

Advice of the Ombudsman for Children  
on the Adoption Bill 2009

November 2009



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for children • do leanáí

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## 1. Introduction

- 1.1. The Adoption Bill 2009 was published on 23 January 2009 by the Minister for Children and Youth Affairs. The stated aim of the Bill is to consolidate and modify existing adoption legislation, as well as to give effect to the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption 1993.
- 1.2. The advice set out below has been prepared pursuant to section 7(4) of the Ombudsman for Children Act 2002, which provides that the Ombudsman for Children may on her own initiative give advice to a Minister of the Government on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of proposals for legislation.
- 1.3. The decision to give the 1993 Hague Convention the force of law in Ireland and to reframe our adoption legislation in light of the Convention's requirements is to be welcomed. One of the criticisms of the UN Committee on the Rights of the Child regarding Ireland's most recent report on the implementation of the UN Convention on the Rights of the Child (CRC) was that Irish legislation did not fully correspond to international standards in this area, particularly with respect to protection in intercountry adoptions<sup>1</sup>. The Committee also expressed its concern that Irish legislation did not adequately take into account the best interests of children and that the pace of the reform process was slow<sup>2</sup>.
- 1.4. The Adoption Bill has addressed many of the issues that have caused concern for international monitoring mechanisms, professionals working in the field of adoption and, most importantly, children and families that have been through the adoption process or will go through it in future. There are, however, a number of areas in which the Adoption Bill could be enhanced to better serve the interests of the children who will be affected by it and to ensure full compliance with the UN Convention on the Rights of the Child and other international instruments relevant to the question of adoption.
- 1.5. In particular, consideration should be given to ensuring that the provisions of the Bill are compatible with the European Convention on the Adoption of Children (Revised) 2008<sup>3</sup>. The latter was drafted to replace the 1967 European Convention on the Adoption of Children and to provide an effective complement to the Hague Convention, principally by ensuring that domestic adoptions which are not covered by the Hague Convention are regulated in such a manner as to comply with the underlying aims of adoption. The drafters of the Convention

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<sup>1</sup> UN Document CRC/C/IRL/CO/2, Concluding Observations of the UN Committee on the Rights of the Child on the second periodic report of Ireland under the UN Convention on the Rights of the Child (September 2006), para. 34

<sup>2</sup> Ibid.

<sup>3</sup> Council of Europe Treaty Series no. 202 (27 November 2008)

understood these aims to be: making the adoption process child-centred; guaranteeing that decisions are made in the child's best interests; and ensuring that adopted children are provided with a harmonious home<sup>4</sup>.

- 1.6. Although the 2008 Convention has not entered into force and Ireland has not yet signed or ratified it, the Convention is the most recent articulation of minimum standards in the area of adoption and it was deemed to be essential because of developments in the jurisprudence of the European Court of Human Rights, the requirements of international instruments and standards agreed since the 1967 Convention entered into force, as well as social change in the Member States of the Council of Europe<sup>5</sup>.
- 1.7. The adoption process affects children and families well before and long after the final adoption order is made. Our legislation must be strong and subtle enough to ensure that the rights of children are fully respected at every stage of that process, that adequate support is given to children and their families, and that the Adoption Authority and the courts have sufficiently nuanced tools at their disposal to ensure the best outcomes for children and their families.
- 1.8. The Adoption Bill constitutes a major restatement and updating of our legislation in the area of adoption and it is unlikely to be amended in a substantial or fundamental way for some time after its enactment. It is therefore essential that the Bill set out a clear and comprehensive vision of what shape our adoption process should take.
- 1.9. The comments below have been prepared in light of these considerations. What follows is an examination of the most significant issues which arise with respect to the Bill's compliance with international human rights standards and its probable effect on children, rather than a comprehensive analysis of its provisions.

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<sup>4</sup> Explanatory report to the 2008 Convention, para. 19

<sup>5</sup> See paragraphs 1-13 of the Explanatory Report to the 2008 Convention and preambular paragraph 6 of the Convention itself.

## 2. Incorporation of the Hague Convention

- 2.1. Section 9 of the Adoption Bill 2009 states that the Hague Convention has the force of law in the State. Section 10 further specifies that judicial notice shall be taken of the explanatory report prepared by Justice Gonzalo Parra-Aranguren in relation to the Hague Convention and that both the courts and the Adoption Authority shall pay due regard to that explanatory report.
- 2.2. The decision to incorporate the Hague Convention directly into domestic law and to require that judicial notice be taken of the Convention's explanatory report represents a progressive approach to international instruments that will hopefully be emulated with regard to other agreements relating to the rights of children.
- 2.3. Although the UN Convention on the Rights of the Child has not been incorporated in this manner, the direct incorporation of the Hague Convention will have the effect of giving greater force to the CRC's adoption provisions because of the relationship between the two Conventions. The explanatory report to the Hague Convention – to which the courts and Adoption Authority shall be obliged to pay due regard when the Adoption Bill is enacted - makes it clear that, although it was not explicitly stated in the text of the Hague Convention, the consensus among those who drafted it was that it should be considered as an international instrument within the meaning of Article 21(e) of the CRC, which requires States Parties "to promote, where appropriate, the objectives of this article by concluding bilateral or multilateral arrangements or agreements"<sup>6</sup>. The objectives of Article 21 of the CRC are to:
- Ensure that the best interests of children shall be the paramount consideration in relation to adoption;
  - Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
  - Recognise that intercountry adoption may be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
  - Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; and

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<sup>6</sup> Explanatory report on the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption (1993), para. 55

- Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it.

2.4. Given that Ireland has one of the highest rates of intercountry adoption in Europe, we have a particular responsibility to ensure that our adoption legislation meets the objectives set out in Article 21 of the CRC and the Hague Convention. The system of cooperation between contracting states established by the Hague Convention is geared towards protecting the rights of adopted children, principally by making sure that their adoption does not result in improper financial gain and that all required consents have been properly obtained. In essence, states must guarantee the integrity of the process which establishes the adoptability of a child before considering alternative care in another jurisdiction. This principle holds irrespective of the quality of care a child would receive if he or she were adopted by a couple or individual from another country.

2.5. It is to that end that current practice in Ireland with respect to intercountry adoption needs to be improved in line with the State's international obligations. To the extent that the Adoption Board does not currently exercise a regulatory function as extensive as that required of a central adoption authority by the Hague Convention, the framework for intercountry adoption in Ireland does not fully guarantee children adopted from other jurisdictions safeguards equivalent to those afforded to children who are adopted within this country. Indeed, addressing this regulatory gap is one of the main aims of the Adoption Bill.

2.6. The preamble to the Hague Convention recognises that a child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. It further acknowledges that intercountry adoption can offer such a home to children in need of alternative care. There is no doubt that many children adopted from other countries have found such homes in Ireland and will continue to do so in future. However, the Hague Convention accords with the UN Convention on the Rights of the Child in emphasising that states should take appropriate measures to enable children to remain in the care of their birth families if possible and that intercountry adoption should only be considered when no suitable alternative care arrangement can be found in the child's country of origin.

