

## CHAPTER FIVE

### PROPOSED ACCESS TO THE REGISTRY

#### 5.1 INTRODUCTION

The New South Wales Register of Births, Deaths and Marriages contains a substantial amount of personal information on the citizens of New South Wales. The Committee considers that, as one consequence, open access to the Register raises issues in relation to privacy, accuracy of data and the use of data.

It should be noted that the Committee's recommendations relate to the Registry, or the administrative area collecting data, and to the Indexes and certificates produced from the Birth, Death and Marriage Registers which contain this data.

In giving consideration to an open Register, the Committee reviewed existing access provisions and compared the privacy concerns of individuals to the benefits of public access to the data. These matters were considered in relation to increased access to the Indexes and to the certificates of the Registers of Births, Deaths and Marriages. Consideration was given to the nature of personal information that would be available should increased access to Registry Indexes and certificates be allowed.

Recommendations made by the Committee concern differential access to the Register. The rationale of the Committee in these recommendations is to maintain a balance between privacy protection and public interest. In general, because of privacy considerations, it is recommended that individual members of the public have less access to Registry data than persons involved in medical, historical and other academic research. However, the Committee considers that an access policy advising members of the public of access provisions to the Register, and a legislative amendment specifying the principles governing the exercise of the discretion of the Principal Registrar, would enhance public understanding of the operation of the Registry. Recommendation 5 concerns an amendment to the legislation, while Recommendations 6 to 10 concern the proposed access policy.

Access recommended by the Committee is described in two parts. Recommendations 11 to 18 concern access proposed for family researchers and the general public, and Recommendations 19 and 20 concern access by specialist researchers. The Committee considers that the options proposed in this chapter achieve a balance between the need to protect individual privacy and the public benefit of access to the information contained on the Register.

## 5.2 ACCESS POLICY

The Registry has no written access policy or public document available which details the way in which the discretionary power of the Principal Registrar is exercised in Registry practices. Nor are the criteria which are generally used to determine access publicly available. The Committee believes that some discretionary power to allow a degree of flexibility for access should remain with the Principal Registrar. For instance, the Committee was informed of a number of specific cases where certificates were urgently needed for humanitarian purposes. The Committee is of the view that any legislation delineating the power of the Principal Registrar should not be so overly prescriptive as to prevent the exercise of discretion in unforeseen circumstances.

The Committee considers that an access policy should be developed which describes the provisions under which access may be sought by the general public and by specialist researchers. The Committee believes that the current criteria underlying Registry practices should continue, with access based on the age of the record requested, the relationship of the applicant to the subject of a record, and the purpose for which access is requested.

That policy should also include a description of the criteria to be used by the Principal Registrar to determine whether a reason offered for access is sufficient to allow for the release of data requested when such reason is not specified in the access policy. While the Committee believes that the discretionary power of the Principal Registrar should be minimal, it also believes the power, as defined in legislation, should continue to allow sufficient flexibility to deal with particular cases. The *Registration of Births, Deaths and Marriages Act 1973*, should set out clearly the power of the Principal Registrar for the purpose of accountability, and for the protection of privacy for Registry data.

The Committee considers that the Registry access policy should list the organisations which receive data through statutory authority. The policy should also include a description or codified list of informal and discretionary access arrangements. As indicated earlier in this Report, the Committee believes that data in the Register should not be used for direct mail or marketing purposes, as such use of data may intrude on the privacy of individuals.

### **Recommendation 5:**

**That the *Registration of Births, Deaths and Marriages Act 1973* be amended to specify the principles governing the use of the discretion of the Principal Registrar.**

**Recommendation 6:**

- . **That access provisions continue to be based on the following criteria:**
  - . **the age of the record; or**
  - . **the relationship of an applicant to the subject(s) of a record; or**
  - . **permission from the subject(s) of a record; or**
  - . **the exercise of the Principal Registrar's discretion.**

**Recommendation 7:**

- . **That a public access policy be developed for Registry data. The policy should include:**
  - . **the criteria upon which access provisions are based;**
  - . **an explanation of the rights of access for individuals based on these criteria;**
  - . **the statutory provisions for research access; and**
  - . **current informal access arrangements.**

**Recommendation 8:**

- . **That, at the point of collection, the purposes for which Registry data may be used should be stated in general terms.**

**Recommendation 9:**

- . **That the access policy be:**
  - . **publicly available; and**
  - . **available in plain English and community languages.**

**Recommendation 10:**

- . **That the access policy be reviewed every five years.**

### **5.3 THE BIRTH REGISTER**

The Law Reform Commission and a number of genealogists considered that both the Birth Index and Birth Certificates should be made openly available.<sup>206</sup> Others proposed that for the benefit of historical research, access should be available to birth records made prior to and including the years of World War I.<sup>207</sup>

