

## RECOMMENDATIONS

### **Recommendation 1:**

- That data protection principles be enacted in New South Wales in legislation, as a priority.

### **Recommendation 2:**

- That the Attorney General pursue with the Commonwealth government and other States a policy of uniformity and national access to Registry data.

### **Recommendation 3:**

- That negotiations on the establishment of a National Death Index be concluded as a matter of priority.

### **Recommendation 4:**

- That the *Registration of Births, Deaths and Marriages Act 1973* be amended to define the functions of the Registry, and
- That those functions include:
  - the collection and provision of statistical data;
  - the recognition of Registry data as evidence toward the establishment of a range of citizen entitlements; and
  - the retention and maintenance of records for perpetuity.

**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.

**Recommendation 11:**

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

**See also Dissenting Report**

**Recommendation 12:**

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

**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**

**Recommendation 14:**

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

**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.

**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**

**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**

**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, and as far as practicable, incorporating the National Health and Medical Research Council guidelines, in consultation with:**
  - **the New South Wales Health Department; and**
  - **any other appropriate agency.**

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

**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.**

## GLOSSARY OF TERMS

<b>Access</b>	The ability to gain information on the births, deaths and marriages records held by the Registry, either by viewing Indexes to the Registers, inspecting the Registers or obtaining a copy of a record in the form of a certificate.
<b>Certificate</b>	A reproduction of the registered details of either a birth, death or marriage.
<b>Data Protection</b>	Safeguards for personal data against privacy infringement.
<b>Evidence</b>	Oral or written information supplied to the Committee by witnesses during formal parliamentary Hearings.
<b>Index</b>	An alphabetical listing of the subjects of birth, death or marriage registrations, usually produced on an annual basis as a means of referencing the Register entry. In addition to the names of the subjects and registration numbers, Indexes may include a limited amount of the personal data contained in the Register entry.
<b>Open Register</b>	Full public access to the Indexes of Birth, Death and Marriage Registers, and, subject to the payment of any prescribed fee, the issue of a full Certificate relating to any individual to any other individual upon request. No access is permitted to the Registers themselves. Parts of the Register, and access to Indexes and Certificates in relation to such parts, may be closed by statutory provisions.
<b>Other Jurisdictions</b>	Other countries and Australian states and territories with the exception of New South Wales.
<b>Records</b>	Any information held by the Registry regarding registered births, deaths or marriages.
<b>Register</b>	The consolidation of the information on all the births, deaths or marriages recorded by the Registry. This consolidation may be carried out by a variety of manual or computerised means.

<b>Registration</b>	The administrative process in which details concerning a birth, death or marriage are recorded.
<b>Registration of Births, Deaths and Marriages Act 1973</b>	New South Wales legislation relevant to the registration of a birth, death or marriage occurring within New South Wales.
<b>Registry</b>	The administrative area, usually within the Attorney-General's Department, which is responsible for maintaining records relating to registered births, deaths and marriages.
<b>Submission</b>	Written material provided by an individual or organisation to the Committee containing opinions in relation to the Inquiry.
<b>Witness</b>	An individual, summonsed and sworn by the Committee for the purpose of providing evidence concerning matters relevant to the Inquiry.



## STRUCTURE OF THE REPORT

Chapter One outlines the terms of reference and the background to the Committee's Inquiry.

Chapter Two outlines the current access provisions to Registry records by individuals and organisations. The Committee reviews the current situation in New South Wales with respect to data protection and the protection of privacy, particularly in regard to legislation.

Registry records and access provisions in other jurisdictions are compared in Chapter Three, with current arrangements applying in New South Wales also described.

The Committee considers the way in which the role and function of the Registry is determined is pivotal in determining access. Chapter Four outlines evidence taken in this regard and the Committee's deliberations. The Report also describes a number of issues which have been reviewed by the Committee in regard to the public benefit of an open Register.

In Chapter Five, proposed access provisions are described with consideration given to appeals mechanisms should access be denied.

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## CHAPTER ONE

### BACKGROUND TO THE INQUIRY

#### 1.1 TERMS OF REFERENCE

On 7 April 1992 the then Attorney-General, the Hon P E J Collins, MP, asked that the Standing Committee on Social Issues of the New South Wales Legislative Council inquire into and report on Recommendation One of the Law Reform Commission Report, *Names: Registration and Certification of Births and Deaths*.

The Committee accepted this Inquiry on 5 May 1992. The Terms of Reference are consideration of the question whether to adopt Recommendation One of the Law Reform Commission's Report, namely that:

The Register of Births, Deaths and Marriages should become an open register available to all members of the public, except for those parts which are closed by statutory authority.<sup>1</sup>

#### 1.2 ORIGINS OF THE REFERENCE

In 1985, the then Attorney General, the Hon T W Sheahan, MP, requested the Law Reform Commission investigate a decision by the Equal Opportunity Tribunal asserting that certain practices in the naming of children were discriminatory.

