

The Adoption (Information and Tracing) Bill, 2016

The Adoption (Information and Tracing) Bill, 2016 attempts to provide a legislative basis for information and tracing services – to both adopted people and natural parents. It provides for the transfer and safeguarding of relevant records into the custody of the state. It also provides a legislative basis for the National Contact Preference Register.

In light of opposition from Senators to restrictions on release of birth information contained in the proposed government amendments Committee Stage of the Bill was paused to facilitate a further intensive period of briefings and consultations with Minister Zappone and political groupings in both Houses of the Oireachtas and key stakeholders, including adopted people and their representatives, constitutional lawyers, and natural or first mothers. This period of consultation concluded in July and was followed by a further period of consultation with the Attorney General with Minister Zappone offering a proposal of a new scheme or approach that would represent the best way forward as a result of speaking and listening to a wide-range of views from key stakeholder. Having considered many possibilities, Minister Zappone suggested that the best and most appropriate outcome is that there is a disclosure of birth information to adopted persons in all cases, but in a manner that provides as much protection for the privacy rights of the natural parent as possible.

Following on from extensive consultations, Minister Zappone presented an alternative interpretation of the constitutional case that the Attorney General advises is primary in setting out the parameters of this Bill, drawing on the expertise of the constitutional lawyers the Minister had consulted in order to offer an alternative interpretation of the constitution.

Minister Zappone suggested that there are other ways to protect the right of privacy of the birth parent that would be fair and proportionate, and that would not stand in the way of disclosure of birth information for their daughter or son.

The Attorney General did not accept this view, nor the alternative proposal for amendments that were put forward. The Attorney General holds the view that it is constitutionally unacceptable to allow unrestricted access to birth information for adopted people. His advice is that, if there is an objection by a natural parent to the release of information, even though this may happen in only a few circumstances, that there must be some procedure to harmonise the natural parent's privacy rights with that of the right to information concerning one's origin.

In light of the need for a legislative basis for information and tracing, and the opposition to the constitutional requirement for some form of harmonising rights between adopted person and natural parent, Minister Zappone and her officials have put together the following set of 4 options on how to proceed with the legislation.

- The first two options focus on the prime issue of how to harmonise the rights between adopted person and natural parent in relation to the release of birth information; and
- The second two options take that off the table. This will mean that in the case of the second two options the Bill will not seek to provide a legal basis to provide for the

release of information and that the difficulties that remain in this regard, will continue to stand.

Option 1

Proceed with the Bill as is – including the Government amendments proposed in May 2019.

On the prime issue of harmonisation, if the natural mother can be located and she objects to the provision of information to her daughter or son, then a process begins with the Adoption Authority to get the views of both sides and make a determination regarding the release of information according to criteria laid out in the Bill.

Option 2

Proceed with the Bill as is – including the Government amendments proposed in May 2019, with additional amendments to Part 5, on how to harmonise rights in the release of information.

In Minister Zappone's consultation with the Attorney General, he has agreed that the Bill could contain a Presumption in Favour of the release of the information to adopted people. This is, in the Minister's view, significant, given his advice regarding constitutional matters.

The Attorney General has agreed for two things to be proposed to be included in the Bill:

- 1) The Inclusion of amendments to the Long Title of the Bill (this is new).

The text would reference a right of the persons to information concerning their origins and the identity of their birth parents. This will assist the Adoption Authority of Ireland to seek to vindicate the identity rights of the applicants by giving them, as they are now explicitly named in legislation. The text would mention birth parents' rights too – but these have already been clearly articulated in the draft legislation. What is new in the Long Title is a clear reference to the right of a person to information concerning their origins.

- 2) To insert a new section in the Bill, by amendment. A part of this amendment will outline that, where there is an objection to the release of birth information by the natural parent, if the case between the adopted person and the birth parent are equal, the Adoption Authority of Ireland will be obliged to release the information.

Option 2 will include both of these proposed changes. And it will provide for a defined period for the natural mother to opt-in to state her objection to the release of information. If she does not do this, information will be released automatically on application from the adopted person. This will be a more efficient way for Tusla to proceed. They will not have to locate the natural mother on receipt of the application for information from the adopted person.

Option 3

Would remove provisions in respect of the issue of harmonisation and the legal basis for the release of information. It would remove all provisions of the Bill with the exception of:

- The Safeguarding of Records;
- Tracing for the purposes of Re-union; and
- Putting the National Contact Register on a Statutory footing.

Option 4

Would remove all provisions of the Bill with the exception of those related to the Safeguarding of Records.

Part 2 would remain – to provide a legal basis for the gathering, safe keeping and preservation of records.