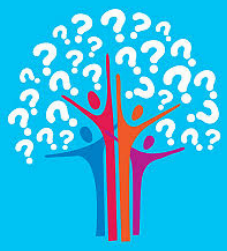

Aitheantas

Adoptee Identity Rights

Submission to the Joint Committee on Children, Disability, Equality, Integration and Youth on the General Scheme of the Birth Information and Tracing Bill 2021

About Aitheantas - Adoptee Identity Rights

Aitheantas - Adoptee Identity Rights are an advocacy group with an Adoptee led focus, formed in 2018 to advocate for reform and equality for Irish Adoptees.

Aitheantas' core policy is People before Paper putting adoptee welfare at the forefront of legislation and supports. Aitheantas research charts the social harm and intergenerational aspect of forced and coercive adoption through the closed adoption process in Ireland.

Aitheantas campaigns for open access for Adoptees to Health, Heritage and History information and the acknowledgement of Identity Rights.

Aitheantas have campaigned through supporting Council Motions, securing unanimous supporting motions from Councils across the country for open access for adoptees to their own information.

Aitheantas are also the group behind the historic #RepealtheSeal campaign which saw historic levels of public support for survivors to access their own information.

Introduction

The long title on page 2 of the Bill sets out the purpose of the General Scheme as follows “is to recognise the importance of a person knowing his or her origins; to achieve this through the provision of access for the purpose to his or her birth certificate, birth information, early life information, care information and medical information; to provide this access for all persons who were adopted, nursed out, boarded out, the subject of an incorrect birth registration or who otherwise have questions in relation to their origins...”

It is our contention that the purpose of the Bill, set out above, is not reflected in the provisions as set out in the General Scheme in that there are conditions or qualifications to achieving the aspirational purpose of the Bill and we will set out these further below.

It is our contention that the General Scheme of Birth Information and Tracing Bill is another version of the Supreme Court decision in IOT v B [1998] 2 IR 321. In this case, the Supreme Court held that the right to know the identity of one’s “natural mother” was an unenumerated personal right under Article 40.3 of the Constitution, following on from the natural and special relationship between the mother and the child. Hamilton CJ found that the exercise of this right to identity might conflict with the mother’s constitutional right to privacy.

Significantly, Hamilton CJ held that in such instances the mother did not have an absolute constitutional right to have her anonymity guaranteed at the time she placed her child for adoption. Accordingly, the Supreme Court held that there were two conflicting constitutional rights.

It is the role of the Oireachtas, pursuant to Article 15.2.1 of the Constitution, to legislate. Keane J, in IOT v B, stated robustly that the whole matter was one that required to be regulated by legislation. Keane J said that the fact that the Oireachtas had failed to regulate by legislation did not "... justify the courts in undertaking such a task for which they lack, not merely the expert guidance available to the legislative arm but also and more crucially the democratic mandate."

Hamilton CJ had similar reservations on the role of the Court in this regard. It is quite clear from the different decisions in the Supreme Court in IOT v B of the need for legislation to regulate the exercise of the unenumerated right to identity and to reconcile it with the sometimes conflicting mothers right to privacy.

It is our contention that the General Scheme of Birth Information and Tracing Bill attempts to regulate the two constitutional rights and in so doing favours the birth mother's right to privacy. We will set out below numerous examples of where this is found in the Bill.

Head 2 – Interpretation

"Agency" means the Child and Family Agency;
"Authority" means the Adoption Authority of Ireland.

It is our consistent contention that the Child and Family Agency (TUSLA) and the Adoption Authority of Ireland are not fit for purpose to carry out the functions as set out in the General Scheme nor are they the suitable bodies that should be involved in regulating the law going forward on information and tracing.

Head 3 – Relevant person may apply for copy of birth certificate

H3(13)

Further to Head 3 (9), where the birth parent confirms that they are not willing to be contacted by the specified person, the release of the birth certificate is conditional on the relevant person attending an information session with a social worker.

If the relevant person does not attend said information session, the birth certificate is not released. This is a qualification or restriction on the access to the adoptee's birth certificate which is objectionable to adoptees for many reasons. We believe that the imposition of the information session the purpose of which is set out in H3 (13) could be achieved without the imposition of this conditions of an information session with a social worker.

We believe that this condition restricts the constitutional right to identity as found in the IOT case and we believe that it errs in law and has no legal basis. It is not correct to say, in law, that the birth parents right to privacy permits the Oireachtas to redraft or redefine the constitutional right to privacy as held by the Supreme Court in the IOT case.

In so doing, we believe also that this is further evidence of discrimination against adoptees in the exercise of their constitutional rights and as there is no legal basis for same, we believe it also violates Article 40.1 on the constitutional right to equality.

We also find this imposition of an information session as a condition to the release of one's birth certificate, in the General Scheme, objectionable on other grounds. The recent report of the Commission of Inquiry into Mother and Baby Homes refers to the vitriolic criticism of TUSLA by survivors and adoptees.

It is our contention, as set out above, that there has been a serious breach of trust by both TUSLA and the AAI in their interactions with adoptees and accordingly this amounts to a serious obstacle in having adoptees require to interact with social workers from the above agency as a condition to the release of their birth certificate.

We also question the legal basis for requiring the above agencies social workers to carry out information sessions as a condition to the release of one's birth certificate, where the agencies said social workers have previously sat and decided on the release of information to adoptees. There is a serious question of bias, or at best, a perception of bias that does not permit the agency or authorities social workers to be involved in a process which is conditional upon the release of one's birth certificate.

It is of great concern to us that the explanatory notes to Head 3 do not refer to the adoptees constitutional right to identity as held by the Supreme Court in IOT v B as the legal basis for the release of one's birth certificate, as alluded to in the explanatory notes in Head 7.

Head 4 – Counselling Support for Birth Parents

We are greatly concerned at the very glaring and obvious omission of counselling support for adoptees as provided for birth parents under Head 4. In this regard, we also refer to the explanatory note to Head 4 on page 14 of the General Scheme which provides for counselling support from TUSLA which for many reasons as set out above we object to TUSLA's role in this regard.

Head 6 – Relevant person may apply for items and information

We note that Head 34 provides for flexibility and clarity in allowing the Minister to make regulations designating bodies as relevant bodies for the purpose of this Act. We believe that this provides ample opportunity and scope for the Minister for the Minister to provide for a new agency as a 'relevant body' to interact with adoptees under the provisions of the Act, especially where there may be conflicts in law or otherwise as a result of interactions with TUSLA or the AAI in the past.

Head 7 – Relevant Body to provide birth information

H7(11)

As above, imposes a condition of release of one's birth information in having to attend an information session with a social worker. As set out above, we believe that this is a disproportionate interference with the constitutional right to identity.

We also believe that this compulsory information session with a social worker is objectionable for the reasons set out above.

We find an inconsistency with this restriction in the exercise of one's constitutional identity as set out under Head 7 with its very own explanatory notes, in particular paragraph 1 on page 19 of the General Scheme

Head 8 – Relevant body to provide early life information

We are concerned with the wording of H8(2), 'to the extent it is practicable to do so, the relevant body shall provide the applicant with a copy of the records containing the early life information requested'.

This is another example of a restriction or limitation in the exercise of one's constitutional right to identity as set out in the General Scheme.

Head 9 – Relevant body to provide care information

We are concerned with the wording of H9(2), 'to the extent it is practicable to do so, the relevant body shall provide the applicant with a copy of the records containing the care information requested'.

This is another example of a restriction or limitation in the exercise of one's constitutional right to identity as set out in the General Scheme.

Head 10 – Relevant body to provide medical information

H10(3)

H10(3) is very restrictive. In certain circumstances, it may void the value of the information being provided and is potentially arbitrary/discretionary.

H10(4) and H10(5)

H109(4) and H10(5) refers to the Authority and may 'issue guidelines in respect of the type of medical information that relates to a birth parent or birth relative and that is, or is likely to be of relevance to the maintenance and the management of the health of a relevant person, the release of which is necessary for reasons of substantial public interest'.

