

March 1993

Standing Committee on Social Issues Report No. 5

ISBN 0 7310 0084 6

TABLE OF CONTENTS

TABLE OF CONTENTS	i
CHAIRMAN'S FOREWORD	iii
ACKNOWLEDGEMENTS	v
PREVIOUS PUBLICATIONS	iv
TERMS OF REFERENCE	vi
MEMBERSHIP OF THE STANDING COMMITTEE	vii
EXECUTIVE SUMMARY	ix
RECOMMENDATIONS	xv
GLOSSARY	xxi
STRUCTURE OF THE REPORT	xxiii
CHAPTER ONE BACKGROUND TO THE INQUIRY	1
CHAPTER TWO PRIVACY AND DATA PROTECTION	11
CHAPTER THREE REGISTRY RECORDS AND COMPARATIVE ACCESS PROVISIONS	21
CHAPTER FOUR OPEN REGISTER - ACCESS ISSUES	51
CHAPTER FIVE PROPOSED ACCESS PROVISIONS	69
DISSENTING REPORT	85

BIBLIOGRAPHY	89
SUBMISSIONS RECEIVED	93
WITNESSES AT FORMAL HEARINGS	99
HEARING AND MEETING DATES	101
APPENDICES	103
1 Law Reform Commission Report's Recommendation One	105
2 Privacy Committee of New South Wales' recommended data protection principles	109
3 Comparative Registry Access	115
4 New South Wales Index and Certificate Records	121
5 Access Subject to the Principal Registrar's discretion and Access Under Special Arrangements	125
INDEX	131

CHAIRMAN'S FOREWORD

When the Committee began our Inquiry into this Reference, there was an expectation that it would be a relatively brief and simple task, in comparison with some of our previous inquiries. The Reference was, after all, quite specific, with a narrow focus.

However, closer examination soon revealed that the Reference involved one of the fundamental moral dilemmas of a free society: the question of how far an individual's personal information should be made available to other people. The right to freedom of information, here, is directly opposed to the right to privacy. The latter right is particularly threatened in this age of electronic data bases, especially in a jurisdiction where there is, as here, no legislated protection for data.

The Committee carefully considered the arguments from both sides, and believe we have struck an appropriate balance in our recommendations: safeguarding the right to privacy of individuals and their families, while supporting access for legitimate research purposes.

I am grateful to the members of the Committee for their contributions, and it needs to be acknowledged that every recommendation in the Report has the support of at least nine Members of Parliament representing five different political parties. Their diverse perspectives can occasionally be challenging, but ensure that our deliberations are wide-ranging and thorough, as sensitive, complex social issues deserve.

I would also like to express my gratitude to the staff of the Committee. Director Isobel Bothwell, Acting Senior Project Officers Jaleen Caples and later Glen Baird, Committee Officer Heather Crichton and Assistant Committee Officer Annie Marshall have provided the team which made this Report possible. Clerk Assistant - Committees of the Legislative Council, Mike Wilkinson, has given valuable administrative support.



Marlene Goldsmith
Chairman

**PREVIOUS PUBLICATIONS
BY
THE STANDING COMMITTEE ON SOCIAL ISSUES**

- | | |
|---------------------|--|
| Report No. 1 | <i>Accessing Adoption Information</i>
October 1989 |
| Report No. 2 | <i>Drug Abuse Among Youth, Volume One</i>
December 1990 |
| Report No. 3 | <i>Medically Acquired H.I.V.</i>
October 1991 |
| Report No. 4 | <i>Juvenile Justice in New South Wales</i>
May 1992 |

Copies available from: **The Secretariat
Legislative Council Standing Committee on
Social Issues
Parliament House
Macquarie Street
Sydney NSW 2000**

Telephone: **230 2986**

Facsimile: **230 2981**

ACKNOWLEDGMENTS

The Standing Committee on Social Issues wishes to record its appreciation for the many written submissions and the evidence received, particularly from members of the public. This Report is substantially based on such information.

Of particular assistance to the Committee were representatives from the New South Wales Registry of Births, Deaths and Marriages, the Privacy Committee of New South Wales, and the New South Wales Law Reform Commission.

The Committee also extends its thanks to the Staff of the New South Wales Parliamentary Library who were most helpful in the research for the Inquiry.

