Submission on the General Scheme of the Birth Information and Tracing Bill 2021

Irish Human Rights and Equality Commission

July 2021

Coimisiún na hÉireann um Chearta an Duine agus Comhionannas
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Contents

Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act'). In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and to examine any legislative proposal and report its views on any implications for human rights or, equality.[1]

The Commission welcomes the opportunity to make this submission on the General Scheme of the *Birth Information and Tracing Bill 2021* (the 'General Scheme'). The Commission may make further observations on the *Birth Information and Tracing Bill 2021.*

This submission focusses on the following matters.

- The Right of Access to Birth Certificates and Early Life Information;
- 'No Contact' Preference and Counselling;
- The Child's Access Rights; and
- Access for Relatives of Deceased Relevant Persons.

The Commission considers the following human rights to be relevant:

- the right to identity;
- the right to privacy;
- the right to equality and non-discrimination;
- the right to health;
- the right to bodily and physical and mental integrity;
- the right to freedom of expression;

[1] Section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

- the right to know the truth; and
- the right to dignity.

The Commission recognises that facilitating and regulating access to birth and early life information engages various data protection rights under domestic, international human rights, and European Union law.[2] The importance of privacy and data protection has been emphasised in a long line of landmark judgments of the Court of Justice of the European Union ('the CJEU)' under Article 7 and 8 of the Charter in recent years.[3] The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 and the fact that information is already in the public domain will not necessarily remove the protection of Article 8.[4]

The Commission welcomes that the proposed legislation gives persons the right to access information in respect of their birth and early life information. The General Scheme has the potential to have a significant positive impact on people who seek to know their own identity. Participants in the Commission's listening sessions, which included former residents of Mother and Baby Homes and County Homes, stated that the right to truth was one of the most important issues for participants.[5] There was a broad consensus regarding the need for survivors to have 'free and unfettered' access to their own personal information and records.[6] To deny these records can be re-

[2] Regulation (EU) 2016/679, (the General Data Protection Regulation or GDPR) which is directly applicable in Ireland, Article 7 and 8 of the Charter and Article 8(1) of the ECHR.
[3] See *Digital Rights Ireland*, C-293/12; *Google Spain* C-131/12; *Schrems*, C-362/14; *Tele2 Sverige*, C-293/15.
[4] *Satakunnan Markkinapörssi Oy* and *Satamedia Oy v. Finland* (App No 931/13) [GC] at paras 133-134. Article 8 provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, is collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged. See *Big Brother Watch v UK* (App Nos 58170/13, 62322/14 and 24960/15) [GC].
[5] IHREC, Advisory Paper to the Interdepartmental Group on the Government's Planned Development of a 'Restorative Recognition Scheme for former residents of Mother and Baby Homes and County Homes' (April 2021).
[6] This included access to records including: long birth certs, early life information, medical information, admission records, payment records where relevant, vaccine information, foster care details and legal status of adoptions – all of which, in combination, can offer a fuller picture for survivors. For mothers, it includes the provision of details of their children's adoptive identities, copies of all forms they are reported to have signed, and copies of their medical records for the time before, during and after they gave birth. The relevant data holders include the Church, Tusla, government departments and the Adoption Authority.

traumatising for the survivor and a further violation of their human rights, particularly for the survivors who may be approaching end of life. The Commission is also mindful that some birth parents may be apprehensive about the implications of this legislation. It is important that the proposed legislation makes provision for their support.

Relevant Human Rights and Equality Framework

As the General Scheme is concerned with the regulation of the provision of personal data and information that go to the core of one's identity, it engages a number of fundamental rights, protected under the Constitution, EU law and international human rights law binding on the State.

Right to Identity

The General Scheme engages the right to know one's identity, as guaranteed under the Constitution, the European Convention on Human Rights ('the ECHR') and international law.[7] The right to identity arises under the Constitution, as an unenumerated right pursuant to Article 40.3. This right was first recognised in the case of *IO'T v B*[8] where the Supreme Court held that both the birth parent and the adoptee had rights to their identity and privacy respectively.[9]

Hamilton CJ observed that:

> "The right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child .... The existence of such right is not dependent on the obligation to protect the child's right to bodily integrity or such rights as the child might enjoy in

[7] Article 40.3. of the Constitution, Article 8 of the European Convention on Human Rights (the 'ECHR') and Article 7 and 8 of the UN Convention on the Rights of the Child (the 'UNCRC'), Article 12 of the UN Declaration of Human Rights (the 'UNDHR') and Article 17 of the International Covenant of Civil and Political Rights (the 'ICCPR') and Article 7 and 8 of the Charter of Fundamental Rights of the European Union (the 'Charter').

[8] *IO'T v B* [1998] 2 IR 321.

[9] The *IO'T* case has been repeatedly cited as the reason why adoptees could not be provided with unfettered access to their birth and early life information. This in many respects appears to arise from a misreading of the judgment, which appears to assume that both rights must be given equal weight. See, inter alia, David Kenny, 'It's finally time to admit that the Government's legal advice on adoption is wrong' (*The Journal*, 15 Jan 2021), accessible via https://www.thejournal.ie/readme/mother-and-baby-homes-commission-5324898-Jan2021/

relation to the property of his or her natural mother but stems directly from the aforesaid relationship."[10]

The Chief Justice went on to hold that such right was not an absolute one and had to be balanced against the mother's right to privacy. The Court determined that it was not possible or desirable to exhaustively lay down the criteria to be applied in the balancing of the child's right to identity and birth mother's right to privacy. Hamilton CJ, held that in doing so, the determining court is entitled to have regard to, (i) the circumstances giving rise to the natural mother relinquishing custody of her child; (ii) the present circumstances of the natural mother and the effect thereon (if any) of the disclosure of her identity to her child; (iii) the attitude of the natural mother to the disclosure of her identity to her natural child, and the reasons therefor; (iv) the respective ages of the natural mother and her child; (v) the reasons for the natural child's wish to know the identity of her natural mother and to meet her; (vi) the present circumstances of the natural child; and (vii) the views of the foster parents, if still alive. The list was not intended to be exhaustive and the court would have to consider all the circumstances which might be adduced in evidence.