2.7. It is hoped that the Oireachtas will therefore enact the Adoption Bill 2009 as soon as possible and put in place the robust framework we need. This framework should be further strengthened by the preparation of ministerial regulations setting out in detail the standards which will apply to any agencies that act as intermediaries in the intercountry adoption process, as provided for in the Bill. Consideration should also be given to require that bilateral

2.8. In addition, the Bill should clarify precisely how the transitional arrangements for intercountry adoption applications made prior to the enactment of the Bill will operate. Section 63(2) provides that if immediately before the establishment day, a foreign adoption within the meaning of the Adoption Act 1991 is not yet effected but is still in process, the adoption may proceed under the Act. The difficulty with this formulation is that it is unclear what the term “in process” will mean in practice. It could refer to a number of possible stages in the adoption process, including the point at which an application for assessment of suitability is submitted to the relevant authorities; the point at which a declaration of eligibility and suitability has been granted; or the stage immediately prior to the making of an adoption order (the referral process). If this ambiguity persists, it could potentially leave children adopted from other jurisdictions in a form of legal limbo where the adoptive parents have been deemed eligible to adopt by the Irish authorities, where the children have been or are soon to be legally adopted in their country of origin, but where that adoption may not be recognised in Ireland. The consequences for the children immediately affected in this way would be serious<sup>7</sup>. It was not the intention of the Hague Convention to generate this type of uncertainty, as is clarified both in the explanatory report to the Convention<sup>8</sup> and in the Guide to Good Practice relating to intercountry adoption published by the Hague Conference on Private International Law<sup>9</sup>. It would be entirely compatible with the Hague Convention for the Bill to provide that applications made prior to Ireland’s ratification of the Convention by prospective adopters who have already been granted a declaration of eligibility and suitability to adopt should be allowed to proceed during this transitional period.

### **Recommendations**

**The Oireachtas should enact the Adoption Bill 2009 as soon as possible to ensure that children adopted from other jurisdictions benefit from the safeguards set out in the Hague Convention.**

**Regulations setting out in detail the standards which will apply to the operation of agencies acting as intermediaries in the intercountry adoption process should be prepared following the Adoption Bill’s enactment.**

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<sup>7</sup> The potential for situations to arise similar to those considered in the case of *Attorney General v Dowse and Anor* ([2006] IEHC 64) could increase under these circumstances.

<sup>8</sup> Explanatory report on the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption (1993), paras. 579 - 585

<sup>9</sup> Hague Conference on Private International Law, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice* (2008), chapter 8.3.4

**Consideration should be given to requiring that bilateral agreements with States that are not party to the Hague Convention be reviewed periodically.**

**The Bill should clarify the transitional arrangements for intercountry adoptions that are in process prior to its enactment. In particular, it should provide that applications made prior to Ireland's ratification of the Hague Convention by prospective adopters who have already been granted a declaration of eligibility and suitability to adopt should be allowed to proceed during this transitional period.**

### 3. Best interests principle

- 3.1. Section 19 of the Bill provides that in any matter, application or proceedings before the Adoption Authority or any court relating to the arrangements for the adoption of a child, the making of an adoption order or the recognition of an intercountry adoption outside the State, the Authority or court shall regard the welfare of the child as the first and paramount consideration.
- 3.2. Establishing the paramountcy principle as a general rule governing all matters relating to the adoption of children broadly reflects the spirit of the provisions in the Hague Convention, the CRC and the Revised European Convention on the Adoption of Children which require that the best interests of children be the paramount consideration in the adoption process<sup>10</sup>. Indeed, the UN Committee on the Rights of the Child explicitly recommended the full integration of the best interests principle into our adoption legislation in its concluding observations on Ireland's most recent periodic report under the UN Convention on the Rights of the Child<sup>11</sup>.
- 3.3. It is unclear, however, why the preferred language of the international instruments – emphasising the best interests rather than welfare of the child – was not reproduced in section 19 of the Bill. Although a similar formulation to that found in section 19 of the Adoption Bill is contained in section 3 of the Guardianship of Infants Act 1964<sup>12</sup>, best interests is the term used in the provisions of the proposed Constitutional Amendment on children's rights relevant to adoption<sup>13</sup> and in numerous other sections of the Adoption Bill itself<sup>14</sup>.
- 3.4. According to the best interests principle the centrality in decision-making required by the UN Convention implies not only that outcomes should be focused on achieving what is best for the child in question - it requires that the process for determining which course of action would be in a child's interests include adequate procedural safeguards. To that end, provision should be made for the separate representation of the interests of a child by an independent guardian in any relevant proceedings under the Adoption Bill. This is especially important in the difficult situations in which a dispute arises between birth parents and

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<sup>10</sup> Article 1 of the Hague Convention, Articles 3 and 21 of the CRC and Article 4 of the Revised European Convention on the Adoption of Children are of particular relevance in this context.

<sup>11</sup> See note 1 above.

<sup>12</sup> Act No. 7 of 1964

<sup>13</sup> The second section of the proposed Article 42(A) contained in the 28<sup>th</sup> Amendment to the Constitution Bill (No. 14 of 2007) states that: "Provision may be made by law for the adoption of a child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child, and where the best interests of the child so require". The fourth section of the proposed amendment states that: "Provision may be made by law that in proceedings before any court concerning the adoption, guardianship or custody of, or access to, any child, the court shall endeavour to secure the best interests of the child".

<sup>14</sup> See, for example, sections 17, 31, 33, 50, 54, 75, 88 and 92 of the Adoption Bill 2009

prospective adoptive parents, such as those provided for in section 31 of the Bill<sup>15</sup>.

3.5. With regard to children who are able to express their own views on matters which affect them, the UN Committee on the Rights of the Child has clarified that a consideration of those views must form part of a determination of their best interests<sup>16</sup>. In addition, the UN Committee has emphasised that where a child's views are being presented by a representative during the course of any relevant judicial or administrative proceedings, conflicts of interest must be avoided and the representative must be tasked exclusively with representing the interests of the child rather than any other person, institution or body<sup>17</sup>.

### **Recommendation**

**Section 19 of the Bill should be reformulated to comply more fully with the provisions of the UN Convention on the Rights of the Child and other instruments relating to the best interests principle, particularly by providing for the separate representation of the interests and views of the child in any relevant proceedings under the Adoption Bill.**

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<sup>15</sup> Section 31 provides that the High Court may, in certain circumstances, dispense with the consent of a person whose consent is ordinarily required and give custody to the prospective adoptive parents, pending the making of the adoption order.

<sup>16</sup> UN Document CRC/C/GC/12, General Comment No. 12 of the UN Committee on the Rights of the Child (2009), para. 70. See also section 5 below.

