

ICCL Submission on the Birth Information and Tracing Bill, 2021

June 2021

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Overview

1. ICCL welcomes the opportunity to provide input on the Birth Information and Tracing Bill 2021, published on 11 May 2021. ICCL has previously recommended and reiterated the call of survivor groups and others on the need for legislation to provide immediate access to birth certificates and other relevant records for children born in Mother and Baby Homes and other institutions.
2. First, we set out the relevant legal framework and human rights law in this area. Second, we acknowledge the positive aspects of the Bill. Third, we highlight some areas of concern. Finally, we make recommendations to strengthen the Bill.

Part 1: Relevant legal framework

3. ICCL has previously highlighted the State's human rights obligations in relation to remedying institutional abuse that occurred in Mother and Baby Homes.¹ International human rights law provides that the right to an effective remedy requires the State to: (a) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (b) Provide those who claim to be victims of a human rights law violation with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation; and (c) Provide effective remedies to victims, including reparation.² A key issue underpinning effective investigations, access to justice, and remedies is access to information, including information for adopted persons about their identity.
4. The Irish Supreme Court has recognised a person's right to know the identity of their birth mother as an unenumerated constitutional right, but noted that it needed to be balanced against the birth mother's right to privacy, with "regard to all the circumstances

¹ ICCL, *Briefing note on the human rights obligations of Government following publication of Mother and Baby Homes Commission's Final Report*, March 2021.

² The right to a remedy is protected in various international human rights law treaties: Universal Declaration of Human Rights ("UDHR"), art. 8; International Covenant on Civil and Political Rights ("ICCPR"), art. 2; Convention on the Elimination of Racial Discrimination ("CERD"), art. 6; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), art. 14; Convention on the Rights of the Child ("CRC"), art. 39. Other relevant international declarations include the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHL and Serious Violations of IHL (2005).

of the case”.³ The right to privacy is guaranteed under Irish law as an unenumerated constitutional right.⁴ It is also protected by European and international human rights law.⁵

5. The right of access to information for adopted persons about their origins has been recognised in European and international human rights law. The European Court of Human Rights (ECtHR) has recognised that the right to know one’s identity, including access to information about parental and genetic identity, is an important component of the right to respect for private and family life.⁶ Similarly, the UN Convention on the Rights of the Child protects the right of the child “to preserve his or her identity” and states that “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.”⁷
6. The EU General Data Protection Regulation (“GDPR”), which came into force in May 2018, aims to give EU citizens “more control over their personal data.”⁸ The GDPR defines ‘personal data’ to include a person’s ‘physical, physiological, genetic, mental, economic, cultural or social identity’.⁹ ICCL believes that the GDPR requires the State to provide natural parents, adopted people and people who were placed in ‘informal care arrangements’ as children with their personal data.
7. Thus, the State has an obligation to fulfil the right of all individuals to access documents that contain their personal data and provide information about their personal identity, including their birth certificate. It is vital that every individual born in Ireland has access to their birth certificate. Birth certificates have been a matter of public record in Ireland since 1864 and it is important that all individuals are afforded access to such a fundamental record of their own personal identify.
8. In addressing the issue of enabling access to personal identity records, the government must also take into account the right to privacy of mothers and any interference must be provided for by law, demonstrably necessary and proportionate to the aim of fulfilling

³ *IOT v B and the Rotunda Girl’s Aid Society and MH v Rev GB and the Rotunda Girl’s Aid Society*, [1998] 2 IR 321, 349.

⁴ *Kennedy and Arnold v. Attorney General* [1987] IR 587.

⁵ Charter of Fundamental Rights of the European Union; European Convention on Human Rights (ECHR); International Covenant on Civil and Political Rights (ICCPR).

⁶ *Gasin v UK* (1989) 12 EHRR 36; *Odievre v. France* (App No 42326/98) ECHR 2003-III; *Godelli v. Italy* (App No 33783/09) 25 September 2012; *SH v Austria* (2011) 52 EHRR 6, para 83.

⁷ UN Convention on the Rights of the Child (UN CRC), article 8.

⁸ EU, *Summary of Regulation (EU) 2016/679 – protection of natural persons with regard to the processing of personal data and the free movement of such data*, 2020.