The Supreme Court refers to harmonisation of rights in order to determine which is superior. A technique used by the Irish courts in many decisions to assess whether a restriction on constitutional rights is legitimate is the principle of proportionality. This looks at the legitimacy of legislative or executive interference with rights from the perspective of whether it represents a proportionate interference with the rights of the individual.[11]

The *IO'T* case has been repeatedly cited as the reason why adoptees could not be provided with unfettered access to their birth and early life information. This in many

[10] *IO'T v B* [1998] 2 IR 321, at 348

[11] *Heaney v Ireland* [1994] 3 IR 593, per Costello J: *"The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-*
(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
(b) impair the right as little as possible, and
(c) be such that their effects on rights are proportional to the objective.

respects appears to arise from a misreading of the judgment, which appears to assume that both rights must be given equal weight.[12]

In the Supreme Court case of *N. v. Health Service Executive,*[13] (the Baby Ann case), the Court made several references to the blood link. In respect of adoption, it emphasised that the importance of the biological link should not be minimised and that it is common for adopted children to want to see their birth parents at some stage.[14] More recently in *JMcD v. PL and BM,*[15] the Supreme Court commented on identity in the context of a child's right to knowledge of their parents. Fennelly J stated that from the point of view of the child, the psychiatrists agreed that a child should normally have knowledge, as part of the formation of his or her identity, of both parents, in the absence of compelling reasons to the contrary.[16] In 2014, Denham CJ recognised the important need to know one's identity in *OR v. An tArd Chláraitheoir.*[17]

Some freedom of information cases have made reference to the right to identity. *South Western Area Health Board v Information Commissioner*[18]concerned the conflict between an adopted child wishing to trace her parentage and the parent's wish to maintain privacy and confidentiality. The High Court held that the respondent acted in breach of the provisions of natural and constitutional justice and did not follow fair procedures in determining that certain documentation which contained joint personal information ought to be disclosed in circumstances where the requester's birth mother was not afforded an opportunity to make representations regarding that disclosure. Smyth J remarked that:

> "To have formed a view or opinion that "the degree of invasion of the birth mother's privacy occasioned by the release of the records was minimal and justified in the public interest" is to fail to consider relevant issues and rights,

[12] See, inter alia, David Kenny, 'It's finally time to admit that the Government's legal advice on adoption is wrong' (*The Journal*, 15 Jan 2021), accessible via https://www.thejournal.ie/readme/mother-and-baby-homes-commission-5324898-Jan2021/
[13] *N. v. Health Service Executive* [2006] 4 IR 374.
[14] *N. v. Health Service Executive* [2006] 4 IR 374, at para 209.
[15] *JMcD v. PL and BM* [2010] 1 ILRM 461, at para 81.
[16] *JMcD v. PL and BM* [2010] 1 ILRM 461, at para 81.
[17] *OR v. An tArd Chláraitheoir* [2014] 3 IR 533.
[18] *South Western Area Health Board v Information Commissioner* [2005] IEHC 177, [2005] 2 IR 547.

> such as the constitutional rights, of the birth mother's family and the protection of her marriage and to make a value judgment as to the extent or degree of invasion of rights without according the birth mother directly, or indirectly through her legal advisors, the opportunity to make representations in support of the rights she sought to protect."[19]

Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v Information Commissioner,[20] concerned an elderly man's efforts to utilise freedom of information legislation to obtain personal information about his mother held by the appellant hospital. McCarthy J cited the judgment of Hamilton C.J. in *I. O'T* to the effect that:

> "[t]he right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child".

When the Supreme Court heard the matter, it decided that the information sought was given by the man's mother in confidence and the maternity hospital was entitled to refuse to disclose it.[21] The information related to his private interest and the Commissioner erred in considering granting him access to it was in the public interest. Fennelly J held that the Commissioner based her decision on the public interest in persons generally having the fullest possible information on their origins but the Freedom of Information Acts contained no such policy.

More recently the right to identity arose in *Habte v Minister for Justice and Equality*[22], where the High Court held that the right to have one's identity properly recorded by the State is a fundamental right protected as an unenumerated right in the Constitution, the ECHR, and the EU Charter of Fundamental Rights. Accordingly the applicant in

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[19] *South Western Area Health Board v Information Commissioner* [2005] IEHC 177, [2005] 2 IR 547, at 556.
[20] *Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v Information Commissioner* [2009] IEHC 315.
[21] *Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v Information Commissioner* [2011] IESC 26.
[22] *Habte v Minister for Justice and Equality* [2019] IEHC 47: see also *Caldaras v An tArd Chláraitheoir* [2013] IEHC 275.

those proceedings had a right to have her identity details, such as date of birth, correctly reflected in official documents. This was upheld on appeal by the Court of Appeal which held that that a person's date of birth is a significant aspect of his or her personal identity and constitutes an important link to his or her family.[23]

Overall, one can conclude that the right to have information about one's origins and blood family are rights on a constitutional plane, but are not untrammelled rights, and that as with all Constitutional rights, balancing must occur on occasion. Whether a right has been constitutionally abridged can be assessed by reference to the doctrine of proportionality. Furthermore, the Courts have not explicitly confirmed that the right to identity in *I'OT v. B* inheres in a child as well as an adult. However, many judgments[24] contain passages which discuss the importance of identity and the blood link in a manner which appears implicitly to include children.

