no certificate to alter. However, the possibility remains, that Victorian courts might follow the pre-*Goodwin* authority on the basis that ensuring every person has ready access to a copy of their birth certificate creates an unduly burdensome obligation on the state.

The *Goodwin* authority is indicative of the strong linkage between birth registration and identity rights. This is consistent with the view of Nowak who argued that the two rights are closely associated.[106] While this does not create a general right of access personal information, access to information that is significant to the development of personal identity will come within the scope of the right to privacy.[107] If this approach is adopted by Victorian courts, then the right to privacy should encapsulate both the right to birth registration and the right to obtain a birth certificate.

## E *Protection of Children*

Proof of identity documentation is necessary to establish a person's age. Without an ability to do this, a child is at risk of being unable to rely on the additional protective measures afforded to children in recognition of their special vulnerability. Therefore, it is necessary to examine whether the provisions of the *Charter* relating to the protection of children can potentially assist in addressing the birth certificate and birth registration problems faced by some Indigenous

101 Human Rights Law Resource Centre, *Human Rights Law Resource Manual* (2006) <http://www.hrlrc.org.au/resources/manual>.

102 *Marckx v Belgium* (1979) 2 EHRR 330, [31]; *Airey v Ireland* (1979) 2 EHRR 305, [32].

103 (2002) 35 EHRR 447.

104 Ibid.

105 *Rees v United Kingdom* (1986) 24 EHRR 143; *Cossey v United Kingdom* (1990) 13 EHRR 622; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163; Clayton and Tomlinson, above n 71, [12.250]–[12.251].

106 Nowak, above n 63.

107 *Pretty v United Kingdom* (2002) 35 EHRR 1, [61]; *MG v United Kingdom* (2003) 36 EHRR 3; Clayton and Tomlinson, above n 71, [12.288]–[12.289].

children in Victoria. Section 17(2) of the *Charter* states that '[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. There are further protections afforded to children in the criminal justice system outlined in s 23. These rights are modelled on arts 24(1), 10(2)(b) and 10(3) of the ICCPR and they provide special protection of children in recognition of their vulnerability.[108] The ECHR contains no separate provisions for children, and there is therefore little comparative jurisprudence to guide the operations of these rights in the *Charter*.[109] However, the HRC, in a General Comment, has stated that the ICCPR equivalent of s 17(2) might extend to the enjoyment of social and cultural rights.[110] This is important in relation to the provision of numerous services directed at children, including, education and health care services. Without proof of identity, children may be refused enrolment in school or the provision of health care.[111] Following the HRC's guidance, it is a possible that a child's inability to enrol at school, because they cannot produce a birth certificate, would be a violation of s 17(2) of the *Charter.* A parent or guardian's inability to provide proof of a child's age, because they cannot obtain a copy of the child's birth certificate, could also violate these rights. Under the *Charter*, as under Victorian law, a child is defined as a person under 18 years.[112] To benefit from the additional protections afforded to children by the *Charter*, a child may be required to prove his or her age. In this regard, a birth certificate can operate as the vital piece of evidentiary proof.[113] Without a birth certificate as proof of age, it may be impossible for a child to claim the rights and protections specifically afforded to them by virtue of their youth.

## V *CHARTER* IMPACTS ON THE BDM REGISTRAR

For the reasons outlined above, it can be argued that the current Victorian legislative and administrative processes relating to birth registrations and access to birth certificates are likely to interfere with a number of *Charter* rights. Building on that analysis, this section examines the exact impact the *Charter* may have upon the BDM Registrar. The focus is confined to: (a) the interpretative provision — s 32 of the *Charter* — which is a central and powerful tool to achieve human rights outcomes; (b) the obligations on the BDM Registrar to act consistently with *Charter* rights; (c) reform that the *Charter* may stimulate without the need to resort to litigation; and (d) the possible impact of the education provision of the *Charter.*

108 See Joseph, Schultz and Castan, above n 64.

109 Pound and Evans, above n 33, 163.

110 Human Rights Committee, *General Comment No 17: Rights of the Child (Article 24)*, UN Doc HRI/GEN/1/Rev.6 (1989) 144 para 3.

111 Gerber, 'Problem of Invisibility', above n 22; Nowak, above n 63.

112 *Charter* s 3(1).

113 Jonathan Todres, 'Birth Registration: An Essential First Step Toward Ensuring the Rights of All Children' (2003) 10 *Human Rights Brief* 32; Sharp, above n 68.

### A *Interpretation Provision*

Section 32(1) of the *Charter* states that: 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. The application of s 32(1) is not limited to the court. It mandates that anyone who gives effect to legislation, including public authorities, such as the BDM Registrar, must apply it as they interpret their statutorily mandated duties and functions.[114] Therefore, s 32(1) is useful to address any interference with *Charter* rights by the BDM Registrar, as it can provide the requisite interpretative tool to enable the BDM Registrar to construe her functions and powers compatibly with human rights. In particular, s 32(1) could provide the impetus for a review of the requirements pertaining to birth registration, the waiver of fees, and the broad mandate for the BDM Registrar to set policies relating to the provision of birth certificates.

The text of s 32(1) is closely modelled on s 3(1) of the HRA. Indeed, Bell J has described s 32(1) as a descendant of HRA s 3(1).[115] The main textual distinction between these two provisions is the *Charter*'s additional phrase that the interpretation of a provision must be done 'consistently with their purpose'. However, it would appear that the text of the *Charter* was specifically adopted to give legislative effect to the prevailing construction in the UK, of s 3(1) of the HRA, as established by the House of Lords in *Ghaidan v Godin-Mendoza*[116] ('*Ghaidan*'). The Community Consultation Committee's Report specifically referred to *Ghaidan* suggesting that it gave the courts 'clear guidance to interpret the legislation'.[117] In this seminal case, the Law Lords held that any re-interpretation had to be consistent with the purpose of the legislation.[118] Section 32(1) appeared to give legislative effect to the test established in *Ghaidan*, and therefore it should not be attributed a narrower construction than the operation of s 3(1) of the HRA. Bell J in *Kracke* suggested that a narrower approach would

> weaken the operation of s 32(1) in a way that was not intended. Narrower boundaries would reduce the special interpretive obligation to a restatement of the standard principles of interpretation … already expressed in s 35(a) of the *Interpretation of Legislation Act 1984* [(Vic)].[119]

In *RJE v Secretary to the Department of Justice*[120] ('*RJE*'), Nettle JA saw 'no reason to doubt' that the approach to s 32(1) was the same as that adopted in

114 The provision is not 'an optional canon of construction': *Re S (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313 [37] (Lord Nicholls) ('*Re S*').

115 *Kracke* [2009] VCAT 646 (23 April 2009) [204] (Bell J).

116 [2004] 2 AC 557.

117 Victorian Department of Justice, *Rights, Responsibility and Respect*, above n 52, 82–3.

118 *Ghaidan* [2004] 2 AC 557, 574–5 [45], 576–7 [48]–[49].

119 *Kracke* [2009] VCAT 646 (23 April 2009) [216] (Bell J).

120 (2008) 21 VR 526.

*Ghaidan*.[121] However, the Victorian Court of Appeal in *R v Momcilovic*[122] ('*Momcilovic*'), has recently distinguished the operation of s 32(1) of the *Charter* from the construction of s 3 of the HRA adopted in *Ghaidan* in favour of a much narrower interpretative power.

Prior to the Court of Appeal decision in *Momcilovic*, it was generally believed that the UK jurisprudence would provide guidance on the operation of s 32(1). That jurisprudence suggests that before the interpretative provision is engaged, the statutory provision in question must be interpreted using ordinary principles.[123] This approach was seemingly affirmed in Victoria in *RJE*[124] and *Re An Application under the Major Crime (Investigative Powers) Act 2004*.[125] This process of interpretation using ordinary principles includes the presumption that Parliament does not abrogate fundamental rights without a clear, unmistakable intention as evidenced by express words or necessary implication.[126] In regards to non-registration of births and/or the inability to obtain a birth certificate, there are no common law rights that are of assistance.[127] Without reliance on common law rights, the interpretative provision must be applied as it is 'not an optional canon of construction'.[128]

The decision in *Momcilovic* rejected this staged approach, of using the ordinary principles of statutory interpretation before relying on s 32(1) of the *Charter*. The Court of Appeal rejected the contention that s 32(1) of the *Charter* created a 'special' rule of interpretation and suggested that the correct methodology is as follows:

> **Step 1:** Ascertain the meaning of the relevant provision by applying s 32(1) of the *Charter* in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).
>
> **Step 2:** Consider whether, so interpreted, the relevant provision breaches a human right protected by the *Charter.*

121 Ibid 556 [114]. It is worth noting that in *Re An Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009) [175] ('*Major Crime*'), Warren CJ did not find it necessary to 'further consider the *Ghaidan* principle', however the Court of Appeal of the Supreme Court of the Australian Capital Territory declined to follow *Ghaidan* in *R v Fearnside* (2009) 228 FLR 77, 96–7 [84]–[89].

122 (2010) 25 VR 436.

123 *R v Lambert* [2002] 2 AC 545, 587 [87] (Lord Hope); *Ghaidan* [2004] 2 AC 557, 584 [60] (Lord Millet); Pound and Evans, above n 33.

124 (2008) 21 VR 526; see also Justice Chris Maxwell 'The Victorian Charter of Rights and Responsibilities So Far: A Judge's Perspective' (Paper presented at the 2009 Castan Centre Conference, Melbourne, 17 July 2009).

125 [2009] VSC 381 (7 September 2009)*;* see also *Kracke* [2009] VCAT 646 (23 April 2009) (Bell J).

126 *Plaintiff S157/2000 v Commonwealth* (2004) 211 CLR 476, 492 (Gleeson CJ); *Major Crime* [2009] VSC 381 (7 September 2009) [43] (Warren CJ).

127 See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 182–8 for a list of the common law rights that informed statutory interpretation.

128 *Re S* [2002] 2 AC 291, 313 [37] (Lord Nicholls).

> **Step 3:** If so, apply s 7(2) of the *Charter* to determine whether the limit imposed on the right is justified.[129]

In coming to this conclusion, the Court of Appeal made the following observations in relation to the operation of s 32(1):

> Our view that s 32(1) does not permit a departure from the intention of the enacting Parliament is reinforced by the fact that s 32(1) requires provisions to be 'interpreted' compatibly with human rights. 'Interpretation' is what courts have traditionally done. It seems improbable that Parliament would have used the word 'interpret' in s 32(1) if it had intended to require courts to do something quite different[130]… On the view we have taken, s 32(1) has the same status as (for example) s 35(a) of the *Interpretation of Legislation Act 1984* (Vic). It is a statutory directive, obliging courts (and tribunals) to carry out their task of statutory interpretation in a particular way. It is part of the body of rules governing the interpretive task.[131]

The authors respectfully suggest that the approach adopted by the Victorian Court of Appeal is problematic. The High Court has granted leave to appeal this decision, and the matter will be heard in early 2011.[132] Thus, it is possible, that the Victorian Court of Appeal's decision in *Momcilovic* will be overturned. The use of the phrase 'consistently with their purpose' in s 32(1) essentially adopts the test established in *Ghaidan*. This is further supported by the direct reference to *Ghaidan* in the Community Consultation Committee's Report. Further, as outlined by Bell J in *Kracke* cited above, the interpretation adopted in *Momcilovic* would almost render s 32(1) otiose. Bearing this in mind, the authors believe it is prudent to consider the operation of s 32(1) as if it were influenced by the UK authorities on s 3 HRA, as well as that outlined in *Momcilovic*.

In discussing s 3 of the HRA, Beatson et al suggest that the provision raises the question '*how* far beyond the ordinary principle of statutory interpretation s 3 authorises the courts and others to go'?[133] Lord Millet described the interpretation provision as 'dangerously seductive, for there is bound to be a temptation to apply the section beyond its proper scope and trespass upon the prerogative of Parliament in what will almost invariably be a good cause'.[134]

Notwithstanding this difficulty, the UK case law provides useful guidance on the operation of s 3 HRA with *Ghaidan* being the leading case. The application of s 3 HRA does not require the presence of legislative ambiguity and it may require the reinterpretation of a pre-HRA interpretation of a statutory provision.[135] The court

129 *Momcilovic* (2010) 25 VR 436, 446 [35] (Maxwell P, Ashley and Neave JJA).

130 Ibid 458 [77].

131 Ibid 464 [102].

132 High Court of Australia, *Results of Applications for Special Leave to Appeal, Friday 3 September 2010* <http://www.hcourt.gov.au/registry/slresults/3-09-10SLResultsMelb.pdf>.

133 Beatson et al, above n 57, [5-65].

134 *Ghaidan* [2004] 2 AC 557, 584 [61].

135 Ibid 571 [29]–[30] (Lord Nicholls), 574 [44] (Lord Steyn), 585 [67] (Lord Millet), 609 [145] (Baroness Hale).

is empowered to reinterpret settled authority on the interpretation of particular legislative provisions in light of s 3 of the HRA.[136] Further, a strict linguistic approach has been rejected.[137] Thus an interpretation should 'subordinate the niceties of language of [the provision under consideration] to broader considerations'.[138]

The power of the interpretative provision is evidenced by the way courts have employed it to read down, read broadly or read in words in a legislative provision.[139] As noted by Beatson et al the reading in of words into a statute 'has proved the most powerful of tools used to achieve compatibility. The results are also the most radical and sometimes controversial. Section 3 can require a court to read in words which change the meaning of legislation'.[140] The width of this power was evidenced in *Ghaidan* in which the Court had to consider the *Rent Act 1977* (UK). Schedule 1 para 2(2) of that Act stated that 'a person who was living with the original tenant as his or her wife shall be treated as the spouse of the original tenant'. This had been interpreted by the House of Lords to ensure de facto couples could inherit a tenancy but not homosexual couples.[141] The House of Lords held that this interpretation was in violation of the ECHR and reinterpreted it 'as though the survivor of such a homosexual couple were the surviving spouse of the original tenant'.[142] As noted, with this powerful interpretive approach, it is the substance of the provision, not the precise words, that is determinative.

Despite the apparent breadth of s 3 of the HRA, it is not without limitations. As noted above, a meaning cannot be adopted that is 'inconsistent with a fundamental feature of the legislation'.[143] Thus, the boundary of the provision is the line between interpretation and legislative amendment.[144] An important limitation on the provision is that it does not provide a freestanding mandate for interpretation; rather, a particular statutory provision for interpretation must be identified. Lord Nicholls has indicated that this helps prevent the court from 'inadvertently stray[ing] outside its interpretation jurisdiction'.[145] The case of *Re S (Care Order: Implementation of Care Plan)*[146] (*'Re S'*) provides a useful illustration of the outer limits of the interpretative obligation. In that case, the legislation in question was the *Children Act 1989* (UK) which stated that once a court had made a care order, which placed a child under the supervision of a

136 *R v Offen* [2001] WLR 253; *Ghaidan* [2004] 2 AC 557; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.

137 *Ghaidan* [2004] 2 AC 557, 573 [41], 577 [49] (Lord Steyn); see also 571 [31] (Lord Nicholls), 596 [110], 601 [123] (Lord Rodger).

138 *R v A (No 2) (Rape Shield)* [2002] 1 AC 45, 68 [45] (Lord Steyn).

139 See Beatson et al, above n 57, [5-99]–[5-111]; *Ghaidan* [2004] 2 AC 557, 585 [67] (Lord Millet).

140 Beatson et al, above n 57, [5-106].

141 See *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

142 *Ghaidan* [2004] 2 AC 557, 572 [35].

143 Ibid 572 [33] (Lord Nicholls), 601 [121] (Lord Rodger); see also Beatson et al, above n 57, [5-114].

144 *Ghaidan* [2004] 2 AC 557, 584–5 [62]–[66] (Lord Millet), 597 [112] (Lord Rodger); *Re S* [2002] 2 AC 291, 313 [39]–[40] (Lord Nicholls). See also Debeljak, 'Mission Impossible', above n 46, 188.