⁹ EU General Data Protection Regulation (GDPR), Regulation (EU) 2016/679 – protection of natural persons with regard to the processing of personal data and the free movement of such data, article 4(1).

the right to personal identity. ICCL would highlight the difference between a right to identity and a right to contact a person. In our view, the centrality of the right to access personal history goes to the core of a person's identity and provides a factor of considerable weight in providing access to such information.

9. Finally, another relevant international instrument is the International Convention for the Protection of All Persons from Enforced Disappearances. Unfortunately, Ireland has only signed and not yet ratified this Convention. Its provisions are relevant as they are indicative of international good practice and some may constitute international customary law.¹⁰ It provides for the right of family members "to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."¹¹ ICCL has repeatedly called on the Government to ratify this Convention and to be guided by its provisions in remedying institutional abuse, including in addressing mass graves and institutional burials.¹²

Part 2: Positive aspects of the Bill

10. ICCL wishes to acknowledge positive aspects of the Bill, including that it provides access to birth certificates¹³ and the right to be provided with some early life information¹⁴ for adopted persons and other relevant persons. It provides a statutory basis for a tracing service¹⁵, information sharing for the purposes of tracing,¹⁶ and a contact preference register.¹⁷ It also provides for the amendment or cancellation of entries in the Register of Births to "ensure that the particulars of birth of an affected person are accurately and correctly recorded"¹⁸ and the establishment of a Register of Acknowledged Identity.¹⁹

Part 3: Areas of concern in the Bill

11. There are some areas of concern, which could be clarified and addressed to strengthen the Bill.

¹⁰ See for example, ICRC *Customary IHL Study, Rule 114*.

¹¹ International Convention for the Protection of All Persons from Enforced Disappearances, 2006, art. 24(2).

¹² See for example, ICCL, *ICCL calls for action on disappeared children*, 2019; ICCL, *Submission on a Certain Institutional Burials (Authorised Interventions) Bill*, 2021.

¹³ Birth Information and Tracing Bill, 2021, Head 3.

¹⁴ *Ibid.* Head 5.

¹⁵ *Ibid.* Head 12.

¹⁶ *Ibid.* Head 15.

¹⁷ *Ibid.* Head 16.

¹⁸ *Ibid.* Head 31.

¹⁹ *Ibid.* Head 32.

12. *Restrictions on access to personal data:* There continue to be some restrictions on access to personal data for adopted persons and others. First, the Bill excludes from the definition of care information, care provided by “ (a) a birth parent or guardian of the child, or (b) a relative of the child who is providing care other than as part of a nursed out, boarded out or foster care arrangements, or (c) a person who is, or becomes, the adoptive parent of the child.”²⁰ In practice, this may exclude important information that may be key to an adopted person’s identity.
13. Second, the Bill does not provide a right for relatives of those who died in institutional custody to obtain information about their relative. It only provides for limited “birth relative information, defined as “(a) whether the person has a birth relative, whether living or deceased; (b) where the person has a birth sibling – (i) the sex of the birth sibling and (ii) whether the birth sibling is older or younger than the person.”²¹ This is problematic and inconsistent with international human rights law. The ECtHR has found that the relationship between a person and their deceased relative can fall under the right to respect for family and private life (article 8).²² For example, in 2013 the ECtHR held that a hospital’s failure to give information to a mother regarding the death of her infant son and the disappearance of his body in 1983 violated article 8 of the European Convention of Human Rights due to the State’s continuing failure to provide information about what happened.²³ The failure to provide information to family members regarding the circumstances of the death of a relative and the location of their body may also constitute a violation of the international prohibition on torture, inhumane or degrading treatment²⁴ and the right to know the truth regarding enforced disappearances.²⁵
14. Third, the Bill does not provide a right for mothers to receive their full records. As noted, access to information, including records, is essential to the realisation of access to justice and the right to a remedy.
15. *Minimum age for access to information:* The Bill provides that a relevant person, who has attained 16 years of age has a right of access to their birth certificate²⁶ and to certain information.²⁷ This age limitation seems incompatible with international human rights

²⁰ *Ibid.* Head 2 – Interpretation.