<sup>17</sup> *Ibid.*, paras. 36 and 37

#### 4. Children of marital families

- 4.1. The categories of children that may be adopted are set out in section 23 of the Bill. In general terms, a child must be under the age of 7 and be either an orphan or born to parents who are not married to one another to be eligible for adoption.
- 4.2. The conditions which must be met for adopting a child whose birth parents are married to each other remain extremely restrictive. Part 7 of the Bill - which deals explicitly with this issue - reflects the jurisprudence which has developed on this question and the provisions of the Adoption Act 1988. In order for a child of parents who are married to each other to be adoptable, the Bill requires among other things that the parents of the child in question must have failed for physical or moral reasons in their duty towards the child for a continuous period of not less than 12 months; that it is likely that the failure will continue without interruption until the child attains the age of 18; and that the failure constitutes an abandonment on the part of parents of all parental rights.
- 4.3. The Bill does not alter the position that parents who are married but who cannot themselves raise their child, for whatever reason, may not voluntarily place that child for adoption. In practice, this means that children of marital families who are in long-term foster care often cannot be adopted and are thus denied the opportunity of having a permanent, secure legal relationship with their foster parents. Children who find themselves in analogous circumstances but whose birth parents have never been married to each other are in a more favourable position in that it is easier for them to get a 'second chance'. The differential treatment of these two groups of children cannot be justified with reference to their best interests or to any notion of necessity or proportionality.
- 4.4. Clearly the drafters of the Bill must operate within the bounds of the Constitution and established jurisprudence. However, the fact that such an unsatisfactory provision still represents the limit of the Oireachtas' latitude in providing for the adoption of children of marital families emphasises the need to address the wider question of children's rights in the Constitution.
- 4.5. In the absence of a change to this provision, Ireland will continue to be in violation of its obligations under Article 2 of the UN Convention on the Rights of Child to ensure that the rights set out in the Convention are enjoyed by every child within its jurisdiction without discrimination of any kind. The UN Committee on the Rights of the Child has clarified that one of the prohibited grounds of discrimination is the marital status of a child's parents, although in this instance it is children of marital rather than non-marital families that are placed at a

<sup>18</sup>. In addition, providing an alternative care option which involves the creation of permanent family ties to one group of children but not to another could raise an issue under Articles 8 and 14 of the European Convention on Human Rights.

4.6. It is hoped that the Oireachtas Committee on the Constitutional Amendment on Children established in November 2007 will propose an effective amendment sufficiently wide in scope to address this problem<sup>19</sup>. The current situation represents not only an unnecessary obstacle to guaranteeing an outcome consistent with a child's best interests but also an anomaly that prevents Ireland from fulfilling its obligations under the international human rights standards mentioned above.

### **Recommendation**

**If it is deemed impossible to relax the restrictions on the voluntary placement of children for adoption by parents who are married to each other, Part 7 of the Bill should be modified to provide for such situations as soon as the Constitution is appropriately amended.**

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<sup>18</sup> Hodgkin, R. and Newell, P. *Implementation Handbook for the Convention on the Rights of the Child* (Third Edition) (UNICEF: 2007), p. 24

<sup>19</sup> For further information on the Ombudsman for Children's recommendations regarding the proposed Constitutional amendment, see the OCO's *Report to the Houses of the Oireachtas on the 28<sup>th</sup> Amendment to the Constitution Bill* (March 2007) and *Submission to the Joint Committee on the Constitutional Amendment on Children* (February 2008), both of which can be accessed at [www.oco.ie](http://www.oco.ie)

## 5. Consultation and consent

- 5.1. Section 24(2) of the Bill provides that prior to making an adoption order with respect to a child over the age of 7, the Adoption Authority shall be obliged to give due consideration to the wishes of the child, having regard to his or her age and understanding.
- 5.2. It is unclear why it was deemed necessary to circumscribe the obligation to consult a child on the basis of his or her age, given that the qualification regarding the child's evolving capacities and understanding was also included. Indeed, section 54 of the Adoption Bill contains a provision which requires the High Court to give due consideration to the wishes of the child without any reference to a particular age. That section is, however, limited to situations where an order is being sought to authorise the Adoption Authority to make an adoption order for a child whose birth parents are married to each other and have failed in their duty towards the child.
- 5.3. Article 4(d) of the Hague Convention states that adoptions should only take place once the competent authorities have ensured, having regard to the age and degree of maturity of the child, that consideration has been given to the child's wishes and opinions. Article 6 of the Revised European Convention on the Adoption of Children echoes this principle, though it also provides that such consultation may be dispensed with if it is manifestly contrary to the child's interests<sup>20</sup>.
- 5.4. These provisions are themselves informed by one of the general principles of the UN Convention of the Rights of the Child, namely the right children have under Article 12 of the Convention to express their views on matters which affect them and for those views to be given due weight and consideration, having regard to the age and maturity of the child. In its General Comment on Article 12 of the CRC, the UN Committee on the Rights of the Child has clarified that the right to be heard in adoption proceedings – including those relating to step-parent and foster parent adoptions – is protected by Article 12 and that providing the children in question with appropriate information

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<sup>20</sup> The explanatory report to the Revised European Convention on the Adoption of Children notes that the Convention's provisions in relation to consultation and consent were informed by the European Convention on the Exercise of Children's Rights 1996 (CETS No. 160), which acknowledges a child's right to be informed and participate in proceedings affecting him or her before a judicial authority. They were also framed in light of European Union Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, which emphasises the importance of hearing the voice of the child in matters relating to parental responsibility over him or her in accordance with his or her age and maturity. See in particular paragraphs 30, 39 and 40 of the explanatory report.

regarding the nature of the adoption is an element of the young person's right under the Convention<sup>21</sup>.

- 5.5. None of these instruments limits the right to be heard with reference to chronological age. Indeed, the essence of this principle is that the right to be consulted, to express views and for those views to be given due consideration exists for all children. The age and maturity of the child affect how the right is realised, not whether it exists at any given moment. This remains the case notwithstanding the fact that the very young age at which most children are adopted would often make such a process of consultation unrealistic. It should be noted, however, that this does not imply that a child should feel an obligation to express such views if he or she does not wish to do so<sup>22</sup>.
- 5.6. The requirement to obtain the consent of children of sufficient age and understanding to an adoption is an extension of this principle. Although the Hague Convention does not require such consent to be given, it expressly provides for it in Article 4(d)<sup>23</sup>. The Revised European Convention on the Adoption of Children is more explicit in Article 5(1)(b) by stating that an adoption shall not be granted unless the consent of a child considered by law as having sufficient understanding has been given and not withdrawn; and that a child shall be considered as having sufficient age and understanding on attaining an age which is to be prescribed by law and not more than 14 years.
- 5.7. This suggests that there is an overarching responsibility to seek the consent of a child to an adoption, on the understanding that this is predicated on capacity which may not be present in many cases. In order for our adoption legislation to be compatible with the Revised European Convention on the Adoption of Children, however, it would not be permissible to override or set aside the requirement for the consent of a young person over the age of 14 to an adoption solely on the basis of his or her age. Respecting this principle is especially important when one considers the fact that in most instances, decisions taken during the adoption process are ones that are entirely beyond children's control and the situations in which they find themselves are the product of other people's choices.
- 5.8. The European Court of Human Rights has considered the question of children's consent or opposition to an adoption order. In the case of *Pini and Others v. Romania*, two nine year old Romanian girls objected to their adoption placement in Italy. The Court ruled that the girls' consistent refusal to join their adoptive parents and the

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<sup>21</sup> UN Document CRC/C/GC/12, General Comment No. 12 of the UN Committee on the Rights of the Child (2009), paras. 55 and 56.

<sup>22</sup> *Ibid.*, para. 16

<sup>23</sup> Article 4(d) of the Hague Convention provides that an adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have ensured that a child's consent to an adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing.

consequent unlikelihood of achieving a harmonious integration into their new adoptive family were significant factors in the case which could not be ignored. In addition, the judgment of the Court emphasised that it is especially important prior to an adoption order being made that the child's interests should prevail over those of the prospective parents since, as it had previously held, adoption means providing a child with a family, not a family with a child<sup>24</sup>.