145 *Re S* [2002] 2 AC 291, 314 [41].

146 Ibid.

local authority, the court's supervisory role was expressly excluded.[147] The Court of Appeal used the interpretation provision of the HRA to read into the *Children Act 1989* (UK) a system of 'starred milestones' which if not met could allow the matter to be remitted to the court for guidance. On appeal to the House of Lords, it was held this was an incorrect application of the interpretive obligation. Imposing this starring system was inconsistent with the legislatively mandated exclusion of court supervision, which was a fundamental purpose of the legislation.[148] Lord Nicholls stated that:

> this judicial innovation [of imposing starring milestones] passes well beyond the boundary of interpretation. I can see no provision in the Children Act which lends itself to the interpretation ... [and] no such provision was identified by the Court of Appeal.[149]

His Lordship stated that the starred system constituted an unacceptable amendment. Importantly, Lord Nicholls expressed concern about the far-reaching administrative burden that would be placed on local authorities with scarce resources, which might negatively impact on the discharge of their responsibilities.[150]

This guidance offered by the UK authorities has been rejected by the Court of Appeal in *Momcilovic* where the Court stated the 'Victorian Parliament did not intend s 32(1) to be a "special" rule of interpretation in the *Ghaidan* sense'.[151] Unfortunately, however the Court only offered 'tentative views' as to how Parliament intended s 32(1) to operate.[152] Perhaps the most significant of these tentative views was that:

> Compliance with the s 32(1) obligation means exploring all 'possible' interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights.[153]

In *Kracke*, Bell J suggested that the interpretative provision of the *Charter* is of particular use in interpreting open-ended discretions so that they are exercised in a manner compatible with human rights.[154] Despite the narrower construction adopted in *Momcilovic*, Bell's suggestion is not inconsistent with that decision. This is very relevant considering the broad discretion reposed on the BDM Registrar to waive fees for birth certificate applications and to establish policies in relation to the identification requirements to obtain a birth certificate.

147 *Children Act 1989* (UK) c 41, s 100.
148 *Re S* [2002] 2 AC 291, 313–14 [40]–[43] (Lord Nicholls).
149 Ibid 314 [43] (Lord Nicholls).
150 Ibid.
151 *Momcilovic* (2010) 25 VR 436, 456 [69] (Maxwell P, Ashley and Neave JJA).
152 Ibid 464 [101].
153 Ibid 464 [103].
154 *Kracke* [2009] VCAT 646 (23 April 2009) [210]–[211] (Bell J).

## B *Possible Interpretations*

As established in *Re S*, a particular statutory provision must be identified for reinterpretation. The authors can see no reason why *Momcilovic* would unsettle this principle. Thus, in applying s 32(1) of the *Charter* in relation to the problems of legal identity resulting from the inability to obtain a birth certificate, specific provisions of the *BDM Act* must be identified for interpretation. The three most relevant sections for the issue under consideration here are ss 14, 15 and 46 of the *BDM Act* which relate to birth registration and the supply of birth certificates. They provide as follows:

> Section 14
>
> A person has the birth of a child registered under this Act by lodging a birth registration statement with the Registrar in a form and manner required by the Registrar specifying any prescribed particulars.
>
> Section 15(1)
>
> The parents of a child are jointly responsible for having the child's birth registered under this Act and must both sign the birth registration statement but the Registrar may accept a birth registration statement from one of the parents if satisfied that it is not practicable to obtain the signatures of both parents on the birth registration statement.
>
> Section 46(1)
>
> On completing a search of the Register and on payment by the applicant of the prescribed fee, the Registrar may issue a certificate–
>
> (a) certifying particulars contained in an entry; or
>
> (b) certifying that no entry was located in the Register about the relevant registrable event.

Thus responsibility for birth registration is placed on the parents of the child, and is not linked at all to the provision of a birth certificate.

It could be tempting to argue that the interpretation provision of the *Charter* could justify reading into s 14 of the *BDM Act* a system of automatic supply of a birth certificate upon birth registration. In light of the decision in *Re S*, it is doubtful whether s 32(1) of the *Charter* would be construed to permit such an interpretation. *Momcilovic* would make such a construction move from doubtful to impossible. These provisions of the *BDM Act* outline a fundamental component of the statutory regime relating to birth registration, specifically, that parents are responsible for the registration of a birth, and that a birth certificate is a discrete event, which within the statutory regime is treated as an entirely separate from birth registration. This is emphasised by the fact that these statutory provisions are located in different Parts of the *BDM Act*; ss 14 and 15 are located in Pt 3, outlining the process for the registration of births, while s 46 is located in Pt 7, relating to the functions of the BDM Registrar.

The authors suggest that to read into s 14 a process of automatic supply by the BDM Registrar of a birth certificate upon registration would go beyond what is permissible under s 32(1) of the *Charter*, even if *Momcilovic* is overturned. The *BDM Act* clearly distinguishes between registration of births and the supply of birth certificates. To link the two would constitute a significant shift in a fundamental feature of the legislation. Thus, the authors contend that the *Charter*'s interpretative provision cannot be used to reconfigure an essential feature of the legislative framework, namely that birth registration and the issue of a birth certificates are discrete and separate events. To have a birth certificate automatically provided upon birth registration would require an amendment to the *BDM Act*.