²¹ *Ibid.*

²² ECHR, *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence*, 2020.

²³ *Zorica Jovanovic v Serbia* (2013) ECHR 21794/08.

²⁴ UN Human Rights Committee, *General Comment no. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights on the right to life*, 30 October 2018, CCPR/C/GC/36, para. 56. See Communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 9.10; Communication No. 2120/2011, *Kovalev v Belarus*, Views adopted on 29 Oct. 2012, para. 11.10.

²⁵ International Convention for the Protection of All Persons from Enforced Disappearances, 2006, art. 24(2).

²⁶ *Ibid.* Head 3.

²⁷ *Ibid.* Head 5.

law. International human rights law provides that the right to identity is a right of the child. For example, the UN Convention on the Rights of the Child provides for the right of the child to preserve their identity and that 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.”²⁸ Human rights are not dependent on a person turning a certain age, however, parents or legal guardians may provide appropriate direction and guidance in the exercise by the child of their rights, in a manner consistent with the evolving capacities of the child.²⁹ The Irish Special Rapporteur on Child Protection sets out that “birth and early life information should be available to an adopted child’s parents on behalf of the child at any point after birth, and directly to the child from the age of 12.”

16. *Limited definition of incorrect birth registration:* The definition of “incorrect birth registration” does not address situations where the date of birth of the person has been falsified.
17. *Limited institutions addressed in the Bill:* The Bill sets out a list of institutions (14 Mother and Baby Homes and 30 County Homes) in Schedule 1. These institutions are included in the definition of care information, which encompasses “the name of a person in charge and the name of any person who cared for a relevant person while he or she was resident as a child in an institution listed in schedule 1.”³⁰ The Bill provides that a relevant person, who has attained 16 years of age has a right of access to care information. A relevant person is defined as including “a person who resided as a child in an institution listed in schedule 1.”³¹ This may limit the scope of information to be provided and who can access information. The Clann Project has identified up to 182 agencies, institutions and individuals that “were involved in Ireland’s closed and secret system of adoption from 1922 onwards”.³²
18. *Lack of enforcement mechanism underpinning requests for information:* The Bill provides that the Agency and Authority may request information from a person who has this information in their possession or under their control.³³ It states that “a person who receives a request... shall comply with the request.” However, there is no enforcement mechanism underpinning this provision as not complying with the request does not entail consequences under the Bill.

²⁸ UN CRC, article 8.

²⁹ UN CRC, article 5.

³⁰ Birth Information and Tracing Bill, 2021, Head 2.

³¹ *Ibid.* Head 2.

³² Clann Project, *Principal Submission to the Commission of Investigation into Mother and Baby Homes*, 2018, p. 7.

³³ Birth Information and Tracing Bill, 2021, Head 13.

19. *Counselling supports for birth parents*: The Bill provides for counselling support for birth parents who expressed a no contact preference.³⁴ The right to access counselling support could be expanded to all birth parents and adopted persons.

Part 4: Recommendations

ICCL believe the following recommendations would address the key areas of concerns and strengthen the Bill:

- (i) Ratify the International Convention for the Protection of All Persons from Enforced Disappearances.
- (ii) Remove restrictions on access to personal data:
 - a. Remove the exclusions in the definition of care information;
 - b. Provide for a right for relatives of those who died in institutional custody to obtain information about their relative
 - c. Provide for a right for mothers to receive their full records;
- (iii) Remove the minimum age for access to information: In line with the Special Rapporteur on Child Protection's recommendation, ensure that birth and early life information is available to an adopted child's parents on behalf of the child at any point after birth, and directly to the child from the age of 12.
- (iv) Amend the definition of 'incorrect birth registration' to ensure that it addresses situations where the date of birth has been falsified or is incorrect.
- (v) Ensure that the list of institutions named in the Bill is comprehensive and does not pose a barrier to the scope of information to be provided and who can access information.
- (vi) Ensure that a lack of compliance with a request for information under the Bill has an enforcement mechanism.
- (vii) Extend the right to access counselling support provided by or on behalf of the Child and Family Agency to all birth parents and adopted persons.

³⁴ *Ibid.* Head 4.

About ICCL

The Irish Council for Civil Liberties (ICCL) is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights.