

Introduction

The following text presents a legal opinion on behalf of Child Identity Protection (CHIP)ⁱ on the compatibility of the Irish Birth Information and Tracing Bill 2022 (Bill)ⁱⁱ with international legal standards on the right to identity and right to access to information. The Bill, published by the Children’s Minister of Ireland on 12 January 2022, claims to provide adopted people, formerly boarded out people and people who were institutionalised in Mother and Baby or County Homes, with access to their birth certificates and other records. The Bill seeks to enshrine in the law of Ireland the importance of a person knowing his or her origins. It is argued that the Bill “provides for the full and unredacted release of birth and early life information to persons who have attained the age of 16 years.”ⁱⁱⁱ It is reported that the cross-party Joint Oireachtas Children’s Committee has worked thoroughly on the text of the Bill and after holding wide consultation and public hearings, proposed 83 changes to the Bill’s provisions.^{iv} However, the text of the current Bill^v shows that the majority of these recommendations have been rejected or ignored. This legal opinion does not intend to provide an extensive analysis of the Bill, which has already been done elsewhere,^{vi} but focuses on three main aspects (i.e.: mandatory information session, limited scope of data available and exclusion of most mothers and relatives from information rights):

International Standards on the right to identity and the right to access to information

Each person has the right to identity in terms of birth registration, name and nationality ([Article 24 of the International Covenant on Civil and Political Rights 1976 \(ICCPR\)](#)). Article 8(1) of the Convention on the Rights of the Child (CRC) further provides that State Parties are obliged “to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”.^{vii} The right to identity has life-long impact and it enables other human rights to be realised.^{viii} Furthermore, Article 19(2) of the ICCPR^{ix} provides that the right to freedom of expression includes the freedom to seek, receive and impart information “without distinction of any kind, such as (...) birth.”^x

The United Nations Special Rapporteur on Freedom of Opinion and Expression “has consistently stated that the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own.”^{xi} Accordingly, “the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government.”^{xii} Similarly, in their 2004 Joint Declaration, the three special mandates on freedom of expression at the United Nations, Organisation for Security and Co-operation in Europe and the Organization of American States stated that “[t]he right to access information held by public authorities is a fundamental human right.”^{xiii}

Consequently, the right to access personal information held by a public authority is extrinsically linked to the person’s right to identity. Given the scope of Article 8 (1) CRC and the child’s right to identity in family relations, the achievement of this right entails preserving information concerning the identity of [the child’s] biological family and all the events of their life story before alternative care placement and/or adoption.^{xiv} The fulfilment of this right will also encompass the ability to access this information. In this respect, in his report in 2020, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence outlined the importance of archives and ensuring access.^{xv} In cases where the child has been relinquished or abandoned, according to the [UN Guidelines for the Alternative Care of Children](#), the State should respect the child’s “right to access information on his/her origins where appropriate and possible under the law of the State.”^{xvi} In addition, the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention recommended that adoption records should be preserved in perpetuity, which allows for compliance with Article 30 on State’s responsibility for ensuring

access to information.^{xvii} A number of regional instruments are also relevant, promoting a general right to accessing information.^{xviii}

Only when information is preserved in its entirety and with integrity, as well as is fully accessible, can the person's identity be speedily re-established when elements are missing and/or falsified during their childhood as required by Article 8(2) CRC. Indeed, in this context, the Special Rapporteur on the sale and sexual exploitation of children in her report in 2017 has recommended to States to “[e]nsure the right to information about one's origins and access to information about the rights of victims of illegal adoptions”.^{xix} In cases of systematic and ongoing abuse, the UN SR on transitional justice has recommended actions for the design and implementation of effective apologies.^{xx} Respecting the above rights also contributes to the achievement of Sustainable Development Goals (SDG) 16.3 in terms of wide access to justice and SDG 16.9, ensuring a legal identity for all.

Based on this international framework, there are a number of areas where the Bill is not fully aligned:

1. Mandatory information session

While professional assistance may be helpful for accessing information, mandatory sessions have the potential to restrict the exercise of information rights. It is therefore important that mandatory information sessions about privacy be removed from the Bill. It is important to note that birth certificates in Ireland have been public documents for over 150 years. As such, this requirement is discriminatory as some adoptees are required to attend this mandatory information session in order to access public documents, that are freely available to the general population. It seems that the mandatory information session is a pre-condition to exercise a fundamental right, which applies arbitrarily only to this group. Furthermore, it would appear that the priority of the public authority is to respect the privacy rights of the biological parent.^{xxi} This provision fails to distinguish between the act of accessing a birth certificate and the act of (potentially) contacting a parent. It further seems too heavily rely on the exception in Article 15(4) EU General Data Protection Regulation, which otherwise grants the data subject the broad right to access all their data.