Nevertheless, this is not the end of the application of the *Charter*'s interpretative provision. Section 47(1) of the *BDM Act* states '[t]he Registrar must maintain a written statement of the policies on which access to information contained in the [BDM] Register is to be given or denied under this Division'. This has the effect of empowering the BDM Registrar to establish policies for access to, and certification of, registry entries.[155] The authors suggest that, by virtue of s 32(1) of the *Charter*, this power must be construed in a manner that ensures that BDM Registrar policies are compatible with human rights. *Momcilovic* will have no impact on this construction. In order to ensure that the policies are consistent with human rights, the BDM Registrar should consider:

(i) adopting a more flexible approach in relation to Indigenous people seeking to obtain a copy of their birth certificate. Orenstein has suggested that the BDM Registrar should accept 'Proof of Aboriginality' documentation in lieu of the mandated categories of ID documents.[156] Indigenous health and legal services accept this as appropriate identification;[157]

(ii) removing the additional requirement that ID documents be certified by a police officer, when an application for a birth certificate is made by mail or online. Any person authorised to witness affidavits[158] should be authorised to certify ID documents for the BDM Registrar;

(iii) eradicating current economic barriers to Indigenous Victorians obtaining a copy of their birth certificate. The waiving of fees that may be beyond the means of disadvantaged and marginalised sections of the community is recognised as an important strategy to improve birth registration systems

155 *BDM Act* s 47.

156 Current BDM Registrar policy states that a person must have three forms of identification from the following three groups, preferably one from each group, or if not possible two from the 2nd and one from the 3rd. Group One includes: Australian Driver's Licence, Australian Passport. Group Two includes: Citizenship Certificate, Credit or Bank Account Card, Tax File Statement, Medicare Card. Group Three includes: Utility Account (ie gas), Bank Statement, Rental Agreement: Victorian Registry of Births, Deaths and Marriages, *Application for Birth Certificate*, above n 19.

157 Orenstein, 'Difficulties Faced', above n 3.

158 Section 123C of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) sets out the list of persons who are authorised to witness affidavits. They include, judges, lawyers, members of Parliament and police officers.

and access to birth certificates.[159] There is a cogent argument that the BDM Registrar's power to remit fees in 'appropriate cases' pursuant to s 49 of the *BDM Act* should be interpreted consistently with s 32 of the *Charter.* It is suggested that the BDM Registrar is obliged to read into this provision that an 'appropriate case' includes where the fee operates to discourage or prohibit a person applying for a copy of their birth certificate.

As noted above the interpretative provision is not an optional canon of construction and the BDM Registrar must interpret her legislatively mandated powers, namely ss 47(1) and 49 of the *BDM Act*, in accordance with s 32(1) of the *Charter.* The authors contend that if the BDM Registrar does not interpret these powers in such a manner she may be violating s 32(1) of the *Charter.*

## C *Obligations on Public Authorities*

Section 38 of the *Charter* imposes substantive and procedural obligations on public authorities in regards to *Charter* rights. Debeljak argues that the effect of this provision is to impose 'onerous obligations' on public authorities.[160] A public authority is defined under s 4 of the *Charter* and includes a public official within the meaning of the *Public Administration Act 2004* (Vic) and an entity established by a statutory provision that has functions of a public nature. Section 5 of the *BDM Act* states the BDM Registrar must be employed under the *Public Administration Act 2004* (Vic), and registry staff may also be employed under that Act.[161] The BDM Registrar's functions are governed by the *BDM Act* and specifically her responsibilities in registering births and issuing birth certificates are public in nature pursuant to ss 38(2) and (3) and as a consequence the BDM Registrar and staff are a public authority.

The substantive obligation of s 38 makes it unlawful for a public authority to act in a way that is incompatible with *Charter* rights. This includes positives acts, failures to act, and proposals to act.[162] The procedural obligation makes it unlawful for a public authority when making a decision not to give proper consideration to *Charter* rights. Section 38(2) imposes two exceptions to these obligations. First, decisions that are made pursuant to a statutory provision, or otherwise under the law are exempt. This captures acts by public authorities undertaking actions that are imposed by statutory provisions that are incompatible with human rights.[163] For example if the Victorian government legislated highly invasive anti-terrorism laws that clearly interfered with *Charter* rights,[164] the public authorities implementing that legislation would not be in breach of the *Charter.* The second

159 Todres, above n 113.

160 Julie Debeljak 'Human Rights: Responsibilities of Public Authorities Under the *Charter of Rights*' (Paper presented at the Law Institute of Victoria Charter of Rights Conference, Melbourne, 18 May 2007) 2.

161 *Charter* s 7.

162 *Charter* s 3.

163 Pound and Evans, above n 33.

164 In this instance the requirements in *Charter* s 28 would have to be complied with.

exemption is if the public authority could not reasonably have acted otherwise. This could include where the public authority was acting pursuant to legislation that is incompatible with human rights.[165] For example, the BDM Registrar could not issue a marriage certificate to a same-sex couple, because pursuant to s 5 of the *Marriage Act 1961* (Cth), marriage is defined as 'the union of a man and a woman to the exclusion of all others'. In that case, the BDM Registrar is required to comply with the federal legislation that expressly discriminates against homosexuals, even though it is incompatible with human rights.