The right to identity also arises under Article 8 of the ECHR, which provides for the right to respect for one's private and family life.[25] The ECtHR has recognised the right to obtain information in order to discover one's origins and the identity of one's parents as an integral part of identity protected under the right to private and family life.[26] The right to identity under Article 8 applies also to children. [27]

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[23] *Habte v Minister for Justice and Equality* [2020] IECA 22, at para 31.

[24] Such as *Baby Ann*, *JMcD v PL and BM*, and *OR*

[25] Article 8 ECHR provides that: *1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in* accordance *with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

[26] See *Jäggi v Switzerland* (2008) 47 EHRR 30, 13 July 2006; *Gaskin v. the United Kingdom* (1989) 12 EHRR 36, where the Court held that persons in the situation of the applicant in that case who had sought documents relating to his life in a care home "have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development." at para 49.

[27] *Mikulić v Croatia* (App No 53176/99, 7 February 2002). This case concerned a five year old girl who, with her mother, had filed a paternity suit. In finding a violation of Article 8, it observed that in determining an application to have paternity established, the courts were required to have regard to the basic principle of the child's interests. In the present case, it found that the procedure available did not strike a fair balance between the right of the applicant to have her uncertainty as to her personal identity eliminated without unnecessary delay and that of her putative father not to undergo medical testing. Accordingly, the inefficiency of the courts had left the applicant in a state of prolonged uncertainty as to her personal identity.

However, the right to obtain information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents[28] is not absolute. In the case of *Odièvre v. France*, which concerned an anonymous birth and the impossibility for the applicant to obtain information about her biological parents, the Court found no breach of Article 8 of the Convention because the French legislator had achieved a proper balance between the public and private interests involved.[29] The ECtHR appears to give considerable weight to whether or not a fair balance had been struck between the interests of both parties.[30] The right to identity also arises under Article 7 and Article 8 of the UNCRC and it is clear this right does not only accrue to adults, but also to children under 18 years. Article 7 provides that every child:

> "shall have the right from birth to a name [and] the right to know and be cared for by his or her parents".

Article 8 states:

- "Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity".

The UN Committee on the Rights of the Child has observed the importance of the right of the child to identity. In General Comment No. 14,[31] it was stated that the right of the child to preserve his or her identity is guaranteed by the Convention (Article 8) and

[28] See *Jäggi v. Switzerland, no. 58757/00, at 25*, ECHR 2006, and *Odièvre v. France [GC]*, no. 42326/98, at para 29, ECHR 2003-III.
[29] *Odièvre v. France [GC]*, no. 42326/98
[30] See *Godelli v Italy* (App No 33783/09, 25 September 2012) which concerned the confidentiality of information concerning a child's birth and the inability of a person abandoned by her mother and subsequently adopted to find out about her origins. The applicant maintained that she had suffered severe damage as a result of not knowing her personal history, having been unable to trace any of her roots while ensuring the protection of third-party interests. The Court held that there had been a violation of Article 8 ECHR, considering in particular that a fair balance had not been struck between the interests at stake since the Italian legislation, in cases where the mother had opted not to disclose her identity, did not allow a child who had not been formally recognised at birth and was subsequently adopted to request either non-identifying information about his or her origins or the disclosure of the birth mother's identity with the latter's consent. See also *Mikulić v Croatia* (App No 53176/99, 7 February 2002).
[31] UNCRC, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, UN Doc. CRC/C/GC/14, at paras 55 and 56.

must be respected and taken into consideration in the assessment of the child's best interests, and that children must have:

> "the opportunity to access information about their biological family".[32]

As well as these more express recognitions of the right to identity, it is arguably also capable of arising under Article 12 of the Universal Declaration of Human Rights and Article 17 ICCPR, which both concern the right to respect for family and private life. Both are drafted in near identical terms with the ICCPR also prohibiting unlawful interference, as well as arbitrary interference.[33] It may also fall within the scope of European Union law under Articles 7 (the right to respect for private and family life) and Article 8 (the protection of personal data) of the Charter. This is particularly the case given that the data protection is primarily regulated by Union law.[34]

Right to Privacy

The right to privacy has been invoked by or on behalf of the birth parents of an adopted person in order to withhold their identifying information.[35] This is seen as the right against which the right to identity arising above is balanced. However, this right is also held by adopted persons and should not be understood purely in the negative sense of a

[32] It should be noted that in the 2019 report of the UN Special Rapporteur on the sale and sexual exploitation of children, the UN Special Rapporteur encouraged Ireland to enact legislation protecting the rights of adoptees to information about their origins and identities, and stated that the rights of children to essential information about their identities should be treated as separate from, and not contingent upon, the desire of any party to be contacted. It was recommended that adopted children should be entitled to seek this information, in addition to adults who were adopted as children. See Visit to Ireland: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, UN Doc No A/HRC/40/51/Add.2, 15 November 2019, at paras 47-48.

[33] Article 17 of the ICCPR provides: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

[34] Article 7 provides that "Everyone has the right to respect for his or her private and family life, home and communications. Article 8 provides that "1. Everyone has the right to the protection of personal data concerning him or her; 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified; 3. Compliance with these rules shall be subject to control by an independent authority.

