FROM THE MINISTER OF HEALTH

Department of Health
An Roinn Sláinte
Männystrie O Poustie
www.health-ni.gov.uk

Ms Carál Ní Chuilín, MLA

caral.nichuilin@mla.niassembly.gov.uk

Castle Buildings
Stormont Estate
BELFAST, BT4 3SQ
Tel: 028 9052 2556
Email: private.office@health-ni.gov.uk

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Dear Caál

During the Second Stage debate of the Adoption and Children Bill on 5 October 2021, you raised a number of issues and queries on the Bill and indicated that you intended to raise these at Committee. In response, I advised that I had asked officials to review Hansard so that, when they come before the Committee, they will have detailed answers.

In order to provide as much clarity on the Bill as possible, I thought it might be helpful to provide further information now on the issues you raised. This will hopefully be of assistance to you in engaging with stakeholders and also my officials during the Committee's scrutiny of the Bill.

Responses to the key issues which you raised are provided in the Annex to this letter.

Yours sincerely

Robin Swann MLA
Minister of Health

Copied to:
All MLAs

Annex

RESPONSE TO QUERIES RAISED DURING SECOND STAGE DEBATE ON THE ADOPTION AND CHILDREN BILL

I would appreciate "private fostering" and, indeed, "private adoption" being outlined in clause 1. I would like there to be further explanation of what those private arrangements may entail.

"**Private fostering**" is defined in Article 107 of the Children Order. It is an arrangement whereby someone other than a parent or relative of the child or a person who has parental responsibility for the child, cares for a child under the age of 16 years (or in the case of a disabled child, under 18 years) for more than 28 days.

Unlike fostering, the Health and Social Care Trust does **not** place the child in a private fostering arrangement. However, if this private arrangement lasts more than 28 days then there is a duty, set out in Regulations, on the parent of the child, the person who is privately fostering the child and anyone involved in making such arrangements to notify their local Trust of the arrangement.

If the child is being cared for by a relative then this is **not** a private fostering arrangement. Such an arrangement would be considered to be "informal kinship care".

If a Trust formally places a child with a relative this arrangement would be "formal kinship care".

A practical example of a private fostering arrangement would be where a parent knows they are going into hospital for a period which will last more than 28 days and they arrange for a friend or neighbour to look after their child whilst they are in hospital/recovering.

<u>What must a Trust do if they receive notification of a child being privately fostered?</u>
When a Trust receives notification of a child being privately fostered it must take steps to ensure the welfare of the child is being satisfactorily safeguarded and promoted.

The Trust must also ensure that advice is given to the private fosterer if it considers such advice it is needed.

Current Regulations, the Children (Private Arrangements for Fostering) Regulations (NI) 1996, set out the timescales and the information which must be provided to a HSCT when notifying them of a private fostering arrangement and the frequency of visits to the child by a Trust.

Trusts have received no such notifications during recent years. In order to address this, actions have been taken to raise awareness of the duty to notify, however these have not led to any notifications being received.

What will the Bill do in respect of private fostering?

The Bill amends the Children Order to place a **duty on Trusts to promote awareness** within their area of requirements as to the notification of private fostering. There is a power in the Bill to make regulations which will set out the action that Trusts must take when they receive notification that a child is **proposed to be** privately fostered.

Articles 106 to 117 of the Children Order defines private fostering and sets out the arrangements and requirements. Provision in the Bill will amend these Articles and the Department does not consider it necessary to replicate the definition already provided in Article 107 of that Order in the Bill.

"Private adoption"

Within Northern Ireland, only a statutory adoption agency or a voluntary adoption agency which is registered with RQIA (referred to as an Appropriate Voluntary Organisation (AVO)) can make arrangements for the adoption of children.

Under current legislation, there are 5 statutory adoption agencies in Northern Ireland which are the 5 HSC Trusts.

All voluntary adoption agencies who make arrangements for the adoption of children must be registered with RQIA under Part 3 of the Health and Personal Social Services

(Quality, Improvement and Regulation) (NI) Order 2003 (the 2003 Order), and are regulated by the Voluntary Adoption Agencies Regulations (Northern Ireland) 2010.