Evidence taken from representatives of the Australian Bureau of Statistics and the Passport Office supported maintenance of current restrictions, on the grounds that accuracy and coverage of data would diminish should the Birth Register become open. It was suggested that some people providing data to the Registry would not provide the correct information should access to birth records be widely available. The Committee was told that less accurate data would be detrimental to research and more accessible data would damage the value of birth information for the purpose of identification.<sup>208</sup> Representatives of the Law Reform Commission suggested, on the other hand, that an open Register would contribute to greater accuracy by making data more publicly accessible.<sup>209</sup>

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<sup>206</sup> NSW Law Reform Commission, 1988 and Evidence. Killion, 30.7.92, p.4

<sup>207</sup> Evidence. Townsend, 30.7.92, p.43

<sup>208</sup> Evidence. Farrell, 5.8.92, pp.3-4, Middleweek, 5.8.92, p.39

<sup>209</sup> Evidence. Gamble, 5.8.92, p.12

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### 5.3.1 Birth Indexes

In evidence the Committee heard a wide range of opinions concerning access to Birth Indexes. Views ranged from suggestions that the Birth Index be made completely open to a view that access should be restricted to one hundred years after the recording of a birth. The latter view is more restrictive than the current practice, but it was suggested that such a time frame would enable very few living people to have their records accessed and therefore reduce any intrusion of privacy.<sup>210</sup> The Registry Office proposed that Birth Indexes become available seventy-five years after a birth.<sup>211</sup>

The Committee, with one dissenting voice, recommends that access to the Birth Indexes should be available after the passage of seventy-five years from a birth and that a system be introduced which would enable ongoing release year by year of the respective Birth Indexes. The Committee judges that this recommendation is a reasonable balance between protecting the privacy of individuals, including those who might be sensitive to their age being made readily available, and the broader public relevance of the data.

Concern was expressed that past and present recording practices may include an identifying characteristic on a record. Registration numbers have been used to indicate the status of the subject of the record. For example, a particular sequence of numbers has been used to identify ex-nuptial births that have been subsequently re-registered as being legitimate following the marriage of the parents. The Committee considers that registration numbers which are identifying should be removed, particularly on Indexes that are widely available.

#### **Recommendation 11:**

**That annual Birth Indexes be made available on an ongoing basis after seventy-five years have elapsed.**

#### **See also Dissenting Report**

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<sup>210</sup> Evidence. Morgan, 30.7.92, p.48

<sup>211</sup> Submission 87A. NSW Registry of Births, Deaths and Marriages. p.24

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**Recommendation 12:**

. **That identifying registration numbers on the Birth Indexes be progressively removed.**

**5.3.2 Birth Certificates**

The Principal Registrar suggested that Birth Certificates should be made available seventy-five years after a birth.<sup>212</sup> A number of genealogists supported this view.<sup>213</sup> Personal information included on a Birth Certificate but not on a Birth Index includes details of the parents' marriage, ages, and full names and the mother's maiden name. As more details are available on a Birth Certificate than on a Birth Index, and the certificate has identification value for its subject, the Committee considers that restrictions on accessing a Birth Certificate should be greater than those for accessing the Birth Index.

Whilst access to the Birth Certificates in England is described as open, access to a Birth Certificate for a person born in 1930 or a later year requires the applicant to provide details of the birth and names of both parents of the subject of a certificate.<sup>214</sup> One reason for the greater openness of the English system is undoubtedly the fact that less information is recorded.

The Committee recognises the role of a Birth Certificate in providing identity, either wholly or in part. Further the Committee considers that sensitive information on a Birth Certificate precludes the provision of a certified copy of a Birth Certificate being made available until one hundred years after the record was made. Access to the details provided on a record of a birth occurring within the last one hundred years should only be available to people:

- . with access due to their relationship to the subject, as for current practice (outlined in Section 3.4.4 above); or
- . with permission from the person who is the subject of a record; or
- . who have or are entitled to have the Death Certificate of the subject of the item sought; or

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<sup>212</sup> Evidence. Flett, 30.7.92, p.84

<sup>213</sup> Evidence. Killion, 30.7.92, p.5

<sup>214</sup> Evidence. Garnsey, 30.7.92, p.5

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whose reasons for requesting access are accepted by the Principal Registrar as sufficient to enable them to be allowed the access so requested.