[35] It should be also be noted that a parent may have experienced significant trauma in the course of the adoption process, including but not limited to rape leading to pregnancy: see the Commission's Advisory Paper to the Interdepartmental Group on the Government's Planned Development of a 'Restorative Recognition Scheme for former residents of Mother and Baby Homes and County Homes' (April 2021), pages 3-5.

freedom from inference, but also as a positive right, whereby adopted persons are entitled to develop their personality and personhood and their private and family lives – this is typified by the case law of the ECtHR, as set out above, which identifies the adopted person's identity rights as similarly falling within Article 8.

The right to privacy is provided for as an unenumerated right under Article 40.3 of the Constitution.[36] In the context of the tension between the right to identity and the right to privacy of birth parents, *IO'T v. B* sets out that the birth parent enjoys a right to privacy and confidentiality but such a right is neither absolute or precludes the disclosure of their identity.[37] On this basis, it would seem that the parameters of the right to privacy of the birth parent involves a balancing exercise which is typical in cases involving a clash of constitutional rights, and is highly dependent upon the context and facts of each case.

The ECtHR has found that the notion of 'private life' within the meaning of Article 8 ECHR encompasses a person's physical and psychological integrity; the right to 'personal development'; and the notion of personal autonomy.[38]

The ECtHR has recognised the countervailing privacy rights of a natural parent in the context of a child seeking information about them and has dealt with this clash of rights by assessing if the legislation struck a balance and ensured:

> "sufficient proportion between the competing interests".[39]

Furthermore, a significant margin of appreciation applies for Contracting States in this sensitive area.[40]

The denial of access to information regarding the fate and whereabouts of family members has also been found to violate the right to respect for private and family life

[36] See *McGee v Attorney General* [1973] IR 284; *Ryan v Attorney General* [1965] IR 294; *Kennedy v Ireland* [1987] IR 587.
[37] *IO'T v B* [1998] 2 IR 321. The Supreme Court identified a range of factors that needed to be taken into consideration in balancing these rights.
[38] See *Niemietz v. Germany; Botta v. Italy* (App No 21439/93), ECHR 1998-I, *Bensaid v. the United Kingdom* (App No 44599/98), ECHR 2001-I; *Pretty v. the United Kingdom* (App No 2346/02).
[39] *Odièvre v. France* (App No 42326/98, 13 February 2003, Grand Chamber).
[40] *Odièvre v. France* (App No 42326/98, 13 February 2003, Grand Chamber) at para 49.

under the ECHR.[41] Failure to return the remains of deceased family members to their relatives has on many occasions been found to violate the right to respect for private and family life under the ECHR.[42] In *Guerra and Others v. Italy*[43] a violation of Article 8 was found in respect of the right to effective access to information concerning health rights. Thus, there may be positive obligations inherent in effective respect for private or family life which require the State to provide essential information about risks to one's health in a timely manner.[44]

The right to privacy similarly arises under Article 12 of the UN Declaration of Human Rights, and Article 17 ICCPR. Per ICCPR General Comment No 16, this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right. It is also provided for under Article 7 of the EU Charter of Fundamental Rights, and Article 16 of the UNCRC.[45]

Equality and Non-Discrimination

The Commission considers that treatment of adoptees historically has been marked by differentiation and discrimination as against children raised by their birth parents. Under the Constitution, equality is an aspect of human dignity which, according to the Preamble, the Constitution aims to safeguard.[46] The guarantee of equality before the law in Article 40.1 of the Constitution requires, in general terms, that like persons should be treated alike, and different persons treated differently, by reference to the

[41] *Jovanovic v Serbia* (2015) 61 EHRR 3
[42] See *Hadri-Vionnet v Switzerland* (App No 55525/20; *Girard v France* (App No 22590/04); *Pannullo and Forte v France* (App No 37794/97); *Sabanchiyeva and Others v. Russia* (App No 38450/05); *Maskhadova and Others v. Russia* (App No. 18071).
[43] *Guerra and Others v. Italy* (19 February 1998, at para 60, Reports 1998 I).
[44] See also *KH and Others v. Slovakia* (App No 32881/04, 28 April 2009).
[45] Article 16 of the UNCRC provides that: 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.
[46] *MD v. Ireland* [2012] IR 697.

manner in which they are distinct. [47] However, Article 40.1 is not a guarantee of perfect equality.[48]

Article 14 of the ECHR provides for a prohibition on discrimination, including on birth status. The ECtHR considers that very weighty reasons have to be advanced before a distinction on grounds of birth outside marriage can be regarded as compatible with the ECHR.[49]

Discrimination against adults and children is also prohibited under international human rights law.[50] In respect of Article 24 of the ICCPR, the CCPR General Comment provides that the implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under Article 2 (equality before the law) to ensure that everyone enjoys the rights provided for in the Covenant.[51] The Covenant requires that children should be protected against discrimination on any grounds such as race, colour, sex, language, religion, national or social origin, property or birth.[52]

[47] *Murphy v. Ireland* [2014] 1 IR 198, 227-229.
[48] *MR v. An tArd Chláraitheoir* [2014] 3 IR 533.
[49] *Fabris v. France* (App No 16574/08) [GC] at para 59; *Wolter and Sarfert v. Germany* (App Nos. 59752/13 and 66277/13) at para 58; and *Inze v. Austria* (App no. 8695/79) at para 41. The distinction that had existed in many Member States between children "illegitimate" and children born within marriage for inheritance purposes raised several issues under Article 8 of the Convention taken alone, per *Johnston and Others v. Ireland* (1987) 9 EHRR 203 and under Article 14 taken in conjunction with Article 8, per *Brauer v. Germany* (App No 3545/04) and *Vermeire v. Belgium* (App No 12849/8) and Article 1 of Protocol 1, per *Inze and Fabris.*
[50] See Article 2(1) and Article 24 ICCPR, Article 21 of the EU Charter and Article 2 UNCRC.
[51] UN Human Rights Committee (HRC), CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989, at para 1.
[52] UN Human Rights Committee (HRC), CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989, at para 5.