The Commission was requested to examine:

- . the criteria for the registration of the surname of married and unmarried parents;
- . the registration procedures, particularly concerning acknowledgment of an ex-nuptial child;
- . the details to be recorded in relation to births and deaths;

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<sup>1</sup> NSW Law Reform Commission, 1988, p.28

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the provision of certificates omitting potentially embarrassing details which appear in a registration; and any related matter.<sup>2</sup>

Recommendation One was one of fourteen made in the Commission's Report.

In support of Recommendation One, the Law Reform Commission included in its Report eleven explanatory paragraphs. Those paragraphs describe a number of the views of the Commission regarding the operation of the Registry and are reproduced in Appendix 1.

### 1.3 THE LAW REFORM COMMISSION REPORT

The Commission noted that the registration legislation has not been reviewed since its passage in 1855. It considered that the legislation does not contain the principles and guidelines expected in legislation today, and that the wide, unregulated discretion of the Principal Registrar is unacceptable. An open Register would eliminate the need for such discretion, the Commission believed.

In its Report the Commission stated that the Register is not and can never be totally closed. The *Registration of Births, Deaths and Marriages Act 1973*, as amended, does not specify the reasons for a secret Register although they appear to be based on issues of privacy and confidentiality, which the Commission suggested are not achieved. Whilst it is not widely known, statutory provisions provide government and private institutions access to Registry data. The Commission indicated that it considers that the confidentiality of the current system depends on the discretion and decision-making principles which underlie the manner in which the discretion of the Principal Registrar is exercised. In addition, the Commission noted that there is no foolproof identification system and accordingly no practical way of verifying the identity of those applying for access. Rather it is suggested that the Principal Registrar is required to rely on the honesty of applicants in determining whether to release requested information.

The Commission considered that it is not nor has ever been the function of the Registry to provide a person with complete proof of identity, and that an open Register would make this notion clear to all. Although Birth Certificates can be improperly obtained to establish a false identity, the Commission held that such certificates continue to be used as a reliable evidence of identity. Further, the Commission acknowledged that the privacy of an individual may be breached should an open Register system be used to gain access to another person's birth certificate for idle curiosity. However, it was considered that such applications would not be made frequently enough to cause concern. The need for

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<sup>2</sup> Ibid, p.ix

an individual to provide a full certificate as evidence for a particular purpose which requires only part of the information contained on a certificate was considered a greater privacy concern.

The Commission indicated that it had no evidence that the practice of an open Register in other jurisdictions had led to abuses of personal privacy. Rather it considered that the possibility for abuse of privacy lies in commercial applications of access through the sale of computer links to the Registry data base. Whilst access only to the Indexes has avoided such problems in other jurisdictions, the Commission believes that on-line access to the Registry data base should only occur with statutory authority or on clear principles of public benefit. The Commission considered that the Privacy Committee was an appropriate body to assess applications for computer access to information. The Commission's report notes that the Registry has the technical capacity to open its Registers.

The intention of the Law Reform Commission's Recommendation One was that the Registry should provide open access to all Indexes, except those required by legislation to be kept confidential. Any person should then be entitled to a full copy or an extract of any non-confidential Registry entry upon the payment of a prescribed fee.<sup>3</sup>

#### 1.4 DEFINITIONS

The Registry is the administrative area within the Attorney General's Department which is responsible for maintaining records of registered births, deaths and marriages, while the Register, in this Report, is defined as the consolidated information so recorded.

The Register has always, subject to certain qualifications, been closed to the public. The *Registration of Births, Deaths and Marriages Act 1973*, as amended, does not provide for the public to search the Indexes to the Register or the certificates themselves, and discretion is given to the Principal Registrar to either refuse an application or supply a certificate. Thus any person requesting a certificate from the Principal Registrar must provide sufficient reason for requiring it.

The meaning of "open Register" and "closed by statutory authority" were not immediately clear and required research and an appreciation of Registry practice to clarify their meaning. These two points are defined below.

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<sup>3</sup> Ibid, p.28

### 1.4.1 An Open Register

The Committee's view of an "open Register" was taken from the explanatory notes for Recommendation One, which indicated that an open Register operates in the following way:

- . Indexes of Registers are made available in the public area of the Registry;
- . the public may search the Indexes and request copies of the Register entries to which they refer;
- . no access is permitted to the Registers themselves, except by requesting identified copies;
- . requests may be made for an official search of the Registers to be undertaken by Registry staff; and
- . some parts of the Register are closed and not available except with special dispensation.<sup>4</sup>

### 1.4.2 Closed by Statutory Authority

Recommendation One of the Law Reform Commission's Report specifically excluded from an "open Register" those Registers that were "closed by statutory authority."