- 5.9. It has been observed that provisions requiring the consent of children of sufficient age and maturity to the making of adoption orders can potentially place an unnecessary burden on those young people<sup>25</sup>. Indeed, the importance of not compelling children to express their views where they do not wish to do so should be borne in mind in this regard<sup>26</sup>. However, it should be possible to frame the right to consent to an adoption and, more importantly, the manner in which such consent is sought in a way that is sensitive to the wishes of the child. This could possibly be achieved by providing that it would be sufficient in certain circumstances for a child or young person not to object to an adoption order.
- 5.10. The Bill also raises the issue of consultation with a child's birth parents or guardians regarding the child's adoption and the manner in which their consent to the adoption is obtained. In considering how these questions should be addressed in light of the adopted child's rights, it should be recalled that the UN Convention on the Rights of the Child guarantees that a child has the right to know and be cared for by his or her parents, as far as possible (Article 7); that the child should not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child (Article 9); and that both parents of a child have common responsibilities for the upbringing and development of the child (Article 18). An adoption that is fully compliant with the Convention can only occur if parents are unwilling or are deemed by judicial process to be unable to discharge this responsibility. Any legislation that permits adoptions under less stringent conditions would arguably amount to a breach of the child's rights under the Convention<sup>27</sup>.
- 5.11. It should be noted in this regard that a child's right to know and be cared for by his or her father has been given greater protection in section 18 of the Bill by requiring the Adoption Authority to seek the authorisation of the High Court before dispensing with the obligation to consult the father and afford him the opportunity to apply for

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<sup>24</sup> Pini and Others v. Romania, (Applications 78028/01 and 78030/01)(2004), paras. 155-164

<sup>25</sup> See, for example, the *Report for the Attention of the Committee of Experts on Family Law Containing an Evaluation of the Council of Europe Legal Instruments in the Field of Family Law* prepared by Professor Nigel Lowe (Council of Europe Document CJ-FA 2006 1 Rev) (2006), p. 9

<sup>26</sup> See note 22 above.

<sup>27</sup> Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 296

guardianship<sup>28</sup>. With respect to the consent of birth mothers and other guardians to an adoption order, the provisions of the Bill could be further clarified in situations where such consent is withdrawn before the order is made. Section 26(4) of the Bill provides that their consent may be withdrawn at any time before the making of an adoption order. Section 31, however, provides that if such a person “fails, neglects or refuses to give his or her consent to the adoption” or “having previously consented to the adoption, withdraws his or her consent” the Adoption Authority may dispense with such consent if authorised to do so by the High Court, where the court is satisfied that it is in the best interests of the child. Although there is an argument in favour of giving latitude to the Adoption Authority and the courts to examine each case on its merits having regard to the child’s best interests, this lack of clarity can in and of itself have negative consequences for the parties concerned, most particularly the child<sup>29</sup>. Consideration should therefore be given to observing international practice and specifying a period within which birth parents or guardians who initially place a child for adoption are entitled to the return of the child to their care<sup>30</sup>.

- 5.12. Another issue which arises with respect to the operation of section 31 of the Bill is that of who may apply to the High Court for an order to dispense with consent. At present, only prospective adopters may apply for such an order. However, it would be advantageous if the Bill provided for the possibility of the HSE also making such an application in situations where the applicants do not have sufficient resources to do so and where it would be in the child’s best interests for the adoption order to be made.

### **Recommendations**

**The limits in the Bill placed on the right of children to express their views on matters relating to their adoption should be removed.**

**Provision should be made for seeking the consent of children of sufficient age and understanding to the making of an adoption order. The importance of not compelling children to express their views where they do not wish to do so should, however, be borne in mind and the Bill could address this issue by providing that it would be sufficient in certain circumstances for a child or young person not to object to an adoption order.**

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<sup>28</sup> At present, the decision to dispense with the need for consultation under section 6 of the Adoption Act 1998 is a matter for the Adoption Board rather than the High Court.

<sup>29</sup> For an overview of the main difficulties which can arise, see chapter 5 of the Department of Health and Children’s *Adoption Legislation: 2003 Consultation and Proposals for Change* (January 2005).

<sup>30</sup> A number of reasonable options are discussed in the consultation on adoption legislation undertaken by the Department of Health and Children mentioned above.

**Consideration should be given to specifying a period within which birth parents or guardians who initially place a child for adoption are entitled to the return of the child to their care.**

**Consideration should be given to including a provision which would allow the HSE to make an application to the High Court to dispense with consent where it would be in the child's interests to do so.**

## 6. Eligibility of prospective adopters

- 6.1. The categories of persons eligible to apply for an assessment of suitability to adopt are set out in section 33(1) of the Bill. They are:
- a married couple who are living together;
  - the mother, father, or relative of the child; or
  - an individual who satisfies the Adoption Authority that in the particular circumstances, the adoption is desirable and in the best interests of the child<sup>31</sup>.
- 6.2. Adults do not have a right to adopt. Adoption concerns the right of a child to become integrated into a family where one or both of the child's biological parents are, for whatever reason, unable or unwilling to care for the child. The question of eligibility of prospective adopters must therefore be viewed primarily from the perspective of the children who may be adopted by them. As regards the current categories of persons who are eligible to apply for an assessment of suitability to adopt, the issue is whether maintaining the categories as they stand or extending them would have an adverse effect on children and undermine their rights.
- 6.3. Neither the UN Convention on the Rights of the Child nor the Hague Convention addresses the question of eligibility to adopt in detail, though both instruments emphasise that the competent authorities should grant an adoption only where the adoption will be in the best interests of the child<sup>32</sup>. Article 4 of the Revised European Convention on the Adoption of Children reiterates this underlying principle and states further that the competent authorities shall pay particular attention to the importance of the adoption providing the child with a stable and harmonious home.
- 6.4. Article 7 of the Revised European Convention on the Adoption of Children goes on to address the question of eligibility to adopt specifically. It states that the law shall permit a child to be adopted by two people of different sex who are married to each other or, where such an institution exists, have entered into a registered partnership together; or by one person. Article 7(2) of the Convention provides that States are free to extend the scope of the Convention to same-sex couples who are married to each other or who have entered a registered partnership together and to opposite-sex and same-sex couples who are living together in a stable relationship.

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<sup>31</sup> Section 33 also addresses issues such as the consent of an applicant's spouse to an adoption, the age of applicants and the effect of prospective adopters' habitual residence on their application.

<sup>32</sup> See Article 1 of the Hague Convention and Article 21 of the UN Convention on the Rights of the Child.