Other Human Rights Engaged

The General Scheme also engages the right to health, and bodily and physical and mental integrity,[53] freedom of expression,[54] and the right to know the truth,[55] and the right to dignity.[56]

The right to know the truth can be a corollary of both the right to identity and the right to privacy. No such right has yet been identified in the Irish Constitution. Under international human rights law, the parameters of this right have been discussed mainly in the context of disappearances and State responsibility. However, it is arguably also intimately related to the right to know one's identity. As a matter of EU law, the *Victims' Rights Directive, 2012/29/EU* establishes a link between truth and dignity and provides in Article 3 a right to understand and to be understood.[57]

Observations on the General Scheme

Right of Access

The provision of birth certificates and early life information is by definition the vindication of the right to identity, personality and the right to private and family life of adopted persons. In particular, the unfettered provision of such information under the General Scheme for those whose birth parents have not indicated a no contact preference gives meaningful effect to these rights in a manner that appears to be

[53] See Article 40 of the Constitution, Article 2 and ECHR, and Article 24 UNCRC. These arise and are engaged in the context of adopted persons or their relatives wishing to determine genetic or inheritable medical conditions that may well affect them.
[54] See Article 40.6 of the Constitution, Article 10 ECHR, Article 12 UNCRC and Article 19 ICCPR. This encapsulates the freedom not simply to express, but also to receive and impart information, including potentially that in relation to one's origins.
[55] See Article 24(2) of the international Convention for the Protection of Al Persons from Enforced Disappearance 2006 (which Ireland signed in 2007 but has yet to ratify) and in the ECOSOC's Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, adopted in 2005. In its Resolutions 9/11 and 12/12 on the right to the truth, adopted on 18 September 2008 and 1 October 2009 respectively, the United Nations Human Rights Council referred to the right.
[56] The importance of dignity has been recognised by both the Irish Superior Courts and the ECtHR, see for example *Ryan v. Attorney General* [1965] IR 294, *Norris v. Attorney General* [1984] IR 36, MX v. Health Service Executive [2012] 3 IR 254 and Foy v. An tArd Chláraitheoir [2012] 2 IR 1, as well as *Yaroslav Belousov v. Russia* (App Nos 2653/13 and 60980/14), *Selmouni v. France* (2000) 29 EHRR 403, and *Pretty v United Kingdom* (App No 2346/02).
[57] The right has been recognised under the procedural limb of Article 3 ECHR in *El Masri v. Macedonia* (App No 39630/09) ECHR 2012-VI 263.

consistent with the human rights and equality framework discussed above and is to be welcomed.[58] However, this is not necessarily the case where there is a no contact preference.

Under the General Scheme the privacy rights of natural parents are implicated, as was recognised in *IO'T*, and some will argue that they are adversely affected. However, clashes of fundamental rights are not unusual and the Oireachtas is entitled to legislate in order to regulate this area and to choose to prioritise one grouping's rights. As recognised by the Supreme Court in *Fleming v Ireland,*[59] the presumption of constitutionality:

> "may be regarded as having particular force in cases where the legislature is concerned with the implementation of public policy in respect of sensitive matters of social or moral policy."

Birth and early life information will constitute personal data for the purposes of the GDPR, and its storage and holding by any State authority constitutes processing.[60] The CJEU acknowledged in *Nowak v Data Protection Commissioner of Ireland*[61] that information may be linked to more than one individual and this does not affect the right of access.

The information concerned in the General Scheme is classic mixed personal data, i.e. information that contains personal data of more than one individual. Previously the Government appeared reluctant to legislate in this area to provide access to birth information, as they incorrectly viewed it as third party data, rather than mixed data belonging to both parent and child.[62] The Commission welcomes that by providing for access to this mixed data for adopted persons, the Bill establishes a firm legal basis for

[58] At EU level, Ireland is only one of two States (along with Slovenia) which currently does not grant the right to access adoption files and information relating to one's biological family.
[59] *Fleming v Ireland* [2013] 2 IR 417 at 441.
[60] See Article 4 GDPR.
[61] *Nowak v Data Protection Commissioner of Ireland* (Case C-434/16, 20 December 2017).
[62] See O'Mahony, Logue, O'Rourke and others, Opinion on the application of the Irish Constitution and EU General Data Protection Regulation to the Adoption (Information and Tracing) Bill 2016 and the Government's 'Options for Consideration (5 November 2019).

disclosure, which is necessary pursuant to Article 6 GDPR. The disclosing body can rely on Article 6(1)(c) GDPR: processing which is:

> "necessary for compliance with a legal obligation to which the controller is subject".

The further information provided by the Department in relation to the General Scheme states that:

> "In a similar manner to Subject Access Requests under GDPR, people will be able to apply to any relevant body that may hold information about them".

However, unlike a Subject Access Request under GDPR, no time limit within which a request must be complied with is set out in the General Scheme.[63]

The Special Rapporteur on Child Protection, Dr Conor O'Mahony, has highlighted the proposal in Part 6 of the Bill that records would, for the most part, remain where they are kept.[64]

The Commission recommends that the legislation specifies timeframes for compliance with requests for information so as to not cause undue delay in establishing identity in line with ECtHR case law.

The Commission recommends that the legislation establishes a system for the management of records across agencies and locations that ensures that significant delays are avoided.