There is an element of arbitrariness in H10(4) which is of great concern to us. Of greater concern is H10(5) which uses the word 'may' rather than the word 'shall'. If the Authority is to be permitted under the General Scheme to issue the above guidelines with which we have reservations in any event, there should not be discretion as provided for in H10(5) for the Authority to consult with expertise in hereditary medical conditions.

We refer to the explanatory notes for Head 10 which states on the bottom of page 22 and on page 23 of the General Scheme that the legal basis for the release of information is the General Data Protection Regulation (GDPR). While GDPR is obviously relevant to the release of information, it is of concern that the constitutional right to identity is not referred to as one of the legal basis for the release of information.

Head 12 – Agency and Authority to provide a tracing service

The level of discretion and arbitrariness permitted to the Agency and Authority under H12(2) in the use of the word 'may' rather than the word 'shall' is of concern.

H12(3)
The process is unclear. Again the level of discretion to the relevant body is problematic in practice. There is a lack of clarity and uniformity set out.

The explanatory notes for Head 12, in particular, in the bottom of page 25, we contend the policy intent to provide a robust statutory framework to allow TUSLA and the AAI to deliver a tracing service, is not achieved due to arbitrariness, discretion and a lack of clarity and uniformity in the process.

H12(4)
H12(4) is worthy of inclusion, as set out in the explanatory notes, in paragraph 1 page 26 of the General Scheme.

Head 13 – Agency and Authority may request information

There is a glaring inconsistency in Head 13 compared to Head 10. This inconsistency from a comparison of the explanatory notes to Head 13 on pages 27 and 28 of the General Scheme compared to the explanatory notes for Head 10 as set out on page 22 and 23 of the General Scheme. Head 13 is providing exemptions in the General Scheme to the operation of provisions of GDPR whilst at the same time Head 10 is providing restrictions in the release of information following the provisions of GDPR.

Head 14 – Guidelines

We are strongly of the view that the wording in H14(1) and H14(2) of the word 'may' should be replaced with the word 'shall'. We have highlighted the use of the word 'may' which indicates a choice or option rather than the word 'shall' which means must or is required on many occasions throughout the General Scheme. We refer to the explanatory notes for Head 14 on page 28 of the General Scheme and highlight the wording 'reflect emerging best practice' which we believe should be followed.

This implicitly provides for a review process and is something we would favour, not just under this particular head but throughout the Bill and all its parts.

Head 15 – Agency of the Authority to facilitate contact between parties or to share information between parties

H15(3)

We strongly believe that counselling should be an option here. There is quite plainly an element of rejection and there are foreseeable outcomes in terms of mental health that should be provided for in terms of counselling.

Head 17 – Lodging of medical information and provided items on the Register

H17(3)

'A lodgement of medical information or provided items shall be done in such manner, and accompanies by such information, as the Authority may specify.'

We would have a concern about the discretion afforded to the Authority as set out in H17(3). Again there is an element of arbitrariness and autonomy provided for the Authority which may restrict the level of information lodged and as a result, available to the adoptee.

H17(5)

This part refers to consent to the entry, in a manner to be determined by the Authority. There are two issues with H17(5). The first issue concerns consent and the fact it is not defined. The second issue is as referred above, H17(3), the level of discretion and arbitrariness allocated to the Authority which is of concern and has potential to restrict the amount of information that will be made available to the adoptee under this heading.

Head 18 – Authority to communicate matches on Register and share medical information and provided items

In contrast to previous points above concerning the language and the use of the word 'may' and 'shall', we note in H18(1), H18(2), and H18(3), the use of the word 'shall' in all 3 subheadings.

We would like to draw the Committee's attention to a scenario that does not seem to have been provided for under Head 18. This is a situation where, for example, medical information is lodged but the relevant person is not registered in the Contact Preference Register, shall the Authority inform such person of the lodgement of medical or other information?

This perhaps highlights the approach in the Bill to the Register as being intended to be passive whereas the approach in the Bill to tracing is more active. That being said, however, we feel that the above scenario is an omission which should be rectified under Head 18.

