

Best practices on birth registration

This submission was made on behalf of the Child Rights International Network - CRIN (www.crin.org) on 25 October 2017.

This submission addresses best practice in the realisation of birth registration for all children, specifically addressing intersex children and children born as a result of surrogacy or assisted reproductive technologies. These children are at risk of being excluded from birth registration or being subjected to registration requirements that amount to prohibited discrimination. Sustainable Development Goal 16.9 aims to achieve legal identity for all by 2030, including birth registration, and should be read in conjunction with Goal 16.B aiming at the enforcement of non-discriminatory laws and policies for sustainable development.

CRIN recommends that OHCHR take account of the rights and specific needs of intersex children and children born as a result of surrogacy or assisted reproductive technologies in producing its report on the best practices for the registration of children.

Intersex children

Intersex children - children whose reproductive or sexual anatomy do not match the typical definitions of female or male or who are born with varying degrees of physical differences in their genitalia - are often stigmatised by birth registration and other official documents. The requirement to register children as either male or female when this does not fit with the way children grow up to see themselves can be highly stigmatising. The legal necessity to categorise children as male or female at birth can also feed into a desire to impose “normalising surgery” on children before they are old enough to decide what treatment, if any, they would like to undergo. The Committee on the Rights of the Child has been clear that medically unnecessary surgical and other procedures on intersex children without their informed consent can cause severe physical and psychological suffering and should not be carried out.¹

The practice has emerged of identifying intersex people as a third sex on official documents. Kenya’s High Court, for example, has triggered reforms on the birth registration of intersex children² while Australia permits an “X” option on birth certificates for transgender and intersex individuals.³ This practice can, however, stigmatise children and single them out as different. Intersex organisations have widely campaigned for removing sex and gender from all birth certificates and other official documents as a means of avoiding unnecessary harm. Where official documents do indicate sex or gender, best practice for protecting the rights of

¹ See, for example, UN Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Switzerland, CRC/C/CHE/CO/2-4, 26 February 2015, paras. 42-43.

² *Baby ‘A’ (suing through the mother, E.A.) and The CRADLE-the Children Foundation v. The Attorney General, Kenyatta National Hospital and the Registrar of Births and Deaths* [2014] eKLR, petition No. 266 of 2013. Summary and full judgment available at: www.crin.org/node/40827.

³ International Business Times, “Government approves new transgender and intersex law to fight discrimination”, 19 September 2011.

intersex children is to allow classifications to be corrected through a simple administrative procedure at the request of the individual concerned.⁴

Surrogacy and assisted reproductive technologies

The Convention on the Rights of the Child asserts the right of children to be registered soon after birth.⁵ This right applies to all children regardless of whether they were born through assisted reproduction, surrogacy or by natural means and complements SDGs 16.9 and 16.B.

Children born through surrogacy often face barriers in being registered, commonly when they have been born abroad and return with their prospective parents to a country that does not permit surrogacy. Delays and complications may be necessary bureaucratic hurdles designed to safeguard the child's rights and prevent trafficking, but in other cases they may undermine a child's rights and be inconsistent with the principle of the best interests of the child. For instance in 2014 the European Court of Human Rights (ECtHR) ruled that France's refusal to issue birth certificates in relation to two children carried by a US surrogate violated the children's right to family life.⁶ France's highest court ruled in 2017 that same-sex partners may adopt the biological children of their partner when the child has been conceived through a surrogacy carried out outside the country.⁷

The difficulties of establishing the child's legal status may even result in the child and their intended parents being 'stranded' in the child's country of birth or in the separation of the child from their intended parents. Such situations are also in direct conflict with CRC article 9 which requires that the child "shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."

A legislative proposal in India offers one possible solution to preventing problems related to establishing a child's nationality and parentage. It would require foreigners considering entering into a surrogacy agreement to establish that the resulting child would be granted citizenship in the State where their intending parents live and that they will be the legally recognised parents in that state.⁸ However, these measures can cause administrative difficulties, as in Thailand when an Australian couple was required without prior notification to produce a court order proving them to be the child's legal guardian before being allowed

⁴ See *Darlington Statement: Joint consensus statement from 20 intersex organisations*, March 2017, p. 3. Available at: <https://oii.org.au/darlington-statement/>.

⁵ Convention on the Rights of the Child, Article 7.

⁶ *Mennesson v. France*, CRIN summary available at: <https://www.crin.org/en/library/legal-database/mennesson-v-france> and *Labassee v. France*, CRIN summary available at: <https://www.crin.org/en/library/legal-database/labassee-v-france>.

⁷ Cour de cassation, Chambre civile 1, 5 juillet 2017, 16-16.455, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035146562&fastReqId=736135142&fastPos=5> (in French)

⁸ Wells-Greco, M., *The status of children arising from inter-country surrogacy arrangements: the past, present and future*, p. 441. See also the draft Assisted Reproductive Technologies (Regulation) Bill 2010 at: <http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.

to leave the country with their surrogate-born baby. The family's return home was delayed by several days.⁹

⁹ The Guardian, 'Surrogate children's parents must prove custody when they leave Thailand', 15 August 2014. Available at: <http://www.theguardian.com/lifeandstyle/2014/aug/15/surrogate-children-parents-prove-custody-leave-thailand>.