Birth Certificates are currently widely available for a record of a birth occurring in 1905 or earlier years. Thus the Committee has determined a more restricted access in order to protect the privacy of most living people in New South Wales. The Committee, with one dissenting voice, deems that, rather than prohibiting access immediately to records now available, access to Birth Certificates should remain open for births up to 1905. From the year 2006, it is proposed that access to Certificates be available for births to 1906 with annual ongoing release.

The Committee, in rejecting open access to the Birth Certificates of deceased persons, had regard to the possible misuse of such certificates for creating false identities. The Committee, however, has recommended less restrictive access to the Birth Certificates of deceased persons than is the case with certificates of living persons, as the recommendations concerning access to Death Certificates provide an appropriate safeguard.

**Recommendation 13:**

**That Birth Certificates be made available:**

- **to any person for births recorded up to and including 1905; or**
- **to applicants who are currently entitled on the basis of their relationship to the subject; or**
- **to any person who provides written permission, with reasonable identification, from the subject of a particular certificate; or**
- **to any person who has or is entitled to the Death Certificate of the subject of the item sought; or**
- **from the year 2006, to any person provided one hundred years have elapsed since the birth.**

**See also Dissenting Report**

## 5.4 DEATH REGISTER

Opinion taken concerning access to the Death Register was divided. The Law Reform Commission and some genealogists supported both open access to Death Indexes and open access to Death Certificates. Representatives of the Passport Office were concerned that increased access to the Death Register might result in an increase in the creation of false identities.<sup>215</sup> It was also suggested that an open Register would affect the accuracy of information provided.<sup>216</sup>

### 5.4.1 Death Indexes

The majority of witnesses indicated support for open access to the Death Indexes. The Committee believes that Indexes to recorded deaths should be open up to the present time with Indexes progressively released. Major factors behind the Committee's recommendation were the minimal amount of personal information described on the Index, and the fact that the subject is deceased. Death Indexes list the subject's family name and first name(s) and the first name(s) of the parents of the deceased, with the full date of death also included from 1974.

#### **Recommendation 14:**

**That annual Death Indexes be available to the present time, with ongoing release.**

### 5.4.2 Death Certificates

The sensitive nature of information recorded on a Death Certificate, including the cause of death, led the Committee to support restrictions of access to Death Certificates. The Committee considers that information on a death resulting from an illness or action such as suicide might cause distress to surviving family members. Further, it considers that the knowledge that information on a Death Certificate will become public may result in less accurate recording of the cause(s) of a death and thus diminish the role of the Register as a valuable research source.

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<sup>215</sup> Evidence. Middleweek, 5.8.92

<sup>216</sup> Submission 109. Australian Bureau of Statistics. p.1

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The Committee recommends that Death Certificates be made available providing at least thirty years have elapsed since the death of a subject. If a Death Certificate is requested for a death recorded in the last thirty years, the Committee believes that the current rules, which allow access on the basis of the reason for the request and the relationship of the person requesting the certificate to the person who is the subject of the certificate, should be used as the criteria to determine access. Further, it is considered that a Death Certificate should be made available to an applicant with written permission from a person, reasonably identified as one who is entitled to have a Death Certificate through the criterion of relationship to its subject, as outlined in Section 3.4.4.

The Committee's recommendation is based on a belief that a period of time approximate to that separating generations should pass before Death Certificates are freely available. In light of the recommendation that Birth Certificates be freely available upon the production of Death Certificates, the Committee considers that a restriction for this period of time is necessary to safeguard against fraud. If further action to counter fraud is required, the Registry might consider recording the fact that a person is deceased on their Birth Certificate.

**Recommendation 15:**

**That Death Certificates be made available:**

- to applicants who are currently entitled on the basis of their relationship to the subject; or
- to any person who provides written permission with reasonable identification from a person with access through the criterion of relationship to the subject of the Certificate; or
- to any person providing at least thirty years have elapsed since the death of the subject.

**5.5 MARRIAGE REGISTER**

In considering access to records of marriage the Committee reviewed the amount of personal information on a Marriage Index and the content of a Marriage Certificate. Those details are outlined in Chapter Three.

The Committee believes that any person who can provide proof of intention to marry, in the form of a copy of a Notice of Intended Marriage or other form of proof, should be able to ascertain through the Registry whether the other concerned party has been married in New South Wales. The discretionary power of the Principal Registrar has been used to enable such a person to determine whether the other concerned party has been married. Such access should be a right and provision for this purpose included in the written access policy of the Registry.

In principle, the Committee recognises the need for a national access policy in this regard, to allow parties intending to marry the ability to check with ease the records of all Australian jurisdictions. As Recommendation 2 suggests, the Committee believes that the responsible Minister should pursue with the Federal Government and Ministers of other states a policy of uniformity and national access to Registry records.