Head 23 – Information source to retain and maintain records unless otherwise directed

Under Head 23 and the explanatory notes on page 44 of the General Scheme, and in particular, the second paragraph, it refers to records held by TUSLA are not to be transferred to the AAI. It is unclear what the policy intent of this statement is or the reason for stating this in the explanatory notes. Also it does not specify that records held by the AAI are not to be transferred to TUSLA. Clarification on this point would be welcomed.

Head 24 - Secondary Information source to transfer relevant records where directed by Authority

The provisions in Head 24 are generally welcomed and we note again the use of the word 'shall' frequently under this heading. That being said, we refer to the explanatory notes for Head 24 on page 47 in the General Scheme, and in particular, the second last paragraph of that page.

This again provides some degree of discretion to the Authority in terms of what is considered more appropriate and a priority. We believe that there should be some oversight or some restriction in this role assigned to the Authority including direction given by guidelines provided by the Minister as an alternative.

Head 28 – Search powers

Head 28, as seen above in previous headings of the General Scheme places more emphasis on data protection than on the constitutional right to identity.

Head 29- Interpretation

'affected person' is defined as a person whose entry in the Register of Births was made before the 31st of December 1970. This definition is also repeated in the explanatory notes to Head 29 on page 55 of the General Scheme. We would welcome some clarity for those persons whose entry in the Register of Births was made after the 31st of December 1970.

Head 31 - Amendment or cancellation of entries in the Register of Births

Head 31(5) refers to a decision being appealed but does not specify the right to appeal process. Nor does it specify the role of the Courts in such an appeal process.

Head 32 – Register of Acknowledged Identity

Head 32(1) provides for a 'Register of Acknowledged Identity'. Head 32(3) provides for a 'Certificate of Acknowledged Identity'. We feel that Head 32 would benefit from clarification. In particular, we refer to the explanatory note for Head 32 in the last paragraph of page 58 of the General Scheme.

In particular, it refers to a certificate will be recognised as the person's birth certificate for all lawful purpose. If this is a different form of birth certificate, it would be problematic and perpetuate the discrimination already suffered by adoptees in having a different birth certificate to other citizens.

Head 38 – Immunity

Head 38(2) provides that 'the State shall not be liable in damages in respect of any act done or omitted to be done by a person to whom subsection (1) applies in the performance or the purported performance by the person of its, her or her functions under this Act unless the act or omission concerned was done in bad faith'.

Bad faith is not defined. It indicates a level of intention and accordingly may not include negligence. We also note the explanatory note for Head 38 in the last paragraph in page 64 of the General Scheme which attempts to refer to negligence when it states "[...]the employee was acting in a reasonable manner".

Legally, this is not correct. Not acting in a reasonable manner is not the same as bad faith, "bad faith" being the actual wording in H38(1) and H38(2).

Head 39 – Accuracy of information available to relevant bodies

There is a total contradiction in the explanatory notes in Head 39 on page 65 of the General Scheme with the wording of the provisions as set out in Head 39(1) and Head 39(2).

Head 39 attempts to indemnify relevant bodies for damages in respect of the accuracy of the information processed. Besides the contradictions in the wording of the provisions and the explanatory notes, there is no oversight in place and no system of checks and balances. It is a blanket indemnification which is objectionable on many levels.

Head 40 – Restrictions of rights and obligations under the GDPR

As mentioned above, the approach in the General Scheme can be best described as à la carte approach to GDPR.

In Head 40(1), it states 'The rights and obligations provided for in Articles 12 to 22 and Article 34, and in Article 5 (in so far as any of its provisions correspond to the rights and obligations in Article 12 to 22), of the Data Protection Regulation, are restricted pursuant to Article 23(1)(i) of the Data Protection Regulation to the extent necessary to enable persons to access birth 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.'

We would like to highlight in particular 'to the extent necessary'. Again, as above, we are concerned with the lack of clarity, lack of definition and arbitrariness in the wording in the General Scheme.

We feel that such provisions should be much clearer from the perspective of allowing the adoptees to exercise their constitutional right to identity, which is the stated purpose of the General Scheme.

We feel that it is absolutely essential that some provision is included in the General Scheme for a review period for this legislation. The omission or lack of a review provision will lead to the constitutional right to identity of adoptees being potentially left in abeyance for years to come.