When the Report was released, in December 1988, there were five separate Registers. These were the Registers of Births, Deaths, Marriages, Adoptions and Stillbirths. The information contained on all the Registers was not generally available to members of the public. The release of the information on the latter two Registers was prohibited by legislation.

In recent years there have been two changes in the legislation which affect the Adoption and the Stillbirth Registers and consequently the meaning of Recommendation One as originally described has also changed.

Section 46(1) of the *Registration of Births, Deaths and Marriages Act 1973*, as amended, prevented the Principal Registrar allowing access to a certified copy of information on the Adoption Register unless so ordered by:

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<sup>4</sup> Ibid, p.29

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- . the Supreme Court; or
- . a court having jurisdiction in New South Wales, in relation to proceedings before it; or
- . the Director-General of the (then) Department of Youth and Community Services.<sup>5</sup>

Following the report of the Standing Committee on Social Issues, *Accessing Adoption Information*, in October 1989, the *Adoption Information Act 1990* was developed. That legislation allows an exemption to Section 46(1) of the *Registration of Births, Deaths and Marriages Act 1973*, as amended, which has enabled persons who are aged 18 years or older, and who are adopted, to gain access to their original Birth Certificates containing the details of the adoptee's biological parents. The *Adoption Information Act 1990* also applies to birth parents, who may gain a birth certificate or information relating to their adult child relinquished for adoption.

Practices relating to the registration of a stillbirth have also changed since the Commission's Report was released. From 1969 stillbirths were registered in a yearly Register of Stillbirths. In addition, the Principal Registrar was prohibited from issuing a certificate from the Stillbirth Register unless ordered by a court. The *Registration of Births, Deaths and Marriages (Amendment) Act 1992* ceased the practice of maintaining a separate and closed Register for stillbirths. A stillbirth is now registered on the Birth Register, and the practice of noting on an entry that the child was stillborn has been discontinued. Access to the Birth Certificate of a stillborn child is now the same as for any other Birth Certificate.

Therefore, since June 1992, the only Register now specifically "closed by statutory authority" is the register of persons adopted who are under 18 years of age, as this is specifically defined as "closed" by the *Adoption Information Act 1990*.

Thus, simply, the Committee was asked to consider whether the records held on the Registers of Births, Deaths and Marriages should be "open", or more readily accessible to the public, with the exception of the Adoption Register for persons under 18 years of age, which remains closed.

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<sup>5</sup> *Registration of Births, Deaths and Marriages Act 1973*

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## 1.5 METHOD OF INQUIRY

Advertisements calling for submissions and detailing the Terms of Reference for this Inquiry were placed in *The Sydney Morning Herald* and *The Australian* newspapers in May 1992. Agencies who have access to Registry records, either formally or through the discretionary powers exercised by the Principal Registrar, were advised of the Inquiry in order that they could respond and make submissions to the Inquiry.

### 1.5.1 Submissions

The Committee received 169 written submissions. Overwhelmingly these came from genealogists and family historians. In addition, a number of submissions were received from individuals and agencies which currently access or would like to access Registry records. Considerable interest was shown in the use of Registry information in the development of family histories and in researching social history.

The vast majority of submissions from genealogists and family historians supported an open Register. Family historians currently have restricted access to Registry records, with records dated after 1905 being particularly difficult to access. Submissions from both individual genealogists and family history organisations consistently indicated that an open Register would assist genealogists in their research to develop family trees. In support of an open Register, the Australasian Federation of Family History Organisations indicated that it supports the Law Reform Commission's Recommendation One for an "open" Register because "the adoption of this recommendation would greatly assist the valuable work being done by family historians in recording and preserving the community history of this state."<sup>6</sup>

Submissions were received from organisations which, through the exercise of the Principal Registrar's discretionary power, have access to records. In particular a number of medical researchers expressed strong views that access to Registry records was particularly important and of considerable value to the people of New South Wales. A number of organisations involved in medical and health related research argued for ongoing access or improved access to the data held by the Registry. In some instances, particularly where current access is dependent on requests being reviewed on a case by case basis, organisations supported an increase in the current level of access. The Australian Institute of Health indicated that it "strongly supports the proposal for an open Register of Births, Deaths and Marriages in order to minimise delays in obtaining birth and death data for its research purposes."