2. The limited scope of data available

It is problematic that the Bill defines subcategories of personal data, for example, early life information, care information or birth information. This restricts the right of access to all information, because the Bill does not provide access to full range of identity elements and in fact, tends to perpetuate missing elements. All information should be immediately available without a public authority prioritising which information should be disclosed or not. This restriction is contrary to the principle of maximum disclosure, which establishes “a presumption that all information is accessible.”^{xxii} A promising good practice in this respect can be found in the work of the Stasi Records Archive in Germany, where every individual has the right to view the records that the Ministry for State Security collected about him or her.^{xxiii}

3. Exclusion of most mothers and relatives from information rights

Linked to the definitions of subcategories of personal data, under section 2 of the Bill, “genetic relative information” covers only the following non-identifying information: (a) whether the person has a genetic relative, or had such a deceased relative; (b) where the person has a genetic sibling or had such a deceased sibling— (i) the sex of the genetic sibling, and (ii) whether the genetic sibling is or was older or younger than the person. As a result, the affected person can be informed that they have a sibling (or used to have one), but their identity will not be disclosed. Accordingly, the Bill ignores the States obligation to keep families together through family reunification, in particular sibling groups and maintain contact when separated (Article 9 CRC and paragraph 17, 37 and 62 [UN Guidelines for the Alternative Care of Children](#)). Reuniting siblings is at the core of preserving and re-establishing child's right to

identity, including family relations. In addition, it appears that the Bill limits the mother's access to information about their children that were forcibly and illegally removed from them. This is because "mothers" are not included in the section 2 definition of "relevant person" who may request their information from the public authorities. Mothers can request information only if their child has died in an institution included in the *Schedule*. This is problematic because the *Schedule* lists only 14 Mother and Baby institutions and 30 County Home institutions. As a result, the majority of the 182-plus entities involved in separating unmarried mothers and their children during the 20th century are left out.^{xxiv} Similarly, relatives can apply for information only if the child in question died in an institution listed on the *Schedule*. A related problem is that the Bill allows for the parents of deceased adopted children and adults to request information, but other "next of kin" may only apply after it has been ascertained that those higher in the Bill's order of immediate relatives are deceased.^{xxv} This means that the Bill preconditions the exercise of a fundamental right on the death of a third party.

Given these major deficiencies in the Bill, Child Identity Protection advocates for a wider consultation of affected stakeholders and full alignment with international standards.

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ⁱ Child Identity Protection (CHIP) is an international NGO established in 2020 based in Geneva www.child-identity.org

ⁱⁱ Hereafter the Bill.

ⁱⁱⁱ See [Press release from the Department of Children, Equality, Disability, Integration and Youth](#).

^{iv} [Maeve O'Rourke, "Birth Information and Tracing Bill 2022: An Analysis"](#).

^v [See the text of the Bill as of 19th January 2022](#).

^{vi} For example, see [Maeve O'Rourke, "Birth Information and Tracing Bill 2022: An Analysis"](#). See also, Clodagh Finn, [Unless amended the birth information bill will do more harm than good](#) (Irish Examiner 02.03.2022) and [CLANN briefing note](#).

^{vii} Cf Article 8 of the ECHR which has been interpreted to include "personal identity" within the meaning of "private life." [*Goodwin v the UK* (2002) 35 EHRR 18 at 90]

^{viii} For example, access to education, health, social services and employment

^{ix} Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. Available here <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. Ireland State Party, Signature: 1973, Ratification/Accession: 1989; No reservations on Article 19 on freedom of expression/access to information. (source https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=en#EndDec)

^x See International Covenant on Civil and Political Rights, Article 2; Universal Declaration on Human Rights, Art 2.

^{xi} [Report of the Special Rapporteur, Mr. Abid Hussain](#) E/CN.4/1998/40 (28 January 1998), para 11.

^{xii} *Ibid*, para 14.

^{xiii} [Joint Declaration](#) by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (6 December 2004) p 2. See other relevant international standards promoting maximum disclosure in McDonagh, M. (2013), The Right to Information in International Human Rights Law, Human Rights Law Review at <https://www.corteidh.or.cr/tablas/r30698.pdf>

^{xiv} Cécile Jeannin and Mia Dambach, [Policy Brief 1: Respecting the child's right to identity in intercountry adoption?](#) Geneva, Switzerland: Child Identity Protection, p 12. The addition of "family relations" in Article 8 has its origins in Argentina's history and request to restore the identities of the children, who had been illegally removed from families linked to the opposition of the Dictatorship. Noting the advocacy efforts in this context, particularly by the grandmothers, the term "family relations" arguably goes beyond nuclear ties.

^{xv} Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#) (2020), paras 70-73.

^{xvi} [UN General Assembly, Guidelines for the Alternative Care of Children](#), A/RES/64/142 (24 February 2010), para 42.

^{xvii} [HCCH, Conclusions and Recommendations and Report of the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention](#) (2010), recommendation 28,

^{xviii} [Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Council of Europe Convention on Access to Official Documents](#) and [EU data protection regulations](#)

^{xix} [Report of the Special Rapporteur](#) para 95 (j).

^{xx} United Nations General Assembly, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#) (2019), para 48-60.

^{xxi} See section 17 of the Bill.

^{xxii} [Joint Declaration](#) by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (6 December 2004) p 2.

^{xxiii} See [Federal Commissioner for the Archives of the Ministry of State Security of the German Democratic Republic](#).

^{xxiv} See Claire McGettrick, [List of Institutions, agencies and personnel involved in separating unmarried mothers from their children](#) (2022) Dublin: Justice for Magdalenes Research and Adoption Rights Alliance.

^{xxv} See sections 26-30 of the Bill.