- 6.5. The Adoption Bill as it stands accords with the minimum requirements of the Revised European Convention on the Adoption of Children in relation to the eligibility of prospective adopters but does not extend the scope of the eligibility criteria in the manner outlined in Article 7(2) of the Convention. In considering what impact this will have on children, it should be borne in mind that the eligibility of prospective adopters can affect children in different ways, depending on their situation. Children with no prior connection or relationship with prospective adopters are affected by the eligibility criteria to the extent that altering those criteria can widen or diminish the pool of potential adoptive parents. There are other children for whom adoption means altering the legal relationship with one or both of the child's parents or caregivers within an existing family unit. In these situations, adoption affects the legal conditions in which the family finds itself rather than the family's actual composition. The provisions of our adoption legislation governing the eligibility of prospective adopters must be framed in a manner that is sensitive to the needs of all of these children and to the wide variety of situations in which being adopted could be advantageous to a child. Fundamentally, an adoption should not be denied to a child who could benefit from one.
- 6.6. In the case of children who are currently being raised jointly by an unmarried opposite-sex couple or by a same-sex couple where only one of the parents is the biological or adoptive parent of the child, the other parent may not apply for an assessment of suitability to adopt. In these situations, this parent remains a stranger in law to the child he or she is raising, regardless of the quality or duration of their relationship. The options paper produced by the Working Group on Domestic Partnerships established by the Minister for Justice, Equality and Law Reform in 2006 considered in detail the very real difficulties which can emerge when a primary caregiver cannot adopt or become the legal guardian of a child for whom he or she is caring<sup>33</sup>. These difficulties arise in a range of areas including health, education, maintenance and succession.
- 6.7. No benefits accrue to children in these circumstances by denying even the possibility of being jointly adopted by a non-biological parent. There may be situations in which making such an adoption order would not be in the interests of the child in question, for example where the right of the child to know and be cared for by the non-custodial biological parent is engaged. In such circumstances, alternatives to adoption such as special guardianship may be more appropriate.<sup>34</sup> However, when this right is not engaged, when in the opinion of the competent authorities it would be in the best interests of the child to be adopted by his or her non-biological parent and indeed when it would be the child's preferred option, the Adoption Authority and the courts are not in a position to make the relevant

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<sup>33</sup> See in particular section 3.06 of the Options Paper prepared by the Working Group on Domestic Partnerships (November 2006).

<sup>34</sup> See section 7 below.

order. It is difficult to discern how it could be argued that this categorical exclusion operates in the best interests of the children directly affected by it.

- 6.8. There is also a question of consistency in State policy between the areas of adoption and long-term foster care in this regard. Children in need of care can currently be placed with unmarried opposite-sex or same-sex foster parents. Under section 43A of the Child Care Act 1991, foster parents with whom a child has been placed for a period of at least 5 years may apply for an order which would authorise them to have “on behalf of the Health Service Executive, the like control over the child as if the foster parent or relative were the child’s parent”<sup>35</sup>. Such orders are intended for situations in which it is deemed to be in the best interests of the child to confer greater responsibilities on his or her foster parents but where it is desirable not to sever the links with the child’s birth family through adoption. In other situations, maintaining those ties with the child’s birth family may not be considered appropriate and adoption by the child’s long-term foster parents may be regarded as the best course of action. However, while it is possible for children in long-term foster care to benefit from an order under section 43A of the 1991 Act regardless of who is caring for them, the same cannot be said of an adoption order. The possibility of being adopted by both foster parents is not open to a child who is being cared for by an unmarried opposite-sex or a same-sex couple.
- 6.9. This distinction would appear arbitrary from the child’s point of view and it is unclear what the purpose of barring these categories of foster parents from applying to adopt could be. It cannot logically arise from a concern on the part of the State regarding the capacity of unmarried opposite-sex and same sex couples to care for children, given that the State already entrusts young people to their care - potentially for many years - and has already provided in law for a situation in which they can effectively occupy the role of guardians. Indeed, during the debates in the Seanad regarding the Adoption Bill, the Minister for Children and Youth Affairs clarified that, based on the experience of the foster services, the State has no difficulty with same-sex couples being parents or minding children<sup>36</sup>. It would seem untenable to argue that in situations where there is no prospect of a return to the child’s birth family and where adoption would be in the child’s interests, it would be preferable for one of the long-term foster parents to adopt the child individually or for the child to be placed with another couple with a view to having them adopt the child.
- 6.10. In light of the above, it is clear that there is a cohort of children that could benefit from an adoption but in respect of whom the relevant

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<sup>35</sup> See section 43A (5) of the Child Care Act 1991 (inserted by section 4 of the Children Care Amendment Act 2007). Such an order would be appropriate if it were deemed not to be in the interests of a child to return to the care of his or her birth family but where it would be desirable to maintain links with that family.

<sup>36</sup> Seanad Éireann, Parliamentary Debates, Vol. 194 No. 6, p. 361

adoption order cannot be made due to the current limitations on the categories of persons eligible to apply for an assessment of suitability to adopt. The exclusions maintained in the Bill as it stands offer the courts and the Adoption Authority an unnecessarily limited set of options when considering the interests of individual children whose personal circumstances can vary enormously. These children are thereby denied the opportunity of enjoying a secure, permanent legal relationship with both of their parents and are left at a clear disadvantage vis-à-vis other children in analogous circumstances.

6.11. While article 7 of the Revised European Convention on the Adoption of Children affords States the latitude to exclude unmarried opposite-sex and same-sex couples from the categories of persons eligible to apply to adopt, the trajectory of ECHR jurisprudence suggests that this discretion may in practice become far more limited in future<sup>37</sup>. Legislation which prevents the competent authorities from considering adoption as a possible option for a child where family life has been established with the child's prospective adopters, and where another child in analogous circumstances can benefit from an adoption, could be regarded by the European Court of Human Rights as an unnecessary interference with the child's rights under articles 8 and 14 of the Convention<sup>38</sup>. In addition, the competent authorities in Ireland may in any event be required to recognise adoptions by unmarried opposite-sex couples or same-sex couples effected in other jurisdictions<sup>39</sup>.

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<sup>37</sup> Although the European Court of Human Rights has not commented explicitly on the question of whether unmarried opposite-sex couples or same-sex couples should be entitled to apply to adopt, in the case of *EB v France* (No. 43546/02) (2008), the Court held that where it is open to individuals to apply to adopt, it is not permissible under the ECHR to prohibit an individual from making such an application on the basis of his or her sexual orientation. The judgment established that particularly convincing and weighty reasons must be established in order to justify a difference in treatment which would not contravene Article 14 of the ECHR. In the case of *Wagner v Luxembourg* (No. 76240/01) (2007), the European Court of Human Rights ruled that the inability to register certain foreign adoptions in Luxembourg's domestic adoption register gave rise to a violation of Articles 6 and 8 of the ECHR. The Court stressed the importance of the social reality of the family's situation following the adoption of the child in question and stated that Article 8.1 of the Convention required that this reality be recognised by law. It should also be noted that in the case of *Re P* [2008] UKHL 38, the House of Lords determined that a provision in Northern Irish legislation limiting joint adoption to married couples only was determined to be unjustified and in breach of Articles 8 and 14 of the ECHR. The couple in this case were unmarried but in a stable relationship for 10 years and wished to jointly adopt a child the couple had raised together but who was biologically related to only one of them.

<sup>38</sup> For a discussion of what constitutes a de facto family, the definition of family ties under Article 8 of the ECHR and the obligations on States to act in a manner calculated to enable those ties to be developed, see *Keegan v. Ireland* [1994] 18 E.H.R.R. 342 and *X, Y and Z v. U.K.* [1997] 24 E.H.R.R. 143. The judgments of the High Court in the cases of *McD v L* [2008] IEHC 96 and *W.S. v the Adoption Board* [2009] IEHC 429 also address some of these issues.