### 5.5.1 Marriage Indexes

Evidence taken by the Law Reform Commission and a number of genealogists supported open access to Marriage Indexes.<sup>217</sup> It was alternatively proposed that access to Indexes only be available eighty-five years after an event.<sup>218</sup> The Principal Registrar indicated that the Registry supported access to the Indexes of Marriages to 1930, or after sixty years had elapsed, being made available. This view is based on the fact that a person married at fifteen years of age would be seventy five years of age after sixty years had elapsed since the marriage.<sup>219</sup>

The Committee, with one dissenting voice, recommends that Indexes to Marriages should be made publicly available fifty years after the marriage. The Committee recognises that people are now marrying later in life, with most people who marry being between twenty and twenty five years of age. Releasing the Marriage Indexes after fifty years have elapsed would therefore approximately coincide with the recommended release of the parties' Birth Indexes.

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<sup>217</sup> Evidence. Killion, 30.7.92, p.4; Donohoe, 5.8.92, p.56 and Vine Hall, 5.8.92, p.71

<sup>218</sup> Submission 64. Privacy Committee, p.6

<sup>219</sup> Evidence. Flett, 30.7.92, p.83

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**Recommendation 16:**

That current arrangements, allowing persons providing proof of intention to marry to be provided with information on previous marriages of their prospective spouse, continue and be formalised in the access policy.

**Recommendation 17:**

That annual Marriage Indexes be made available on an ongoing basis after fifty years have elapsed.

**See also Dissenting Report**

### **5.5.2 Marriage Certificates**

The evidence from the Law Reform Commission supported an open Marriage Register and freely available certificates.<sup>220</sup> Evidence from genealogists acknowledged that some of the information contained on a marriage record may breach a person's privacy if made publicly available within fifty or sixty years of the event.<sup>221</sup>

Considering that a large number of people get married between the ages of twenty and twenty-five years of age, the Committee believes that a policy of access to Marriage Certificates after fifty years have elapsed is appropriate. Marriage Certificates would therefore not normally be available until the subjects were approximately seventy-five years old. This would result in restrictions being lifted on access to the information at approximately the same time as the subject's Birth and Marriage Indexes are released.

Given that the Committee received no expressions of concern about the current accessibility of Marriage Certificates, the Committee considers that access to certificates for marriages occurring less than fifty years ago should be available according to the restrictions which currently apply, such as the relationship of the person to the subject(s) of a Certificate and the reason for the request, as outlined in Section 3.3.4. Further, it is

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<sup>220</sup> Evidence. Gamble, 5.8.92, p.18A

<sup>221</sup> Evidence. Killion, 30.7.92, p.4 and Vine Hall, 5.8.92, p.71

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considered that access should also be provided to a person with written permission from a person who is entitled to a Marriage Certificate through their relationship to either of the subjects of a Certificate.

The Committee recommends that Marriage Certificates should also be made available to any person who can provide evidence that at least thirty years have elapsed since the death of both subjects of a marriage.

**Recommendation 18:**

**That Marriage Certificates be made available:**

- **to applicants who are currently entitled on the basis of their relationship to the subject; or**
- **to any person who provides identifiable written permission from a person with access because of their relationship with either of the subjects; or**
- **to any person provided the Death Index indicates that at least thirty years have elapsed since the deaths of both subjects of the Marriage Certificate; or**
- **to any person providing at least fifty years have elapsed since the marriage.**

**See also Dissenting Report**

**5.6 ANNUAL CONFERENCE OF AUSTRALASIAN REGISTRARS**

The annual conference of Australasian Registrars of Births, Deaths and Marriages was held in November 1992, and the conclusions of the Conference were brought to the attention of the Committee by the New South Wales Principal Registrar in February of 1993.

The Principal Registrar provided details of the resolutions which adopted specific target release dates for Indexes of Births, Deaths and Marriages in order to provide a basis for uniform release provisions throughout Australia. The Committee was advised that the

Conference agreed to release Birth Indexes eighty years after registration, Death Indexes thirty years after registration and Marriage Indexes sixty years after registration.

The Principal Registrar had proposed a seventy-five year release rule for the release of Birth Indexes in her formal submission. However, in correspondence regarding the Conference, the Principal Registrar supported the agreed schedule and brought the decision to the attention of the Committee.

The conference proceedings were not available for the consideration of the Committee and no Committee Member had the benefit of hearing the discussion which led to the adoption of the preferred release dates.

The Committee strongly supports the objective of national uniformity. However, in the absence of any knowledge of the reasons for the Conference's decisions, the Committee resolved to uphold the recommendations contained in this report. The Committee's recommendations were made following a lengthy inquiry and consultative process and are considered to represent the most appropriate balance between privacy considerations and the benefit to the public through access.

## **5.7 ACCESS BY SPECIALIST RESEARCHERS**

The Committee is of the view that there is widespread community support for specialist medical, historical and social research which benefits society.

As outlined earlier in the Report, there are a number of agencies which receive data by statutory authority, others through long standing practices and others on a case-by-case basis through the discretionary power of the Principal Registrar. The Committee considers that the access policy of the Registry should clearly state the criteria used to determine the public interest in allowing discretionary access.

In relation to the issues of data protection and medical research, it was noted above (4.2.2) that the adequacy of ethical standards is a complex matter involving both national and state standards and consideration of the degree of discretion these standards allow individual medical organisations. The Committee believes that guidelines concerning the ethical use of medical data should be developed. The guidelines should provide general ethical standards which any medical researcher would need to show would be met in the use of data from the Registers. The guidelines should be developed by the Registry in consultation with the New South Wales Health Department, and any other appropriate agency. As far as practicable, the guidelines should incorporate those developed by the National Health and Medical Research Council.

The Committee considers that the Principal Registrar should retain the discretionary power to consider requests which are not defined in the access policy. In this way special research projects, especially those which may develop concerning as yet unidentified illnesses, may be allowed appropriate access. The Committee supports the criteria currently used by the Principal Registrar for consideration of special research projects, viz: the reason for the research, the reputation of the organisation seeking access, the public benefit of the research and adequate protection of the data for maintaining the privacy of individuals.

Any research, medical or otherwise, should safeguard the privacy of individuals whose data is being utilised. Similar criteria should be developed and applied as ethical research protocols in, for example, the fields of history and demography.

**Recommendation 19:**

• That access for medical research be contingent on meeting ethical and privacy guidelines on the use of the Registry. Such guidelines should be developed by the Registry in consultation with:

- the New South Wales Health Department; and
- any other appropriate agency.

As far as practicable, the guidelines should incorporate those developed by the National Health and Medical Research Council.

**Recommendation 20:**

• That access to Registry records for special research projects not defined in the written access policy be assessed individually by the Principal Registrar, using the criteria of:

- reason for the research;
- reputation of the organisation seeking access;
- public benefit of the research; and

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adequate protection of the data for maintaining the privacy of individuals.

## 5.8 APPEALS

Consideration was also given to the process by which a person who has been denied access to Registry data may appeal against that decision. Of some 1.65 million requests over the last five years, some eighty-five people (a proportion of minor statistical significance) wrote to the Attorney-General complaining about incidents in which access had been denied. Of those complaints twenty concerned denial of access to Indexes and fifteen related to prohibited access to a certificate when consent had not been given by the subject of the certificate. Currently an individual denied access has a right to appeal to the Minister, the Attorney General, for reconsideration of a denied request or to request the Ombudsman to investigate a refusal. However, with no legislative base for Registry access there is little leeway for the Ombudsman to exercise discretion. The Committee was advised that as the rejections made in the last five years conformed to Registry policy all were upheld.<sup>222</sup>

In evidence to the Committee, both the Deputy Director-General of the Attorney General's Department of New South Wales and the Principal Registrar commented on the need for an improved appeal mechanism. In evidence the Deputy Director-General, Mr Grant, said that he shared the view of the Principal Registrar that there should be an appeal mechanism, although "the difficulty is deciding what the appeal mechanism should be."<sup>223</sup>

Mr Grant outlined to the Committee a number of options for an appeal mechanism. The first option was appeal to the departmental head, that is, the Director-General of the Attorney General's Department. A second option suggested was a Ministerial review of the Principal Registrar's discretion. Finally it was suggested that a person be nominated to hear appeals and that such a person be nominated in the registration legislation or by the Minister, after consultation with interested groups. While people currently have appeal rights through judicial processes, the cost of court processes and the delays in matters proceeding are prohibitive.

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<sup>222</sup> Discussion. Flett, 14.12.92

<sup>223</sup> Evidence. Grant, 4.9.92, p.5

The Committee agreed that there is a need to consider an additional independent appeal mechanism. One possibility is a state Administrative Appeals Tribunal, along the lines of the Commonwealth Administrative Appeals Tribunal. The jurisdiction of such a Tribunal would be substantially beyond the terms of reference of this inquiry.

**Recommendation 21:**

- **That the appeals process be formalised and consideration given to the development of a further formal independent appeal mechanism in addition to those currently available.**