

Michael James Boland is a final year BCL student at University College, Cork. In this letter, he considers the Adoption (Information and Tracing) Bill 2016 which will place the right of an adopted person to their birth and adoption information on a statutory footing for the first time in Irish law bringing Ireland one step closer to compliance with the UN Convention on the Rights of the Child

The Adoption (Information and Tracing) Bill 2016

Michael James Boland

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Dear Editor,

There have been six pieces of amending legislation on adoption since the Adoption Act 1952 which have been repealed and consolidated by the Adoption Act 2010. However, notwithstanding the wealth of the apparent legislative attention given to the area of adoption in Ireland, it is only now that the adopted persons' right of access to birth and adoption information will be placed on a statutory footing in the Adoption (Information & Tracing) Bill 2016 (2016 Bill).

Notwithstanding the foregoing, pre-existing legislation on adoption permitted access to birth information albeit in very limited circumstances. Section 22(5) of the 1952 Act granted such access on the authorisation of the courts or An Bord Uchtála. Subsequently, section 8 of the Adoption Act 1976 only allowed disclosure if it was in the best interests of the child.¹

Significantly, the Supreme Court in *I O'T v B*² held that an informally adopted person enjoys a qualified constitutional right to birth information guaranteed by Article 40.3 of the Constitution which may be restricted by a natural mother's right to privacy. The task of harmonising these competing rights rests with the courts. However, in spite of this, McIntyre notes that the majority of the Supreme Court seemed to view the right of the mother to privacy as the paramount concern.³ Barron J considered that while 'public attitude to absolute secrecy has been weakened',⁴ greater 'emphasis should be placed upon the undertaking as to secrecy given to the natural mothers...'⁵ In light of this decision, the 2016 Bill seeks to achieve a balance between the rights of the adopted person, on the one hand, and those of the birth parent, on the other.

¹ The restriction in s 8 is unsurprising given the context in which the 1976 Act came to be. The Act was enacted in response to *M (McL) v. An Bord Uchtála* [1977] IR 287 where the majority of the Supreme Court quashed an adoption order as 'null and void' on the basis that the birth mother was unaware that she could revoke her consent to the adoption prior to the final adoption order. Consequently, the 1976 Act renders valid all consents made and orders signed before the final adoption order is made.

² *I O'T v B and Ors and MH v Father Gerard Doyle and Ors* [1998] 2 IR 321.

³ Owen McIntyre, 'Adoption Law: The Case for Reform, Part I' (2001) 4(1) Irish Journal of Family Law 6, 10.

⁴ *I O'T* (n 2) 380.

⁵ *ibid* 381.

While the forthcoming legislation will regulate and facilitate access to birth information and post-adoption contact through statute, the Adoption Authority already operate the National Adoption Contact Preference Register to enable adopted persons separated from their birth parents through adoption to make contact with each other.⁶ This system will be now be placed on a statutory footing and be renamed the Register of Adoption Contact Enquiries (the Register).

Fundamentally, the Adoption (Information & Tracing) Bill recognises the rights of adoptees and those of the birth parents and for the first time in Irish law, puts retrospective access to birth records and information on a formal legal footing.

The Bill's retrospective effect therefore places an obligation on the Adoption Authority to gather and retain relevant records pertaining to the adopted person. The Bill requires the Authority to prepare an index and also create a database of the records.

The right of adopted persons to access their birth certificate is also provided for in the Bill. In 2012, the Adoption Authority received 50 applications from adopted persons for the release of their birth certificate.⁷ This figure dropped slightly to 43 applications in 2013⁸ and 38 applications were received in 2014.⁹ However, in line with the decision in *IO'T v B*, the right of access to one's birth certificate is contingent on the birth mother's approval following a consultation between the mother and the Child & Family Agency (CFA) who are responsible for information sharing. The veto system preserves the confidentiality and anonymity of the birth mother who is entitled to issue a statement of 'compelling reasons' as to why the birth certificate information should not be disclosed.

Notwithstanding the ECtHR ruling in *Keegan v Ireland*¹⁰ and the resultant Adoption Act 1998, birth fathers have always been silent and largely invisible parties in adoption practice because contact with the birth father is wholly dependent on the mother's willingness to supply his name which she may withhold for a variety of reasons.¹¹ As a result, the child could not form a relationship with their father and vice versa. This Bill goes a long way towards remedying this scenario. Once the Civil Registration (Amendment) Act 2014 is

⁶ Department of Health and Children, *Adoption Legislation: 2003 Consultation & Proposals for Change* (2005) 93.

⁷ The Adoption Authority of Ireland, *Annual Report 2012* (2012).

⁸ The Adoption Authority of Ireland, *Annual Report 2013* (2013).

⁹ The Adoption Authority of Ireland, *Annual Report 2014* (2014).

¹⁰ *Keegan v Ireland* [1994] 18 EHRR 342.

¹¹ Vivienne Darling, 'The Changing Face of Adoption' (1999) 2(4) *Irish Journal of Family Law* 2, 2.

commenced, registration of the name of the birth father on the birth certificate will be compulsory in all cases with very limited exceptions.¹² Therefore, if an application for birth certificate information is granted under the Bill, the adopted person will know the identity of both their birth mother and father.

In addition, the Bill allows the adopted person to apply separately for the provision of the forename and surname of their birth father. The veto system applies equally to birth fathers as it does to birth mothers, and so the natural father can provide a written statement to the CFA setting out his reasons why the application should not be granted.

Adoption has always been one of the most complex and sensitive issues in human relationships. This is why support and guidance will be made available by the CFA to anyone who applies to have an entry made in the Register. Support will also be given before information is disclosed or contact is made.

The Adoption (Information & Tracing) Bill gives adopted persons and birth parents the opportunity of forming a relationship in a structured and regulated way. The 2016 Bill is a welcome development to the law on adoption which reflects the changing attitudes regarding lifelong anonymity between adoptive and birth families.

The Bill is long overdue given that many neighbouring jurisdictions have allowed access to birth information for many years. Adopted persons in Scotland enjoyed a right of full access to birth records since 1930. In 1976, adult adoptees in England and Wales enjoyed a similar right, while 11 years later adopted persons in Northern Ireland were also granted access to their birth records.¹³

Darling rightly points out that ‘[u]p to the 1980’s secrecy had been the keynote to adoption and a “clean break” the governing principle’.¹⁴ While an element of secrecy still pervades adoption in Ireland and while the mother’s right to privacy remains central to the practice, the 2016 Bill is a clear statement that the strict secretive system no longer exists.

Is mise le meas,

Michael James Boland

¹² See further Law Reform Commission, *Report on Legal Aspects of Family Relationships* (LRC 101-2010) [2.01] – [2.32].

¹³ The Law Society’s Law Reform Committee, *Adoption Law: The Case for Reform* (2000) 16.

¹⁴ Darling (n 11).