<sup>39</sup> In addition to the principles set out in *Wagner v Luxembourg*, Council Regulation No. 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in matrimonial matters and matters relating to Parental Responsibility repealing regulation (EC) No. 1347/2000 [2003] O.J. L338/1 (the revised Brussels II Regulation) is relevant in this regard.

6.12. It should be noted that the prospect of extending the categories of those who may apply to adopt to include unmarried opposite-sex and same-sex couples was the subject of significant disagreement during the consultation on adoption undertaken by the Department of Health and Children in 2003<sup>40</sup>. The principal objection to altering adoption legislation in this manner was based on the contention that it would in general be to the advantage of adopted children to be placed with a married, opposite-sex couple rather than an unmarried opposite-sex or same-sex couple. It is instructive to consider how a similar argument was examined by the Houses of Lords when it ruled recently that the provision of the Adoption (Northern Ireland) Order 1987 which excluded unmarried couples from applying to adopt violated the European Convention on Human Rights<sup>41</sup>. The Court found that while it may be possible to generalise regarding the correlations between certain family structures and outcomes for children (in this instance the relevant consideration was the stability of relationships between unmarried couples in general), there is no logical reason to elevate such reasonable generalisations to the level of irrebuttable presumptions of unsuitability<sup>42</sup>. With regard to the relevant provision of Northern Irish legislation, such an approach was found to create a situation in which “the interests of the particular child, which Article 9 [of the Adoption (Northern Ireland) Order 1987] declares to be the most important consideration, [had] disappeared from sight, sacrificed to a vague and distant utilitarian calculation”<sup>43</sup>.

6.13. The distinction between eligibility and suitability to adopt is crucial in this context. Providing that an individual or couple is eligible to adopt implies only that they can apply for an assessment of suitability to adopt. Such assessments are, quite rightly, rigorous and exacting<sup>44</sup>. An adoption order will only be granted where the competent authorities are satisfied that, with respect to a wide range of factors<sup>45</sup> and in light of the in-depth examination of the prospective adopters, they are suited to adopting a child. This represents a very significant safeguard of the child’s interests.

6.14. Against the background of these considerations, and given that there are children who could benefit from an adoption but currently cannot be adopted for the reasons set out above, the eligibility criteria for prospective adopters should be extended in line with the Revised European Convention on the Adoption of Children. It is in the interests of children that the law reflect and provide for the reality of

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<sup>40</sup> Department of Health and Children, *Adoption Legislation: 2003 Consultation and Proposals for Change*, pp. 26-27

<sup>41</sup> Re P [2008] UKHL 38

<sup>42</sup> See comments by Lord Hoffmann at para. 18

<sup>43</sup> *Ibid.*, para. 16

<sup>44</sup> See the Adoption Board’s *Outline of Adoption Law and Practice* (1998). The assessment process includes home visits, individual and joint interviews, and an examination of areas such as the couple’s relationship, their motives for adopting, their expectations of the child and their ability to help the child to a knowledge and understanding of his/her natural background.

<sup>45</sup> See section 34 of the Adoption Bill.

their lives. It is not in their interests for the competent authorities, mandated to consider those interests, to be unduly fettered in their capacity to make reasoned decisions in light of the children's particular circumstances.

### **Recommendation**

**The categories of persons eligible to apply for an assessment of suitability to adopt should be extended in order to remove the statutory bar on unmarried opposite-sex and same-sex couples from making such an application.**

## 7. Contact with birth family

- 7.1. Part 8 of the Adoption Bill sets out the effects of an adoption order, including the manner in which the rights and responsibilities of birth parents with respect to an adopted child are extinguished upon such an order being made. At present, only closed adoptions which sever all ties with the birth parents and their families are provided for under Irish law. This will remain the case if the Adoption Bill is enacted in its current form.
- 7.2. The question of continuing contact with birth parents and their families is a delicate and sensitive one. The need for permanence and for full integration into an adoptive family is of the utmost importance. In light of this, maintaining contact with birth parents and members of their family can present significant challenges and must be considered very carefully. However, there are instances in which it would serve an adopted child's interests to enjoy continuing contact – albeit under very different circumstances – with his or her birth family, on the understanding that it would be carefully calibrated. This is the primary reason behind allowing semi-open and open adoptions. While informal arrangements to allow such contact exist, it would be preferable to provide a statutory basis for them so that the competent authorities can exercise an effective regulatory role, in the interests of the children concerned.
- 7.3. This is most evident in the context of domestic family adoptions. The majority of these are step-parent adoptions in which a natural mother has a child outside of marriage and subsequently marries a man who is not the natural father of the child<sup>46</sup>. If her husband wishes to adopt the child, the natural mother has to give up her sole legal rights and responsibilities and both she and her husband take on joint legal rights and responsibilities in respect of the child. In such circumstances, there is no legal basis for providing that the child can enjoy continued access to his or her birth father or members of his family.
- 7.4. Such a restriction on the capacity of the competent authorities to make an order which maintains ties with both birth parents and their families raises a question regarding the Adoption Bill's compliance with the relevant international standards. As noted above, Article 7 of the UN Convention on the Rights of the Child states that children have a right to know and be cared for by their parents, as far as possible, and Article 9 further provides that children have a right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. While there may be instances in which such continued contact would not be in the child's interests, it cannot be argued that this is always the case. Indeed, the Adoption Board has repeatedly recommended reform in this area of adoption law. It has in particular suggested that legislation should provide for a broad range of conditions - including continued

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<sup>46</sup> Adoption Board, *Annual Report 2007*, p. 16

access by members of a child's birth family – which can be attached to adoption orders<sup>47</sup>. Providing for such flexibility would be consistent with an approach which prioritises the best interests of adopted children and which allows the competent authorities to make orders that fit those children's particular circumstances.

- 7.5. The Adoption Board has also recommended that other legal means be devised to establish the rights and responsibilities of step-parents<sup>48</sup>. Where full adoption by a step-parent is deemed to be the most appropriate course of action, it should be possible to make such an order without requiring the natural parent to first relinquish his or her parental rights and responsibilities. Where it would not be appropriate for a child to be adopted by a step-parent - when, for example, both natural parents retain their parental rights and responsibilities– it should nonetheless be possible to provide the step-parent with a form of special guardianship<sup>49</sup>. Such an order would give the special guardian parental responsibility without extinguishing the parental rights of the non-custodial biological parent. Special guardianship orders could also be useful in the context of families that are re-organised through divorce or for the children of a widow/widower.