There are 3 voluntary adoption agencies registered with RQIA in Northern Ireland: Family Care Adoption Services; Adoption Routes; and Barnardo's NI.

Under the Bill, in addition to being an adoption agency, each Trust is an adoption authority. As an adoption authority, each Trust is required to maintain an adoption service. This means that a Trust must, among other things, make and participate in arrangements for the adoption of children and provide adoption support services, for example, assessment, placement and counselling services.

Registered voluntary adoption agencies assist Trusts by also making and participating in arrangements for the adoption of children and providing adoption support services and the Bill makes provision relating to the exercise of these functions by voluntary adoption agencies.

Current legislation, the Adoption (NI) Order 1987, prohibits **private adoption agencies from operating** by providing in Article 11 that a person other than an adoption agency (i.e. Trust or registered voluntary adoption agency) shall not make arrangements for the adoption of a child, or place a child for adoption, *unless he is a parent of the child and the proposed adopter is a relative of the child*. However, there are a number of circumstances in current legislation where a child may be the subject of an adoption order application even though they have not been placed for adoption by an adoption agency. These adoptions are referred to non-agency adoptions and may include, for example, adoptions by the partner of a parent, cases where authority foster parents wish to adopt a child placed with them on a fostering basis, adoptions by relatives and private foster parents.

Similar provision has been included in clause 96 of the Bill which sets out the steps in relation to arranging an adoption that must not be taken by a person who is not an adoption agency or by a person acting in pursuance of an order from the High Court. It is anticipated that the procedure with regards to non-agency adoptions will be set out in Statutory Adoption Guidance and the current Regional Adoption Policy and

Procedures will also be updated accordingly, for example, to reflect any amendments to timescales.

The Bill only permits adoption agencies or parents (where the proposed adopter is a relative of the child) to make arrangements for the adoption of children, In all cases, including non-agency adoptions as outlined above, an application for an adoption order must be made to court and the relevant HSC Trust will be required to make a report to the court. It is not therefore possible for a child to be adopted without reference to a court and the involvement of a HSC Trust. The Department therefore considers that no reference or definition of “private adoption” needs to be included in the Bill.

Clause 3 refers to the regional adoption board. My understanding is that the adoption authorities are the five health and social care trusts. The regional board and its relationship to each of those trusts needs further definition. As has been raised, there needs to be a seamless link between each adoption authority and their procedures. The guidance on that needs to be clearer and seamless as well.

Under the Bill, every HSC Trust is the adoption authority for its area. The HSC Board (HSCB) is also an adoption authority for any area which is not covered by a HSC Trust. This is also currently the case under the 1987 Adoption Order. While technically an adoption authority, the HSCB does not act in practice as an authority in any HSC Trust area.

The Health and Social Care Bill is currently being considered by the Assembly. This Bill will provide for the dissolution of the HSCB. Assuming successful passage of that Bill, minor amendment of the Adoption and Children Bill will be required to remove reference to the HSCB. Whilst some of the current functions of the HSCB will pass to the Department, this will not include its role as an adoption authority. Trusts will continue to act as the adoption authority for their area and the Bill also contains a power to enable the Department to make regulations to provide that, in relation to prescribed adoption functions or services, another Trust is to be the adoption authority for an area. Also the duty currently placed on the Board to establish and maintain the NI Adoption and Children Act Register will be placed on the Department instead.

The Bill will place a duty on each Trust to provide a fit-for-purpose adoption service – one which meets the needs of everyone connected with adoption in terms of assessment, placement and support services.

The Bill contains a power that will enable the Department to make regulations to provide for some adoption functions or services, relating to both domestic and intercountry adoption, to be undertaken or delivered on a regional basis, for example, one Trust on behalf of the region.

Trusts currently deliver some adoption services on a regional basis, for example, the recruitment of prospective adopters, the provision of information about adoption and the Regional Intercountry Adoption Assessment Service (RIASS). It is anticipated that this could be extended, by way of regulations, to other services such as the provision of adoption support services and intermediary services. Regionalising some aspects of the service could promote greater efficiency, more equal access to services and consistency of service user experience.

