



Submission by the Ombudsman for Children

on the General Scheme of the Adoption (Information and Tracing) Bill 2015

1. Introduction

The Minister for Children and Youth Affairs published the General Scheme of the Adoption (Information and Tracing) Bill ('the General Scheme') on 27th July 2015 and subsequently forwarded the General Scheme to the Oireachtas Committee on Health and Children for pre-legislative scrutiny and public consultation.

The stated aim of the Bill is to facilitate access to adoption information and operates on the basis of a presumption in favour of disclosing information in so far as is legally and constitutionally possible.

This submission is being made to the Minister for Children and Youth Affairs pursuant to Section 7 of the Ombudsman for Children Act 2002, which provides that the Ombudsman for Children may give advice on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of proposals for legislation.

The Ombudsman for Children welcomes the publication of the General Scheme of the Adoption (Information and Tracing) Bill 2015 and its stated overall purpose to provide a statutory basis for the provision of information related to adoption.

This office welcomes the inclusion of the following provisions which were recommended in the Advice of the Ombudsman for Children on the Adoption Bill 2009:

- A general presumption in favour of disclosing information to adopted people regarding their birth and adoption;
- A right of access to an original birth certificate and to the information contained in any relevant adoption records or files for adopted people over the age of 18;
- The clarification of the rights of other parties in relation to the disclosure of identifying information giving the Adoption Authority and the courts clear statutory guidance when called upon to balance competing rights;
- The establishment of the National Adoption Information Register of Ireland.

The framing of Article 7 of the UNCRC emphasises that adoption is a right of the child and not a parental right. The strengthening of children's rights in Article 42(A) of our Constitution has ensured that children are respected as individuals in their own right. While welcoming reference to the best interests of the child being a paramount consideration in Heads 16 and 17, this Office is concerned that the General Scheme is otherwise silent on the rights of children in the provision of information regarding adoption. Our legislation must be strong enough to ensure that the rights of children are fully respected at every stage of the adoption process, including information and tracing.

In preparing this submission, the Office has been guided by international standards and guidance in this area, in particular:

- UN Convention on the Rights of the Child (UNCRC)
- UN Convention on the Rights of the Child (UNCRC) General Comments
- European Convention on Human Rights (ECHR)
- Relevant Judgements from the European Court of Human Rights: *Odièvre v. France* (No. 42326/98) (2003), *Gaskin v. United Kingdom* (No. 10454/83 07)(1989), *Mikulić v. Croatia*, (No. 53176/99), *Jäggi v. Switzerland* (No. 58757/00) (2008), and *Ebru and Tayfun Engin Colak v. Turkey* (No. 60176/00) (2006).
- Article 42A of the Constitution
- UK Adoption and Children Act 2002
- Queensland Adoption Act 2009
- Adoption Law: The case for reform - A report by the Law Society's Law Reform Committee April 2000
- Advice of the Ombudsman for Children on the Adoption Bill 2009, November 2009
- Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014, May 2014.

What follows is an examination of the most significant issues which arise with respect to the General Scheme's compliance with international human rights standards and its probable effect on children, rather than a comprehensive analysis of its provisions.

2. Right to identity

Head 13 provides for information for an adopted person where the adoption order was made prior the commencement of the Bill. Head 14 provides for information for an adopted person where the adoption order is made following the commencement of the Bill. In these Heads, an 'adopted person' is defined as a person aged over 18 years.

This Office notes:

- The General Scheme as it stands does not specifically articulate the right of adopted children to information concerning their birth and origins. It is acknowledged that information about and contact with birth parents is an extremely sensitive issue, for adopted people, whether children or adults.
- One of the fundamental elements of adoption 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 UNCRC are engaged with respect to the adoptive family in these situations, it is not to say that they are no longer relevant with respect to the birth family.
- The UN Committee has recommended 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.¹

¹ UN Documents CRC/C/15/Add.225, paragraph. 38; CRC/C/RUS/CO/3, paragraphs. 40 and 41; and CRC/C/UZB/CO/2, paragraphs. 40 and 41

- As mentioned in previous advices, while it is recognised that a right to information about birth parents exists under Article 8 of the ECHR, the European Court of Human Rights has stressed that this is not an absolute right and must be balanced against the rights of other parties not to have identifying information about them disclosed.² As Heads 13 and 14 are silent in relation to children accessing information about their birth and origins, clarification of the rights of parties in relation to the disclosure of identifying information would need to be extended to children.
- Access to such information by adopted children under the age of 18 would need to be considered very carefully in light of their age and maturity.
- As referred to in our advice on the General Scheme of the Children and Family Relationships Bill 2014, certain jurisdictions such as Sweden and Victoria (Australia) rely on a “sufficient maturity” test.³ While acknowledging that this refers to persons conceived through assisted human reproduction, this office believes that a “sufficient maturity” test could also be applied to information provision for adopted children. This approach is in keeping with the principles set out in the UN Convention on the Rights of the Child, specifically those relating to respecting the evolving capacities of the child and respect for the views of the child.⁴
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This Office recommends:

- **Heads 13 and 14 should be extended to include the right of adopted children to access their birth certificate. Provision should be made for a “sufficient maturity” test rather than specifying an age at which information may be obtained by an adopted child.**
- **The general presumption in favour of disclosing information regarding their birth and adoption to adopted people over 18 should be extended to adopted children.**
- **The right of adopted children to information about their birth and origins should be clearly and unambiguously set out in all relevant sections of the Bill.**

3. Respect for the views of the child and the best interests principle

Head 16 relates to the provision of information for birth parents in respect of an adopted child under 18 years of age while Head 17 relates to the provision of information for an adoptive parent in respect of an adopted child under 18 years.

This Office notes that:

- At present, there is no provision for children to express their views or for the principle of hearing and affording due weight to children’s views, according to their age and maturity, when the Agency is making a determination to disclose requested information pursuant to Heads 16 and 17.
- Jurisdictions, such as the UK⁵ and Queensland⁶, provide for the relevant agency to consider the views of the child, when determinations are made regarding access to adoption information, taking into account their age and understanding.

² Odièvre v. France (No. 42326/98) (2003)

³ Blyth, E., “Access to genetic and birth origins information for people conceived following third party assisted conception in the United Kingdom”, *International Journal of Children’s Rights* 20 (2012) 200-318, p. 311

⁴ Articles 5 and 12 of the UNCRC

⁵ Section 62 of the UK Adoption and Children Act 2002

- Article 42A(4)(2) of our Constitution provides that in respect of a child who is capable of forming their own views, the views of the child shall be ascertained and given due weight, having regard to their age and maturity. While this provision relates to adoption proceedings, this Office believes that this provision should be extended to all administrative proceedings involving children, including adoption information and tracing, to ensure consistency across judicial and administrative decision making.
- Within the framework of the UNCRC, respect for the best interests of the child and respect for the views of the child are interrelated - a determination of what is in a child's best interests must incorporate a consideration of the child's views, where the child wishes to express those views and is able to do so. When their views are not incorporated, a child is not afforded the opportunity to influence the determination of their best interests.
- It is acknowledged that the requirement to take the views of the child into account may not be straightforward, especially in closed adoptions where the child may not be aware that they have been adopted. This would have to be considered by the Agency when making a decision to provide adoption information.

This office recommends:

- **This bill should ensure that the principle of hearing and affording due weight to children's views, according to their age and maturity and individual circumstances, are integrated as positive obligations in Head 16 and 17 when the Agency is making a determination to disclose requested information.**
- **This provision should also to be provided for in Heads 13 and 14 in line with this Office's proposed amendments relating to an adopted child's access to their birth certificate.**

4. Child's right to medical information

Head 17 relates to the provision of information for an adoptive parent in respect of an adopted child under 18 years.

This office notes:

- Head 17(4) provides that there is no obligation for a birth parent to provide the Agency with any information, including information about a child's health.
- The UNCRC provides for the right of a child to the enjoyment of the highest attainable standard of health. By allowing a birth parent to refuse information relating to a child's health, including their family medical history, it could be argued that the State is failing to provide for equal opportunities for all children in the realisation of this right.
- The Committee states that in the assessment and determination of the child's best interests, the State must ensure full respect for his or her inherent right to life, survival and development⁷. This Office considers this right cannot be fully realised without providing for access to relevant information about a child's health.

⁶ Section 257 of the Queensland Adoption Act 2009

⁷ General Comment No 14, Paragraph 42

- Furthermore, a report by the Law Society’s Law Reform Committee recommended that “adopted people, and where appropriate adoptive parents, should have an absolute right to available prescribed information to be prescribed by statute to include, as a minimum, information relating to health and medical history”.⁸

This office recommends:

- **Consideration should be given to removing the provision which allows for a birth parent to refuse the release of non-identifying information relevant to the child’s health.**
- **A provision should be made to allow the Agency to redact identifying information contained in medical documentation if necessary to ensure that an adopted child has access to information relevant to their health and medical history.**

⁸ Adoption Law: The case for reform - A report by the Law Society’s Law Reform Committee April 2000, Page 8