"No Contact" Preference and Counselling

Part 5 of the General Scheme provides for the creation of a Contact Preference Register ('CPR'). The Commission notes that where there is a contact preference or no

[63] FAQs on (I) Birth Information and Tracing Legislation and (II) Illegal Birth Registrations Legislation 11 May 2021, available at: https://www.gov.ie/ga/preasraitis/14c5c-minister-ogorman-publishes-proposed-birth-information-and-tracing-legislation/. Under Article 12 of the GDPR, data controllers must respond to the request without undue delay and at the latest within one month of receiving the request. Controllers can extend the time to respond by a further two months if the request is complex or they have received a number of requests from the same individual, but they must still let the individual know within one month of receiving their access request and explain to them why the extension is necessary.

[64] See Dr. O'Mahony's Opening Statement to the Oireachtas Committee on Children, Disability, Equality and Integration, 15 June 2021, available at https://www.oireachtas.ie/en/committees/.

preference, the birth certificate or birth information shall be provided to the relevant person. Where there is a no contact preference, the Adoption Authority is obliged to arrange an 'information session' to be held with the relevant person and a social worker to inform them of the contact preference, the birth parent's privacy rights and the importance of respecting the preference. Only once the completion of this session is verified by the Adoption Authority will the General Register Office or relevant body then issue the birth certificate or information. There is no provision for dispensing with this requirement.

The requirement for an information session appears to be attempting to cater to the privacy rights of natural parents. The Commission recognises that some birth parents may have concerns regarding the impact that this legislation may have on their privacy and acknowledges that the aim of protecting parental privacy is a legitimate one. However, it is questionable the extent to which this requirement achieves this aim, as the information will be provided and theoretical contact will be possible once the information session is held. The Commission is of the view that the requirement may present a further obstacle to affected persons in accessing information for which they may have been waiting for a considerable time, and where the relevant person does not want to undergo an information session it represents a complete barrier.

The obligation to undergo an information session has been described as paternalistic, and based on the premise that adopted persons must be educated about the need to respect privacy rights. It is argued that there is no evidence that natural mothers were ever provided with any guarantee of confidentiality, and that birth certificates have been public records since 1864 (under the *Registration of Births and Deaths (Ireland) Act 1863*).[65] Furthermore, there is little evidence of birth parents registering a no contact preference on the existing National Adoption Contact Preference Register (NACPR)[66] or that an adopted person will definitely seek out their birth parent.[67] The

[65] See Claire McGettrick, Clann Project – Briefing Note on Adoption Information (November 2020) at p 2.
[66] Clann reports that 137 natural mothers who registered on the existing National Adoption Contact Preference Register (NACPR) indicated that they wish to have no contact with their daughter or son. This figure represents just 5.3% of the total number of natural mothers on the register, and 0.14% out of approximately 100,000 natural mothers in Ireland. Ibid at p.4.
[67] Clann reports that over ten times the number of adopted people than natural mothers have registered a 'No Contact' preference on the NACPR to date. Clann also states that successful contacts have been

aim of protecting parental privacy is a legitimate one. However, it is unclear how an information session has any rational connection with the balancing or protection of the birth parent's right to privacy. The session does not achieve its apparent aim, as the adopted person can simply proceed to contact the parent if they wish, within the confines of the law.

It is a compulsory session which stands in the way of access. When considered in the context of there being (i) little evidence to-date of many natural parents seeking no contact and (ii) limited evidence of actual harm to any such parents, the Commission is concerned that the measure may be a disproportionate or irrational interference with a person's right to know their origins and their right to dignity and equality.

Article 15 GDPR provides that data subjects have a right to obtain confirmation from a controller as to whether personal data concerning them is being processed and copies thereof. There is a general limitation on the exercise of the right of access under Article 15(4) GDPR, which states that the right to obtain a copy of the personal data undergoing processing:

> "shall not adversely affect the rights and freedoms of others".

The scope of Article 15(4) GDPR has not been considered by the CJEU.[68] In circumstances where a person was to refuse to engage with the information session required in the case of a no contact preference, any refusal to provide birth information on this basis could be contrary to Article 15 GDPR, absent an identified exemption under Article 23 GDPR. Head 40(1) does provide that the rights and obligations provided for in Articles 12 to 22 and Article 34, and in Article 5 GDPR, are restricted pursuant to Article 23(1)(i) to the extent necessary to enable persons to access birth

made to-date by many who have utilised the services of organisations such as the Adoption Rights Alliance in order to locate birth certificates and adoption records with little evidence of harm having come to natural mothers. See Claire McGettrick, Clann Project – Briefing Note on Adoption Information (November 2020) at pps. 6-8.

[68] Article 23 GDPR is relevant to the interpretation of Article 15(4). It allows for data subject rights to be restricted in certain circumstances. Any such restrictions must be set out in a legislative measure, respect the essence of the fundamental rights and freedoms, be necessary and proportionate in a democratic society, and safeguard an interest of public importance. Article 23(2) lists elements that must be present in any such legislation restricting data subject rights. The Data Protection Act 2018 ('the 2018 Act') contains provisions dealing with the restrictions of rights of data subjects, including sections 59, 60, and 61 in particular, which give further effect to the provisions of Article 23 GDPR.

and related information in accordance with the provisions of this Act and to enable the Agency and the Authority to provide a tracing service in accordance with the provisions of this Act.