TERMS OF REFERENCE

That the Standing Committee on Social Issues undertake an inquiry and report on whether Recommendation One of the Law Reform Commission's Report, *Names: Registration and Certification of Births and Deaths*, be adopted.

Recommendation One of that Report states:

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.

MEMBERSHIP OF THE STANDING COMMITTEE

ON SOCIAL ISSUES

Hon Dr Marlene Goldsmith, MLC (Chairman)	Liberal Party
Hon Ann Symonds, MLC (Deputy Chairperson)	Australian Labor Party
Hon Franca Arena, MLC	Australian Labor Party
Hon Lloyd Coleman, MLC	National Party
Hon Keith Enderbury, MLC	Australian Labor Party
Hon Elisabeth Kirkby, MLC	Australian Democrats
Hon Doug Moppett, MLC	National Party
Rev The Hon Fred Nile, MLC	Call to Australia Group
Hon John Ryan, MLC	Liberal Party
Hon Helen Sham-Ho, MLC	Liberal Party

SECRETARIAT

Ms Isobel Bothwell	Committee Director
Ms Jaleen Caples/Mr Glen Baird	Senior Project Officer
Ms Heather Crichton	Committee Officer
Ms Annie Marshall/Mr Les Marsden	Assistant Committee Officer

EXECUTIVE SUMMARY

On 7 April 1992 the then Attorney General, the Hon P E J Collins, MP, requested the Standing Committee on Social Issues to inquire into and report on Recommendation One of the Law Reform Commission Report: *Names: Registration and Certification of Births and Deaths*.

The Terms of Reference accepted by the Committee on 5 May 1992 were to consider the question whether to adopt Recommendation One of the Law Reform Commission's Report, which states:

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.

The Commission's Report included eleven explanatory paragraphs on Recommendation One (see Appendix 1). The effects and implications of the terms "open Register" and "closed by statutory authority" required research, to both clarify their meaning and to gain an appreciation of Registry practice.

The definition of an "open Register" was taken from the Commission's Report. An open Register is one in which Indexes to the Registers are made available to the public: the public may search the Index, request copies of the Register entries in the form of certificates and requests may be made of Registry staff to conduct an official search. No public access is permitted to the Registers themselves except by requesting copies identified from the Index.

When the Commission's Report was released in 1988, five separate Registers were in existence. These were the Registers of Births, Deaths, Marriages, Adoptions and Stillbirths. Access to the latter two Registers was closed by statutory authority; that is, legislation prohibited public access.

Changes in legislation since 1988 have affected public access to the adoption and stillbirth Registers. The *Adoption Information Act 1990* has enabled adopted persons aged 18 years or more to gain access to their original Birth Certificates. An amendment in 1992 to the *Registration of Births, Deaths and Marriages Act 1973* has removed the separate Stillbirth register. Stillbirths are now registered on the Birth Register. The only Register now specifically "closed by statutory authority", that is with legislation specifically prohibiting public access, is the Register of persons adopted who are under 18 years of age.

Throughout the Inquiry the concepts of privacy and protection of data held on public Registers were considered. Evidence was heard concerning the Commonwealth *Privacy Act 1988* relating to the handling of information by Commonwealth government agencies. New South Wales has no similar legislation, although the *Data Protection Bill 1992* which is currently before the New South Wales Parliament incorporates data protection principles similar to those of the Commonwealth legislation. Both the *Privacy Act 1988* and the *Data Protection Bill 1992* draw on guidelines developed in Europe by the Organisation for Economic Co-operation and Development, the Council of Europe and the European Commission.

The Privacy Committee of New South Wales also has developed a set of eleven privacy principles similar to those in the *Privacy Act 1988*. As an advisory body, the Privacy Committee has no power to enforce the implementation of its guidelines. The Social Issues Committee considers that data protection principles should be developed into legislation for New South Wales as a priority.

During the Inquiry the Committee became aware of recommendations made in August 1992 by the Independent Commission Against Corruption report on *Unauthorised Release of Government Information*. That report raised a number of issues relevant to the Inquiry, such as the accuracy, consistency, ownership and purpose of data.