### **Recommendations**

**The Adoption Bill should provide for a range of conditions which may be attached to adoption orders, allowing for more open forms of adoption.**

**A legal mechanism should be devised which would obviate the need for natural parents to adopt their own children in the context of step-parent adoptions.**

**The Bill should provide for a form of special guardianship which could be conferred on step-parents in situations where full adoption is deemed not to be the most appropriate course of action.**

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<sup>47</sup> Adoption Board, *Response of An Bord Uchtála to the Minister for Health and Children's Discussion Document on Adoption Legislation* (2003), p. 4

<sup>48</sup> Adoption Board, *Annual Report 2007*, p. 16

<sup>49</sup> See Department of Health and Children, *Adoption Legislation: 2003 Consultation and Proposals for Change*, Chapter 10

## 8. Information and tracing

- 8.1. The first chapter of Part 10 of the Adoption Bill provides for the maintenance of the Adopted Children's Register, its connection with the Register of Births and the manner in which information contained in these registers can be accessed. In particular, section 86 provides that the Registrar General shall keep an index to make traceable the connection between each entry in the Adopted Children's Register and the corresponding entry in the Register of Births and that no information from the index shall be given to any person except by order of a court or the Adoption Authority. Section 88 provides further that a court shall not make such an order or an order for the discovery, inspection, production or copying of any book, document or record of the Authority unless the court is satisfied that it is in the best interests of any child concerned to make the order.
- 8.2. The right to information regarding a person's birth is protected by both the UN Convention on the Rights of the Child and the European Convention on Human Rights. It is also given further expression in the specific context of adoption by Article 30 of the Hague Convention and by Article 22 of the Revised European Convention on the Adoption of Children.
- 8.3. Article 7 of the CRC provides that every child has a right to know and be cared for by his or her parents, as far as possible. Article 8 of the UN Convention on the Rights of the Child further requires that States respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law.
- 8.4. The requirements of these articles in the context of adoption are not straightforward, especially in closed adoptions where the child is not biologically related to his or her adoptive parents. One of the fundamental elements of such adoptions is the integration of the child into a new family that is not his or her birth family. Although the child's rights under Articles 7 and 8 of the CRC are engaged with respect to the adoptive family in these situations, that is not to say that they are no longer relevant with respect to the birth family.
- 8.5. The UN Committee on the Rights of the Child has specifically considered the application of a child's rights under these provisions in the context of adoption. It has recommended to States Parties to the CRC that information regarding the date and place of an adopted child's birth and his or her genetic parents should be preserved and, where possible, made available to the child upon request and when in his or her best interests<sup>50</sup>. It should be noted in this regard that the

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<sup>50</sup> See UN Documents CRC/C/15/Add.225, para. 38; CRC/C/RUS/CO/3, paras. 40 and 41; and CRC/C/UZB/CO/2, paras. 40 and 41. For a general discussion on the relevance of Article 7 of the CRC to adoption information, see Hodgkin and Newell, *Implementation Handbook*, pp. 106-109.

interests of a child with respect to accessing information regarding his or her origins can change with time as the child grows older and issues of identity become more significant for him or her<sup>51</sup>.

- 8.6. There are also a number of principles established in the jurisprudence of the European Court of Human Rights relevant to this issue, particularly those which have been considered in light of the right to respect for private and family life. The Court has held that under Article 8 of the ECHR, individuals have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development<sup>52</sup>. Matters of relevance to one's identity and development for the purposes of Article 8 of the Convention include the identity of one's parents<sup>53</sup>. The Court has also held that birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by the Convention<sup>54</sup>.
- 8.7. While recognising that such a right exists under Article 8 of the ECHR, the European Court of Human Rights has also stressed that it is not absolute and must be balanced against the rights of other parties not to have identifying information about them disclosed<sup>55</sup>. When competing rights of this nature must be considered, it should fall to a competent, independent authority to decide which should prevail in any given instance<sup>56</sup>.
- 8.8. The essence of this strain of jurisprudence has found expression in Article 22 of the Revised European Convention on the Adoption of Children 2008. In particular, Article 22(3) of the Convention states that "an adopted child shall have access to information held by the competent authorities concerning his or her origins. Where his or her parents of origin have a legal right not to disclose their identity, it shall remain open to the competent authority, to the extent permitted by law, to determine whether to override that right and disclose identifying information, having regard to the circumstances and to the respective rights of the child and his or her parents of origin".
- 8.9. The Bill as it stands does not specifically articulate the right of adopted children to information concerning their birth and origins. If this omission is not addressed, there will be a significant discrepancy between Irish adoption legislation and the international standards discussed above<sup>57</sup>. It will also mean that the work currently

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<sup>51</sup> Department of Health and Children, *Adoption Legislation: 2003 Consultation and Proposals for Change* (2005), p. 88

<sup>52</sup> *Gaskin v. United Kingdom* (No. 10454/83 07)(1989), para. 49

<sup>53</sup> *Mikulić v. Croatia*, (No. 53176/99), paras. 54 and 64. See also *Jäggi v. Switzerland* (No. 58757/00) (2008), and *Ebru and Tayfun Engin Colak v. Turkey* (No. 60176/00) (2006)

<sup>54</sup> *Mikulić v. Croatia*

<sup>55</sup> *Odièvre v. France* (No. 42326/98) (2003)

<sup>56</sup> Explanatory report to the Revised European Convention on the Adoption of Children, para.

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<sup>57</sup> It should be noted in this regard that during the consultation undertaken by the Department of Health and Children on adoption in 2003, the intention of the Government was to prepare a

undertaken by the Adoption Board's Information and Tracing Unit will have to proceed without a firm statutory basis<sup>58</sup>.

8.10. The Adoption Bill should contain a general presumption in favour of disclosing information regarding their birth and adoption to adopted people. While the access to such information by adopted children under the age of 18 would need to be considered very carefully in light of the child's best interests and developing sense of identity, the rights of adopted people beyond that age should be clearly and unambiguously set out in the Bill. In particular, they should have a right to access their original birth certificate and to the information contained in any relevant adoption records or files<sup>59</sup>. The rights of other parties in relation to the disclosure of identifying information should also be clarified in the Bill so that the Adoption Authority and the courts will have clear statutory guidance when called upon to balance these competing rights.

8.11. Access to information is closely tied to the question of tracing and re-union. The structure currently in place to manage contact between adopted people and members of their birth families is the National Adoption Contact Preference Register (NACPR) which was launched in 2005. A report on the operation of the NACPR in the period April 2005 – March 2007 concluded that its first two years had been a success and that there had been a positive response from those who had availed of the service<sup>60</sup>. The report commented further that the NACPR is now a permanent feature of the Irish adoption system and that it is envisaged that an application to join the register will be

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separate Bill on adoption information, post adoption contact and associated issues. See Part 5 of the Department of Health and Children's *Adoption Legislation: 2003 Consultation and Proposals for Change*.

<sup>58</sup> For a description of current practice of the Information and Tracing Unit, see the Adoption Board's *Guidelines on Adoption Information and Tracing* (January 2009). At present, when the Adoption Board's Information and Tracing Unit receives an application for the release of a birth certificate, it is obliged to inform itself of the background of the case, take account of the views of the natural mother in relation to the application and consider a number of particular factors (established by the Supreme Court in *IOT v B and MH v Father Doyle and the Rotunda Girls Aid Society* [1998] 2 IR 321) before making a decision regarding the release of that birth certificate. Following the submission of a report by the HSE or the adoption agency which handles the request, the Adoption Board then makes a decision regarding the release of the birth certificate. It may decide not to release the birth certificate in cases where the natural mother has been consulted, has opposed the release and there the Adoption Board considers a natural mother's privacy or safety might be put at risk. The Adoption Board may request that an applicant provide a written undertaking that if he or she wishes to contact a birth parent in future, it will only be done through an adoption agency, the HSE or the Adoption Board. Non-identifying information held on adoption files is also released on a regular basis.