In Case C-73/07,[69] the CJEU stated that derogations and limitations in relation to the protection of personal data must apply only insofar as is strictly necessary. The CJEU has also confirmed in Joined Cases C-511/18, C-512/18 and C-520/18,[70] that even if there is an objective test in the legislation which demonstrates the necessity of a restriction to a legal right, there is also a requirement for the legislative restriction to address the question of proportionality.[71]

The European Data Protection Board's Guidelines 10/2020 summarise the requirements for a legislative restriction to Article 15 rights to be compatible with Article 23 GDPR which include that it should be supported by evidence describing the problem to be addressed by that measure, how it will be addressed by it, and why existing or less intrusive measures cannot sufficiently address it. A general limitation would not respect the essence of the fundamental right to the protection of personal data as enshrined in the Charter. If the essence of the right is compromised, the restriction shall be considered unlawful, without the need to further assess whether it serves an objective of general interest or satisfies the necessity and proportionality criteria.[72]

It is unclear how the interference with Article 15 GDPR identified is either necessary or proportionate. The General Scheme does not allow any examination of the necessity or proportionality of the requirement and it is imposed in all circumstances where there is

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[69] Case C-73/07 *Tietosuojavaltuutettu v. Satakunnan Markkinaprssi Oy and Satamedia Oy*, ECLI:EU:C:2008:727 at 56.

[70] Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du net and others*, ECLI:EU:C:2020:791.

[71] In C-520/18 *La Quadrature du net and others*, ECLI:EU:C:2020:791 the CJEU held: *"In particular, as is the case for Article 15(1) of Directive 2002/58, the power conferred on Member States by Article 23(1) of Regulation 2016/679 may be exercised only in accordance with the requirement of proportionality, according to which derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary (see, by analogy, with regard to Directive 95/46, judgment of 7 November 2013, IPI, C 473/12, EU:C:2013:715, paragraph 39 and the case-law cited)"* at 210.

[72] There is also a requirement to demonstrate how any proposed interference or restriction genuinely meet objectives of general interest of the State and EU or the need to protect the rights and freedoms of others. The restriction of data protection rights will need to focus on specific risks. European Data Protection Board's Guidelines 10/2020.

a no contact preference. The conditional access may be contrary to European Union law.

The General Scheme does not specify a timeframe within which any information session should be offered to a relevant person raising the possibility of further delay in accessing information. The fact that it is envisaged that the information session will be given by a social worker raises the question of adequate resources, the lack of which may, again, give rise to further delay.

The Commission notes that, while a number of jurisdictions have made counselling or access to support services a prerequisite to access information (Northern Ireland[73], New Zealand[74]), they have now moved away from this towards a system of unconditional access in all but exceptional circumstances or where a risk of harm has been identified (England and Wales,[75] Germany[76]). A number of systems facilitate absolute disclosure (Scotland[77], New South Wales[78]). Some systems facilitate disclosure of the birth parents' identity, but will only provide their specific contract details such as their whereabouts with consent (Victoria[79], Queensland[80]). The ages of 18 or 16 are commonly chosen as the minimum age for access to information. The General Scheme's somewhat conditional access system for those affected by a no contact preference is outside the trend in favour of increased unconditional access.

Whilst the Commission does not consider an information session to be necessary, it appreciates there may be some birth parents who do not wish to be contacted. It is important that these parents are supported to the fullest extent possible. The Commission notes that under Head 4 of the General Scheme birth parents in this situation will be informed of their entitlement to avail of counselling and this is

[73] Section 54 of the Adoption (Northern Ireland) Order 1987.
[74] Section 5 of the Adult Adoption Information Act 1985. Although, counselling is not required for persons adopted after 1 March 1986 (section 6).
[75] Adoption and Children Act 2002 and Regulation 10, Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005.
[76] Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern (Adoptionsvermittlungsgesetz - AdVermiG) s 9b(2) BGBl. 2002 I S. 354, BGBl. I S. 1752.
[77] Adoption and Children Act 2002 and Adoption and Children (Scotland) Act 2007.
[78] Sections 133C and 134 Adoption Act 2000.
[79] Part VI of the Adoption Act 1984.
[80] Adoption Act 2009.

welcome. However, the entitlement to counselling should be extended to all birth parents and relevant persons, regardless of their contact preference, and sufficient resources should be allocated to ensure that appropriate, adequate and timely counselling is provided to those who request it.

It is also noted that under Heads 3 and 7 a public information campaign will be carried out during the three months following enactment of the legislation to give notice to the public of the process for registering contact preferences and the process for accessing birth information. The Commission considers that this campaign should also aim to raise broader public awareness of the legislation and provide accessible information on its key aspects, and should utilise, for example, a range of media, including social media, literature information, and websites such as Citizens Information to communicate with its intended audience. In particular this campaign should make clear the relevant supports and services available to all affected persons, including to birth parents some of whom may have apprehensions about the potential disclosure of their information or records.

The Commission recommends that the information session is removed from the legislation.

The Commission recommends that, if the information session is retained, it should be made optional and extended to all relevant persons and birth parents, not just those who are faced with or who have registered a no contact preference.

The Commission recommends that, if the information session is retained, it should be transformed into no-obligation counselling, support and/or information services, tailored to the needs and wishes of the individual in question and co-designed with them. If established in law, there should be a timeframe within which such services will be offered which should be stipulated, and any issues arising under equality legislation in relation to services provided to protected groups should be considered.

The Commission recommends that the entitlement to counselling should be extended to all birth parents and relevant persons, regardless of their contact

preference, and sufficient resources should be allocated to ensure that appropriate, adequate and timely counselling is provided if requested.

The Commission recommends that the public information campaign should have a broad reach, utilise various means of communication, and include information on the supports and services available to affected persons with a view to allay any concerns they might have. The public information campaign should include an accessible, plain English booklet available in a range of accessible formats and delivered to every household in Ireland; and should communicate with the Irish diaspora globally. Any issues arising under equality legislation in relation to protected groups should also be considered in the provision of an information session, provision of support services and the public information campaign.