Purpose specification is a fundamental privacy principle which relates to the collection and release of data. When a person discloses information for a specific purpose, either under compulsion or in confidence, the information should generally be used only for the purpose for which it was required, or disclosed to persons who need it for that purpose or other socially accepted purposes. The Committee considers that where the purpose for which data is collected by the Registry is not specified in a written access policy of the Registry, the purpose for which such data is collected should be publicly stated.

Provision is made in legislation for a number of organisations, including the Australian Bureau of Statistics, the New South Wales Health Department and the Cancer Council, to access data held by the Registry. The *Registration of Births Deaths and Marriages Act 1973* as amended, provides the Principal Registrar with discretionary powers to allow access to Registry data. Over time a number of administrative practices have developed which allow regular access to Registry information by a number of other organisations. These organisations include the New South Wales Roads and Traffic Authority, the Australian Institute of Health and Welfare and the Office of the Sheriff.

The Principal Registrar also grants access under the legislative discretionary power invested in the position, to organisations requiring access to the data for specific purposes. For example, when data on either one or a number of individuals is required by a medical researcher, a law enforcement agency, the Public Trustee or the New South Wales Department of Community Services, each case is evaluated individually.

Consideration is given to privacy issues when discretion is employed by the Principal Registrar, with many cases being referred to the Privacy Committee of New South Wales for comment.

The Committee was advised that when the Principal Registrar gives consideration to access by medical researchers, the purpose of the research, the reputation of the body seeking access and the potential public benefit of the research. The provision of data for medical research involves a number of bodies, including the National Health and Medical Research Council which provides guidance on ethical considerations for research.

There is no Registry policy which is widely available to the public and which describes the statutory provisions for the release of information nor which outlines the practices of the Registry. Clearly, certain practices underlie the daily operation of the release of extracts of certificates or full certificates to members of the public for personal or research purposes. The Committee determines that a written access policy should be made available to members of the public and written in plain English and community languages.

A public access policy should define the provision in the legislation as it is interpreted by the Registrar whereby the "sufficient reason" for access is determined, and describe the statutory, formal and informal discretionary access arrangements permitted in Registry practice. Such a policy would reduce the discretionary power invested in the Principal Registrar in allowing or restricting access to Registry records. In this way, the access practices would become an accountable public policy. The Committee also considers that the access policy, particularly those parts which are determined under the discretionary power of the Principal Registrar, should be reviewed every five years.

The Committee considers that the Principal Registrar would need to retain some discretionary power under legislation, particularly with respect to requests for research by specialist researchers not specifically defined in the Registry's access policy. The Committee is of the view that such requests should be evaluated according to the existing criteria, that is the reason for the research, the reputation of the body seeking access, the public benefit of the research and issues relating to the privacy of individuals.

Although no formal access policy exists, practices relating to public access are based on clear operational guidelines. Indexes to Registry records are available for records for the years 1856 to 1905. These Indexes are available on microfiche at many public libraries throughout New South Wales and at local historical societies. Under Registry policy, access to a copy of a certificate is restricted and access depends on the type of certificate, that is, whether it is a Birth, Death or Marriage Certificate. Each Register raises different privacy concerns. For example, access to a Birth Certificate for a birth which occurred after 1905 is restricted to the subject of the certificate, the spouse, fiancé(e) or parent of the subject, or a solicitor or other authorised individual acting for the subject.

In considering an open Register, a distinction was made between the Indexes to the Register and the certificates of the Register. The amount of information on an Index 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, in addition to the information contained on a Birth Index, includes age of both parents, parents' occupations, the place of birth, where and when the parents were married, whether any previous children are alive or dead, the name of the person who has completed the details on the registration form, and the name of witnesses present at the birth.

The Committee heard in evidence that, for administrative purposes, different numbered sequences or letter prefixes were used for the registration of particular types of entries on the Indexes of the Register. Should Indexes be openly available, knowledge of the identifying characteristics of numbered sequences would enable certain personal characteristics of an individual to be identified. Over time, different sequences on the Birth Index have been used to identify adoptions, stillborn children, ex-nuptial status, and births that have been the subject of paternity claims. The Committee is of the view that the progressive elimination of identifying characteristics of numbered sequences is desirable.

The Committee considered a number of important issues which fundamentally affected the decision whether to recommend the adoption of Recommendation One. The Committee notes an increasing range of entitlements for which Registry certificates are used as a partial or total form of identification.