Section 32(1) of the *Charter* requires that the BDM Registrar, as a public authority, is required to construe her legislatively mandated powers consistently with *Charter* rights. Arguably this renders s 38 superfluous.[166] However, s 38 can be helpful where the actions of a public authority are of a more general nature rather than relating to a specific legislative provision.[167] The authors suggest that current BDM Registrar policies relating to identification requirements may be unlawful as they do not comply with s 38 of the *Charter.* As noted above, it is unlikely that s 32(1) of the *Charter* can be used to require that the BDM Registrar create a system of automatic provision of birth certificates. However, s 38 could be interpreted as requiring the BDM Registrar to significantly reform her current operations, and might facilitate the development of flexible and innovative human rights based strategies to address the problem. Arguably, if the BDM Registrar does not reform her current inflexible system, s 38 could be used as the basis for a declaration from the court that the BDM Registrar's practices are unlawful under an application of judicial review (see further below). Therefore, s 38 should operate as a powerful instigator for policy reform within public authorities.

## D *Consequences of BDM Registrar Unlawfulness*

If the *Charter* is to have any real impact it should impose negative consequences on the BDM Registrar if she acts unlawfully pursuant to the *Charter.* Ideally, it should operate to provide Indigenous people, who through a lack of a birth certificate are unable to establish their legal identity, with an avenue for redress. However, s 39(1) of the *Charter* states:

> If, otherwise than because of this *Charter*, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this *Charter.*

This reveals a fundamental flaw in the *Charter.* In direct contrast to the HRA, it does not give individuals a free-standing cause of action when public authorities

165 See the example accompanying *Charter* s 38(2), and also Debeljak, 'Human Rights', above n 160; Pound and Evans, above n 33.

166 Michael Fordham and Thomas de la Mare, 'Anxious Scrutiny, the Principle of Legality and the Human Rights Act' (2000) 5 *Judicial Review* 40, 47.

167 Beatson et al, above n 57, [6-08]–[6-09].

act unlawfully as a consequence of the *Charter*.[168] A claim for violation of a *Charter* right can only be litigated in the courts if it can be 'tacked' onto another cause of action. In other words, there is no stand alone right to bring a claim for breach of a *Charter* right, and no remedy that can be awarded to a person who can establish an infringement of their *Charter* rights.

Thus, s 39 provides for the possibility of relief for an unlawful act by a public authority only if the *Charter* claim can be linked to a pre-existing cause of action. However, the *Charter* may provide the requisite threshold of unlawfulness to succeed on a pre-existing claim.[169] Section 39(2) specifies two pre-existing grounds of relief that may be available, namely, judicial review and the common law.[170] There is no common law regarding birth registration and birth certificates, so that is not relevant to the issue under consideration in this article. However, there is a real possibility that judicial review of a BDM Registrar's decision could be used as a cause of action upon which claims of *Charter* violations could be linked. Thus an Indigenous person who was unable to obtain a birth certificate because of the BDM Registrar's policies and practices could bring an application for judicial review and rely on the *Charter* to establish an unlawful decision by the BDM Registrar.

The interpretive mandate of s 32(1) of the *Charter* requires a public authority to adopt a human rights compatible interpretation of their enabling legislation, in this case the *BDM Act*. Non-compliance with this mandate could result in a public authority acting beyond the power that is conferred upon them, that is, a public authority could be acting *ultra vires* if it uses its powers in a manner that is incompatible with human rights.[171] A failure to comply with the procedural element of s 38(1) of the *Charter* may also enliven the ground of judicial review, if a public authority fails to take a relevant consideration into account.[172] The mandate on public authorities to give 'proper consideration to *Charter* rights', as set out in s 38(1), should empower the court to scrutinise the extent to which a public authority gave consideration to *Charter* rights. As such, this could be a more rigorous standard than ordinarily characterises this ground of judicial review as established by Mason J in the leading case of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[173] ('*Peko-Wallsend*'). The principle laid down by Mason J was a formulaic 'tick the box' approach to whether a decision-maker failed to take into account a statutory obligation in making a decision. It was held that judicial review should not assess the weight given to a mandatory consideration,

168 *Human Rights Act 1998* (UK) c 42, s 8; Victorian Bar Association, *Submission of the Victorian Bar in Response to the National Human Rights Consultation* (25 May 2009) [121]. See Gans, above n 1, for a recent critical overview of this provision.

169 Debeljak, 'Human Rights', above n 160.

170 Ibid; Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264.

171 Carolyn Evans, 'Administrative Law and Australian Bills of Rights' (Paper presented at the Annual Forum, Australian Institute of Administrative Law, 14 June 2006).

172 Debeljak, 'Human Rights', above n 160.

173 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; Debeljak, 'Human Rights', above n 160, 13; Evans and Evans, above n 170.

thus allowing superficial consideration to constitute proper consideration. It is suggested that a more rigorous approach should be employed, since the use of the term 'proper consideration' in s 38(1) seems to implicitly adopt the test applied by Sheppard J in *Hindi v Minister for Immigration and Ethnic Affairs* ('*Hindi*'), where a test of 'proper, genuine and realistic consideration' was articulated.[174] This clearly involves greater scrutiny than the *Peko-Wallsend* test that specifically avoids assessing the weight given to a relevant consideration.

The *Charter* is also likely to have an impact on '*Wednesbury*' unreasonableness.[175] Under the traditional test a decision was *ultra vires* if a decision was 'so unreasonable that no reasonable authority could ever have come to it'.[176] The Charter might intensify the requisite level of judicial scrutiny, from a decision that no reasonable decision-maker could have made, to a free-standing ground of proportionality. This is the path that has been adopted in the UK, where proportionality has become a more intensive and scrutinised review process than that of *Wednesbury* unreasonableness.[177] Whilst these issues await judicial determination in Victoria, the developments in the UK indicate the potential power and impact of judicial review in achieving human rights compliant outcomes. In this regard, heightened scrutiny of public authority decision-making may provide the necessary impetus for a public authority such as the BDM Registrar to implement reforms that make her practices and policies human rights compatible.