The Child's Access Rights

Under Irish law, the right to certain birth information identified in *IO'T v. B* has not been explicitly recognised as one inhering in children. However, ECHR and international human rights law is clear that children do not have to wait until adulthood for the crystallisation of these rights.[81]

Head 3(1) provides that only a relevant person who has attained the age of 16 shall have the right of access to their birth certificate. Heads 5 and 6 similarly restricts access to (a) birth information; (b) early life information; (c) care information; (d) medical information; (e) provided items, to those over 16. Head 7 refers to Head 6 for the provision of birth information. There is no provision for those younger than 16 at all.

This would appear to be inconsistent with the right to identity under Article 8 UNCRC, as well as a child's right to their identity under Article 8 ECHR and the case law of the ECtHR.[82] The EU Agency for Fundamental Rights has compared approaches to adoption file access for children in the EU from which certain overall EU trends can be gleaned.[83]

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[81] See *Mikulić v. Croatia,* no. 53176/99 and *Odièvre v. France [GC*], no. 42326/98. See also Article 7 and 8 of the UNCRC.
[82] *Mikulić v. Croatia,* no. 53176/99 and *Odièvre v. France [GC*], no. 42326/98.
[83] In fourteen EU Member States, persons have access to their adoption file and to certain information regarding their biological families at 18 years (Cyprus, Croatia, Denmark, Estonia, Greece, Lithuania,

Certain States allow children to access the information at a lower age, provided they have the consent of their parents (for instance in Denmark, Estonia, Germany and Portugal), for important reasons (for instance in Italy and Lithuania) or subject to an individual assessment of the child's maturity (in Belgium and Sweden).[84]

The Commission notes that children, regardless of age, are data subjects under the GDPR. Accordingly, where children under 16 have no means of accessing this personal data encompassed by the General Scheme this may be contrary to EU law.[85]

The Commission recommends that the Bill provides for persons under the age of 18 years who wish to receive identity information to be enabled to receive such information subject to a 'sufficient maturity' requirement.[86]

Latvia, Malta, Poland, Portugal, Romania, Spain, Sweden, and the United Kingdom). In Belgium, Finland and Czechia, children aged 12 or over may exercise such a right. In Austria and Hungary, this is possible from the age of 14 years. In Bulgaria, Germany and the Netherlands (as well as in Scotland) the threshold is set at 16 years. In the Netherlands, in the case of intercountry adoption, children may obtain their adoption file from the age of 12 years. In France and Slovakia, the possibility to access files depends on the child's maturity.
Fundamental Rights Agency, Mapping Minimum Age Requirements with respect to the Rights of the Child in the EU – Accessing Adoption Files and Information on the Biological Family (2017).

[84] Some countries provide for professional assistance for children prior to or during the consultation of the adoption file (for example, for the French-speaking community in Belgium, where such an assistance is compulsory for all persons under 18 years, and in Finland, where the child is free to accept it or not). In Hungary and Estonia, there are limits on the release of information regarding the identity of biological families. These apply if biological parents or siblings could not be asked or did not consent to their identity being disclosed, or if such information is not in the child's best interests.

[85] In December 2020, the DPC published a report (the 'Fundamentals Document') that acknowledged that the GDPR and the Data Protection Act 2018 are largely silent on how data protection rules are to be applied to the processing of children's data (at p12), and the vacuum of rules in respect of how children as data subjects exercise their rights (at p33). However, the DPC's view is that a child may exercise their own data protection rights at any time, as long as they have the capacity to do so and it is in their best interests, and they may also be represented by an adult. The DPC Guidance also places onerous responsibilities on data controllers. These include, when assessing whether to release data to a child, considering the age and maturity of the child, the type of request, the type of personal data at issue, and the best interests of the child (at p.34).See Fundamentals for a Child Oriented Approach to Data Processing (December 2020) The version of the Fundamentals Document which was published by the DPC was expressed to be for the purpose of consulting with all interested parties. Following the conclusion of the DPC's consultation process, a final version of the Fundamentals Document will be published, which the DPC states will inform its approach to supervision, regulation and enforcement in the area of processing of children's personal data.

[86] This approach was endorsed by the Commission in its Observations on the Children and Family Relationships Bill 2015. See IHREC, Submission on Observations on the Children and Family Bill 2015 (March 2015).

Access for Relatives of Deceased Relevant Persons

Access to birth certificates, birth information, early life information, care information, medical information and provided items is restricted to 'relevant persons', as defined above, under Heads 3, 5, 6 and 7. There is no provision for those who fall outside that definition, including in circumstances where the relevant person is deceased. This could restrict the right to identity of a birth relative of a relevant person, and could also result in the withholding of medical information, [87] which could have practical and serious implications for the birth relative.

Given the above identified issues with regard to children under 16, the failure to provide for a system of access to birth information by adoptive parents on behalf of their minor child may be a breach of the child's rights.

If a family member or relative, such as the child of an adopted person wished to access such information in order to determine whether there were any medical issues that would affect them, the complete prohibition on access provided for by the General Scheme may not meet the standard of certain Article 8 ECHR case law, and it may be that the State has positive obligations to ensure such access in certain circumstances.[88]

The Commission recommends that the matter of access for relatives of deceased relevant persons is reconsidered.

[87] The ECtHR has established that people have a right to access information that affects their health. See *Guerra and Others v. Italy* (19 February 1998, at para 60, Reports 1998 I) and *KH and Others v. Slovakia* (App No 32881/04, 28 April 2009).
[88] See *KH and Others v. Slovakia* (App No 32881/04, 28 April 2009) and *Guerra and Others v. Italy* (19 February 1998, at para 60, Reports 1998 I).



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