The Registry, along with other Australian Registries, has been working toward increasing the authenticity of certificates through anti-forgery measures, including the introduction of tamper-proof paper and a watermark. The Committee determined that this direction also supports the notion that Registry certificates form significant proof toward the identification of an individual. Such identification may be seriously compromised by providing any person with information which has a particular value because of its confidential nature.

The Register contains a large amount of personal information on the citizens of New South Wales. The Committee considers that open access to the Register would enable data given on a compulsory basis to be used for commercial purposes. In this way the privacy of an individual may be invaded. The Committee is opposed to commercial use of a public Register for private profit at the expense of the privacy of an individual.

One of the reasons for the Law Reform Commission's Recommendation One on an open Register was that an open Register may result in the collection of less data, because of an increased awareness of privacy considerations. Genealogists and historians expressed concern at such a trade-off.

The Committee heard conflicting evidence that, on the one hand, an open Register may lead to a decrease in the accuracy of the data collected, and, on the other, might actually contribute to accuracy by making data more publicly accessible. The Registry is an important source of information for research. In particular the research conducted by medical researchers, social historians and the Australian Bureau of Statistics is considered by the Committee to be of particular benefit to New South Wales. Accuracy is also relevant for genealogical research. Maintaining an accurate source of Registry data is therefore considered very important. The Committee believes that an open Register may affect the accuracy of the information recorded.

The Committee unanimously recommends that an open Register as proposed by the Law Reform Commission should not be adopted. The Committee agrees that access should be increased to the Indexes. The Committee unanimously agrees that the current criteria used to grant access to certificates, namely the age of the record, the relationship of an applicant to the subject of a record, and the exercise of the Principal Registrar's discretion, should continue to be the basis for access provisions. The application of the age criteria for access to both Indexes and certificates recommended by nine Members of the Committee is designed to provide consistency with the role of the Registry and to protect the privacy of individual citizens. One Member of the Committee has a dissenting view on the application of the age criteria in the release of Indexes and certificates as recommended by the other nine Members of the Committee.

The Committee, with one dissenting voice, considers that Indexes to birth records should be made available with a 75 year time lag and that the ongoing release of Indexes be instituted into Registry practice. Nine Members of the Committee support the current restrictions placed on individual access to certificates of births occurring after 1905, based on the criterion of the applicant's relationship to the subject of the certificate. However, the Committee determine that access provisions be widened to allow access on the basis of written permission from the subject of a certificate and to any person who has or is entitled to the Death Certificate of the subject of a record. The Committee, with one dissenting voice, also considers that from the year 2006, Birth Certificates be released to any person after at least one hundred years have elapsed since the recording of a birth.

It is unanimously proposed by the Committee that Indexes to recorded deaths be available up to the present time, with ongoing release of Indexes each year. As Death Certificates include sensitive information, the Committee recommends that they continue to be made available to applicants currently entitled on the basis of their relationship to the subject of the record; to any person who provides written permission from any person so entitled to access; and to any person thirty years after the death of the subject.

The Committee, with one dissenting voice, considers that Indexes to marriages should be made available to members of the public fifty years after the event is recorded. People who intend to marry should also be able to gain access to information on any previous

marriages of their intended spouse. With respect to access to Marriage Certificates, the Committee judges that the current criteria should continue to serve as the basis for access provisions and, with one dissenting voice, that the application of these criteria be altered to allow access to a person with written permission from a person who has access under the current arrangements and to any person who can provide evidence that at least thirty years have elapsed since the death of the subjects of a marriage. Nine Members of the Committee also recommend that Marriage Certificates be made available to any person after at least fifty years have elapsed since the marriage was recorded.

Increased access to Registry data for medical and academic research is supported by the Committee. Access arrangements 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 incorporate those developed by the National Health and Medical Research Council.

Consideration was also given to the process by which a person who has been denied access to the data held at the Registry may appeal. Whilst in the last five years there have not been a large number of complaints concerning access, the Committee believes that there should be an adequate and independent appeals process. Currently an individual denied access may appeal through the courts or to the Ombudsman or the Minister, that is the Attorney General, for the request to be reconsidered. Committee Members believe that the appeals process should be formalised and consideration given to the development of a further formal independent appeal mechanism in addition to those currently available.