## E *Education*

An integral component of targeted campaigns to address birth registration in other countries has been education.[178] Any education programs developed to address the problems discussed in this article, must be three-fold, and target:

(i) Indigenous communities and parents, outlining the importance of birth registration and birth certificates;

(ii) the BDM Registrar, raising awareness of the problems Indigenous communities are encountering when it comes to birth registration and obtaining a birth certificate; and

(iii) within government more generally, to ensure that those charged with enacting legislative reform are versed in these issues.

In this regard, the VEOHRC has a fundamental role to play. Section 41 of the *Charter* outlines the functions of the VEOHRC in relation to the *Charter* and para (d) specifically provides that the VEOHRC is to 'provide education about

174 *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1, 12 (Sheppard J). Note this is a single Federal Court decision and has not been adopted by appellate courts in relation to the relevant consideration ground of judicial review.

175 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

176 Ibid 230 (Lord Greene MR).

177 *R (Daly) v SSHD* [2001] 2 AC 532; *Huang v SSHD* [2007] 2 AC 167; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420.

178 Claire Cody, 'Count Every Child: The Right to Birth Registration' (Report, Plan, 1 December 2009).

human rights and this *Charter*'. In reference to the education needed to address the problems associated with birth registration and certificates, the wording of the provision is pivotal. Importantly, because of the use of the conjunction 'and' in s 41(d), the VOEHRC is required to provide education about the *Charter* and human rights, as distinct from just the rights set out *in* the *Charter.* The effect of this is that the VEOHRC has the mandate to provide education in relation to the universally recognised human right of birth registration even though it is absent from the *Charter.* Thus, the challenge for VEOHRC is to use this mandate to provide the necessary three tiers of education which are crucial to addressing the problems that Indigenous Victorians are experiencing when it comes to obtaining a birth certificate, proving their identity and enjoying full rights of citizenship such as being able to get a passport and driver's licence.

## F *Reform*

The real power of the *Charter* does not lie in litigation.[179] Its purpose is to facilitate more transparent, scrutinised and accountable administrative decision-making. The VEOHRC, in its submission to the National Human Rights Consultation Committee, the body charged with consulting with Australians about whether Australia should have a federal Human Rights Act, suggested that the Victorian *Charter* has positively impacted public service culture by encouraging new and innovative ways of thinking and resolving human rights issues in the daily exercise of governmental power.[180] In this regard, the *Charter* offers a mechanism for vulnerable groups to assert their rights in a democratic system that is dominated by the majority. The *Charter* has the potential to afford Indigenous Victorians an avenue for achieving recognition and respect of their human rights. Pound recently stated:

> I expect that lawyers working in and for government, and in the community sector, will have occasion to consider and apply the *Charter* on a much more regular basis [than barristers in litigation] as part of the cultural and procedural change [within public authorities] that the *Charter* was intended to achieve.[181]

The *Charter* can operate to facilitate engagement between the BDM Registrar and Indigenous people who, without a birth certificate, are experiencing difficulties in enjoying all the rights of citizenship that the dominant culture takes for granted. The *Charter* has the potential to raise awareness of proof of identity documentation problems caused by the inability to obtain a birth certificate and to encourage the implementation by the BDM Registrar of the targeted policies discussed above. Notwithstanding the arguments raised above, the effectiveness

179 Williams, above n 2.

180 National Human Rights Consultation, 'National Human Rights Consultation Report' (Report, 30 September 2009).

181 Alistair Pound, 'The Victorian Charter of Rights and Responsibilities so Far: A Lawyer's Perspective' (Paper presented at the 2009 Castan Centre Conference, Melbourne, 17 July 2009) [4].

of this non-litigious pressure is undermined by the absence of an express right to birth registration and a birth certificate within the *Charter.*

## VI THE FUTURE OF THE *CHARTER*

It is clear that in implementing the *Charter,* Parliament wanted to affirm the importance of human rights in a democratic and inclusive society. The *Charter*'s Preamble recognises that human rights affirm human dignity and the equality of all Victorians without discrimination, and the special importance of human rights for Indigenous people. This is further cemented by the protection afforded to Indigenous peoples' cultural rights in s 19 of the *Charter.* For this recognition to move beyond rhetoric, the omission of the right to birth registration must be addressed. The *Charter* has an inbuilt statutory review mechanism that can address this. Pursuant to ss 44 and 45, the Attorney-General must cause a review of the *Charter* to be undertaken four and eight years after its enactment. This review must assess whether additional rights should be included in the *Charter.*[182] This requirement for periodic review is an acknowledgement that the *Charter* is Victoria's initial attempt at legislative human rights protection and the current instrument might not be the finished product.[183] The absence of the right to birth registration and a birth certificate in the *Charter* is an example *par excellence* that this landmark legislation is still a work in progress. The mandated review provides the Victorian government with a timely opportunity to correct the erroneous assumption that birth registration is not a live issue in Victoria, by amending the *Charter* to include a new section modelled on art 24(2) of the ICCPR.

The review process should also address the remedial weakness of the *Charter.* Although the *Charter* should intensify the scrutiny of decision-making through judicial review, the absence of a free-standing cause of action undermines its effectiveness to achieve human rights compliant outcomes.[184] The UK experience has indicated the difficulty in establishing and maintaining a human rights culture throughout the public service.[185] A free-standing cause of action should carry a strong deterrent effect, and therefore provide greater incentives to public authorities to resolve *Charter* issues outside the courtroom.[186] In late 2009, the National Human Rights Consultation Committee released its report, and in light of the Victorian experience, it recommended a federal statutory human rights framework that includes a provision allowing a person to bring an independent cause of action for breach of a human right.[187] The authors recommend that the

182 *Charter* ss 44, 45.

183 Victoria, *Parliamentary Debates*, Legislative Assembly, Debates (4 May 2006) Vol 470, 1290–5 (Rob Hulls) (Second Reading Speech).

184 Debeljak, 'Human Rights', above n 160.

185 Francesca Klug and Keir Starmer, 'Standing Back from the Human Rights Act: How Effective is it Five Years On?' [2005] *Public Law* 716.

186 Evans and Evans, above n 170.

187 National Human Rights Consultation, above n 180.

Victorian government use the four year review process as an opportunity to insert a similar provision in the Victorian *Charter.*

Notwithstanding these identified weaknesses, the authors suggest that the *Charter* can operate to imbed the rights contained within in it into the fabric of Victorian society. Section 41(d) provides the VEOHRC with a powerful tool for educating society on the importance of human rights.[188] The *Charter* is also designed to foster a rights culture within the arms of governmental bureaucracy, in other words, public authorities.[189] It is through the framing of problems confronted by public authorities as human rights issues that this change in culture can be fostered. Here, the *Charter* can operate to reframe the issues Indigenous peoples face in obtaining a birth certificate from being a mere administrative problem confronting the BDM Registrar, to being a human rights issue that must be responded to in a manner consistent with the *Charter.* It is this process of reframing that will lead to public bodies like the BDM Registrar altering inflexible policies that can operate to impede the realisation of rights, and ensuring that her practices are fully compatible with human rights. The result will be a rights-based culture with improved outcomes for all Victorians.

## VII CONCLUSION

The old proverb says 'seek and you shall find'. However, for Indigenous Victorians seeking to find a right to a birth certificate in the *Charter*, their search will be in vain. Nevertheless, the authors contend that a number of other *Charter* rights are relevant to this problem, in particular the right to recognition before the law,[190] non-discrimination,[191] privacy[192] and the additional protective rights of children.[193]

The authors suggest that the BDM Registrar, as a public authority, is violating various provisions of the *Charter.* Section 32(1) mandates that a public authority must interpret its statutory functions consistently with human rights 'so far as it is possible to do so consistently with its purpose'. As this article has outlined, despite the narrowing of the provision's construction adopted by the Court of Appeal in *Momcilovic*, this is a powerful interpretative tool. It is suggested that to comply with this interpretative provision the BDM Registrar must adopt a more flexible approach in her dealings with Indigenous people, relax proof of identity rules, remove the police certification requirement and exercise her discretion to remit fees to Indigenous people where it operates as an impediment to obtaining a birth certificate. It is also argued that the *Charter*'s interpretative and legal

188 For an in-depth analysis of human rights education see Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (PhD Thesis, The University of Melbourne, 2008).

189 Victoria, *Parliamentary Debates*, Legislative Assembly, Debates (4 May 2006) Vol 470, 1289–95 (Rob Hulls) (Second Reading Speech).

190 *Charter* s 8(1).

191 Ibid s 8(2), (3).

192 Ibid s 13.

193 Ibid ss 17(2), 23, 24(3), 25(3).

obligations (s 38) might provide the impetus for the BDM Registrar to take steps to address the identified deficiencies in the current regime.

Unfortunately, the *Charter*'s effectiveness as a tool to address these issues is undermined by the dual absence of a right to birth registration, and a free-standing cause of action for violations of the *Charter* by public authorities. The success of the *Charter* should be measured by its ability to respond to the challenges and shortfalls in rights protection in Victoria. The absence of the right to birth registration betrays an ignorance of the issues facing many Indigenous Victorians. It is recommended that the Victorian government use the statutory review process to address these inadequacies.

The authors believe that the very presence of the *Charter*, notwithstanding the erroneous omission of the right to birth registration, has a pivotal role to play in redressing the birth certificate issues facing many Indigenous Victorians. The very presence of a human rights act provides a useful lens through which to scrutinise potential human rights violations. In addition, the *Charter* facilitates the examination of comparative jurisprudence which affords an opportunity to expand and enrich human rights jurisprudence in Victoria. The *Charter* also empowers the VEOHRC to provide education on human rights *and* the *Charter*, thus enabling that body to incorporate the right to birth registration in its human rights training, notwithstanding its absence from the *Charter*. Therefore, the authors resoundingly argue that despite the omission of the right to birth registration from the *Charter*, this human rights legislation makes the resolution of issues surrounding Indigenous people's inability to obtain a birth certificate more viable than in a jurisdiction with no such legislation.

Noel Pearson recommends that the tools available be used 'wisely and skilfully'.[194] Embracing this advice, the authors contend that the *Charter*, despite its weakness, it is a tool that can be used wisely and skilfully to help overcome the obstacles that inhibit Indigenous Victorians' enjoyment of their rights to full participation in society.

194 Pearson, above n 7.