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<sup>6</sup> Submission 78. Australasian Federation of Family History Organisations. p.3

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Other organisations were aware of the benefits for families in increased access to Registry records. The submission from the Medical Genetics Unit of the Children's Hospital noted that "improved access to the Register of Births, Deaths and Marriages would be of benefit to our clients". In particular, the submission notes that, in the case of Huntington's disease, it is extremely important for families to access Death Certificates of relatives from previous generations to ascertain whether the causes of death are consistent with the symptoms of Huntington's disease.<sup>7</sup>

The Australian Bureau of Statistics has statutory access to Registry records. The Bureau indicated that the Registry is its main source for New South Wales demographic data. In its submission to the Registry, the Bureau expressed concern that an open Register may affect the coverage and accuracy of data collected, stating that its "major concern is that an open Register may cause informants to supply inaccurate data because of ease of access to copies of the Register entries".<sup>8</sup>

In submissions to the Committee, the Australian Bankers' Association, the Department of Foreign Affairs and Trade and the Independent Commission Against Corruption raised the issue of the use of Birth Certificates in providing an identity. These organisations had concerns that an open Register would affect the current value of a Birth Certificate in providing identification. The Australian Bankers' Association was against an open Register, and argued that "if the Registry remains closed, as it presently operates, it should continue to act as a form of deterrent against people who have fraudulent intentions."<sup>9</sup>

Data protection and privacy concerns were also raised in submissions to the Inquiry. In particular the concern was posed that privacy principles have not been widely adopted within New South Wales organisations and that no legislation was operating to protect personal data held in New South Wales databases. The Privacy Committee of New South Wales stated that it "opposes the Law Reform Commission's recommendation that the Register of Births, Deaths and Marriages should be open to public access. The Privacy Committee considers that the current procedures for access to Register information do not conform with data protection principles and require reform."<sup>10</sup>

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<sup>7</sup> Submission 82. Medical Genetics and Dysmorphology Unit, The Children's Hospital. p.1

<sup>8</sup> Submission 109. Australian Bureau of Statistics. p.1

<sup>9</sup> Submission 114. Australian Bankers' Association. p.2

<sup>10</sup> Submission 64. Privacy Committee of New South Wales. p.5

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### 1.5.2 Evidence and Research

Evidence was taken from witnesses at formal hearings held in Sydney. The Committee heard evidence from 36 witnesses. Witnesses before the Committee included genealogists, representatives of genealogical societies, and historical, social science, health and medical researchers. Evidence was also heard from representatives of the New South Wales Law Reform Commission, the New South Wales Registry of Births, Deaths and Marriages, the Privacy Committee of New South Wales and the Federal Attorney General's Department. These organisations demonstrated a considerable interest in the outcome of the Inquiry and in some instances a major concern regarding the proposal of an open Register.

Of the witnesses appearing before the Committee, two came from country areas, Armidale and Newcastle. Eight witnesses who appeared before the Committee were from outside New South Wales: six from the Australian Capital Territory and two from Victoria.

In addition to the submissions received and evidence taken, the Committee considered research concerning Registries throughout Australia and overseas. Among the issues which emerged and were considered by the Committee were the purpose of the Registry, the use of Registry data for identification purposes, data protection and privacy.

### 1.5.3 Social Context

The Inquiry coincided with the release of a report in August 1992 by the Independent Commission Against Corruption, entitled *Unauthorised Release of Government Information*. This report led to widespread media coverage and debate about the adequacy of protection accorded to government information, to ensure it is used for legitimate and accepted purposes. The Committee considered the matters raised in the Report in relation to the effects of an open Register and particularly in regard to the purpose of the Register.

The Committee was also aware that the Inquiry was taking place at a time when there had been moves towards more uniform Registry practices and procedures across Registries throughout Australia. It was therefore considered by the Committee that the outcome of this Inquiry may have ramifications for Registries beyond New South Wales.

It became apparent at an early stage of the Inquiry that not all witnesses were aware of the distinction between Registry Indexes and the certificates of the Registry. The Committee therefore was careful to distinguish between an Index entry and a certificate. The amount of information held on a Registry Index entry is considerably less than the

information detailed on a certificate. For example, the Birth Index contains the subject's full name, the parents' first names, the date of birth, and a registration number. A Birth Certificate also includes the age of both parents, parents' occupations, the place of birth, where and when the parents were married, details of any previous children, living or deceased, the name of the person who has completed the details on the Registration form, and the names of witnesses present at the birth.

Throughout the Inquiry, the Committee was concerned to strike a balance between the privacy considerations of individuals and the public benefits which may follow should changes be made to allow increased access to Registry records. To this end, the Committee examined the role and function of the Registry, legislation and guidelines concerning privacy and data protection, the use of Registry data by state and federal organisations and possible commercial uses of Registry data. In examining these issues the Committee considered what the effects of an open Register might be on a range of matters, including the accuracy and coverage of data collected, the nature of and need for the units of data collected and the manner in which the data is stored, collated and made available to members of the public.

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