<sup>59</sup> The submission of the Adoption Board made in the context of the Department of Health and Children's 2003 consultation on adoption provides a detailed description of how such processes would operate. See *Response of An Bord Uchtála to the Minister for Health and Children's Discussion Document on Adoption Legislation* (2003), pp. 16-18

<sup>60</sup> Adoption Board, *National Contact Preference Register: Report on the Launch and Operation of the Register* (2007), p. 25

considered a routine part of any enquiry from adopted people or their natural families who are seeking information or to trace each other<sup>61</sup>.

- 8.12. Given the fact that the NACPR is now an integral component of Ireland's adoption system, it is unclear why the Adoption Bill does not provide the Register with a statutory basis. Although the NACPR is still a relatively new mechanism and may be modified in future, it should nonetheless be possible to set out the broad contours of its operation in primary legislation. Further details could be specified and amended as appropriate by ministerial regulation<sup>62</sup>.

### **Recommendations**

**The Adoption Bill should contain a general presumption in favour of disclosing information to adopted people regarding their birth and adoption.**

**Adopted people over the age of 18 should have a right to access their original birth certificate and to the information contained in any relevant adoption records or files.**

**The rights of other parties in relation to the disclosure of identifying information should also be clarified in the Bill so that the Adoption Authority and the courts will have clear statutory guidance when called upon to balance competing rights.**

**The Bill should provide a statutory basis for the operation of the National Adoption Contact Preference Register.**

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<sup>61</sup> Ibid., p. 24

<sup>62</sup> cf. Adoption and Children Act 2002 (England and Wales), sections 80 and 81

## 9. Post-adoption services

- 9.1. Article 20 of the Revised European Convention on Adoption accords with Article 9 of the Hague Convention in requiring States to ensure the promotion and proper functioning of adoption counselling and post-adoption services to provide help and advice to prospective adopters, adopters and adopted children.
- 9.2. With regard to services provided prior to the making of an adoption order, the HSE is already obliged under section 6(1) of the Child Care Act 1991 to provide or ensure provision of adoption services in accordance with the existing Adoption Acts. That obligation will continue when the Adoption Bill is enacted<sup>63</sup>.
- 9.3. The Bill does not provide for post-adoption services. It is unclear why they were not brought within the scope of the legislation given their undisputed importance. A recent study commissioned by the Adoption Board on intercountry adoption outcomes in Ireland highlighted the particular needs of children who are adopted from other countries, some of whom are still struggling with the consequences of early neglect and institutional care<sup>64</sup>. The Adoption Board has commented that parents and professionals, including social work managers, practitioners and support groups have all identified the urgent need for more awareness and specialised help for the needs of this group of children, including a comprehensive national post-placement service<sup>65</sup>.
- 9.4. Although the international instruments are not prescriptive about the manner in which post-adoption services are to be provided, it would be entirely appropriate to place them on a statutory basis. This could be achieved by including a specific provision in the Adoption Bill relating to post-adoption services or by implementing the recommendation of the Law Reform Commission to amend section 6 of the Child Care Act 1991 to provide that post-adoption services including counselling be made available for both domestic and intercountry adoptions<sup>66</sup>.
- 9.5. Such an amendment would be in keeping with the contemporary view of adoption as a life-long process. Although post-adoption services may in practice be less developed than services offered prior to adoption, they are not in principle less important. Furthermore, a general requirement to support families in this manner need not fetter the capacity of the HSE to refine and expand the relevant services with time.

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<sup>63</sup> Section 158 of the Adoption Bill amends section 6 of the Child Care Act 1991 to provide that there will be an obligation on the HSE to provide or ensure provision of adoption services in accordance with the Adoption Act 2009.

<sup>64</sup> Greene, S. et al *A Study on Intercountry Adoption Outcomes in Ireland* (Dublin: 2007). See in particular chapters 9 and 10.

<sup>65</sup> Adoption Board, *Annual Report 2007*, p. 23

<sup>66</sup> Law Reform Commission, *Report on Aspects of Intercountry Adoption* (LRC 89-2008), paras. 4.37 – 4.43

9.6. Given that the Adoption Bill is intended to consolidate and modernise Irish legislation in the area of adoption and that the Oireachtas is unlikely to return to the issue in such detail for some time, the Bill should reflect international best practice and provide for post-adoption services.

**Recommendation**

**Post-adoption services should be provided for in the Bill.**

## **Annex 1**

### **Summary of recommendations**

- The Oireachtas should enact the Adoption Bill 2009 as soon as possible to ensure that children adopted from other jurisdictions benefit from the safeguards set out in the Hague Convention.
- Regulations setting out in detail the standards which will apply to the operation of agencies acting as intermediaries in the intercountry adoption process should be prepared following the Adoption Bill's enactment.
- Consideration should be given to requiring that bilateral agreements with states that are not party to the Hague Convention be reviewed periodically.
- The Bill should clarify the transitional arrangements for intercountry adoptions that are in process prior to its enactment. In particular, it should provide that applications made prior to Ireland's ratification of the Hague Convention by prospective adopters who have already been granted a declaration of eligibility and suitability to adopt should be allowed to proceed during this transitional period.
- Consideration should be given to reformulating section 19 of the Bill to comply more fully with the provisions of the UN Convention on the Rights of the Child and other instruments relating to the best interests principle, particularly by providing for the separate representation of the interests and views of the child in any relevant proceedings under the Adoption Bill.
- If it is deemed impossible to relax the restrictions on the voluntary placement of children for adoption by parents who are married to each other, Part 7 of the Bill should be modified to provide for such situations as soon as the Constitution is appropriately amended.
- The limits in the Bill placed on the right of children to express their views on matters relating to their adoption should be removed.
- Provision should be made for seeking the consent of children of sufficient age and understanding to the making of an adoption order. The importance of not compelling children to express their views where they do not wish to do so should, however, be borne in mind and the Bill could address this issue by providing that it would be sufficient in certain circumstances for a child or young person not to object to an adoption order.

- Consideration should be given to specifying a period within which birth parents or guardians who initially place a child for adoption are entitled to the return of the child to their care.
- Consideration should be given to including a provision which would allow the HSE to make an application to the High Court to dispense with consent where it would be in the child's interests to do so.
- The categories of persons eligible to apply for an assessment of suitability to adopt should be extended to remove the statutory bar on unmarried opposite-sex and same-sex couples from making such an application.
- The Adoption Bill should provide for a range of conditions which may be attached to adoption orders, allowing for more open forms of adoption.
- A legal mechanism should be devised which would obviate the need for natural parents to adopt their own children in the context of step-parent adoptions.
- The Bill should provide for a form of special guardianship which could be conferred on step-parents in situations where full adoption is deemed not to be the most appropriate course of action.
- The Adoption Bill should contain a general presumption in favour of disclosing information to adopted people regarding their birth and adoption.
- Adopted people over the age of 18 should have a right to access their original birth certificate and to the information contained in any relevant adoption records or files.
- The rights of other parties in relation to the disclosure of identifying information should also be clarified in the Bill so that the Adoption Authority and the courts will have clear statutory guidance when called upon to balance competing rights.
- The Bill should provide a statutory basis for the operation of the National Adoption Contact Preference Register.
- Post-adoption services should be provided for in the Bill.