If kinship is special guardianship, the Bill needs to say so. The lack of mention of kinship undermines the work involved in and the value of kinship. If kinship is not special guardianship, fair enough, but I want to know exactly what it is.

There are three main categories of kinship arrangement, however most kinship care arrangements in Northern Ireland are informal.

Formal kinship care

Currently, under the Children Order, when providing accommodation for a child it is looking after, a Trust must initially consider whether arrangements can be put in place to enable the child to live with their parents or with a relative, friend or other person connected to the child. This requirement will continue to apply. Where such a placement with relatives is possible and is consistent with the child's welfare, the placement will be a formal kinship foster care placement – a fostering arrangement where a child is placed with a relative or friend by a HSC Trust following assessment and approval by a panel. As authority foster carers, formal kinship foster carers are entitled to the same level of foster care allowance and support as non-kinship foster carers.

Informal kinship care arrangements known to Trusts

These are kinship placements arranged privately between parents and a family member or friend, with no Trust involvement initially. There could then be subsequent HSC trust involvement in the exercise of their general duty to support children and families in need under Article 18 of the Children Order.

Informal kinship care arrangements not known to Trusts

There is no legal requirement to notify the HSC Trust of an informal kinship care arrangement, and in the majority of cases the HSCT is not involved in a kinship care arrangement unless there is a safeguarding issue or the child or family is deemed to be "in need".

The title of the Special Guardianship Order (SGO), and the relevant provisions of the Bill, do not refer specifically to kinship arrangements because, unlike Kinship Care

Orders (KCOs) in Scotland, SGOs apply to both kinship and non-kinship carers. For example, any person, other than the parent of the child, can apply for an SGO including, for example, a non-relative foster carer seeking to establish a permanent legal relationship with a child in their care, and by a kinship carer who wishes to formalise an informal care arrangement established without the involvement of the Trust.

In many ways, however, SGOs as they relate to children currently or previously known to Trusts who are being cared for by a relative are similar to KCOs in Scotland. KCOs are targeted at children on the edge of care and are designed to keep children out of care or to help them leave care. SGOs when implemented will have exactly the same purpose and effect.

UK Government data shows that the majority of carers who obtain an SGO in England are kinship carers. For example, 89% of the 3,700 children who left care on an SGO in England in 2019-20 went to live with relatives or friends. Given the comparatively high prevalence of kinship foster care in Northern Ireland, it is anticipated that there will be a correspondingly high proportion of Special Guardians who are kinship carers.

Kinship carers who apply for an SGO will have their support needs assessed as part of an initial court report prepared by their local Trust. They will also be entitled, at any other time until the child turns 18, to request an assessment of need for special guardianship support services. It is worth noting that kinship care orders in Scotland only remain in force until a child turns 16, unless exceptional circumstances apply.

As a reflection of the crucial role played by kinship carers in providing a caring home for our vulnerable children and young people, the Bill and supporting regulations will introduce a range of supports. It will further support formal kinship foster carers by:

- Where a Trust is considering adoption for a child or is satisfied that a child ought to be placed for adoption but is not yet authorised to do so (by way of parental consent or the making of a placement order), the Trust will be required to consider the placement of the child with dually approved carers, enabling the child to be placed with approved prospective adopters initially on a fostering basis. Before doing so, the **Trust must initially consider placing**

the child with a relative, friend or other person connected to the child who is an approved foster carer i.e. a formal kinship foster carer. It is only when a kinship care arrangement has been ruled out that a placement with dually approved carers should be considered.

- Enabling kinship carers who are not content with a decision about whether they should be approved to foster to request an independent review of the decision;
- Placing on a statutory basis the Going the Extra Mile scheme, which enables former kinship foster carers to be supported in continuing to provide care and accommodation for a young person up to age 21; and
- Enabling young people in formal kinship arrangements to benefit from the suite of provisions to support care leavers into adult life, including support for continuing education.

The Bill and supporting regulations will support informal kinship foster carers by:

- Giving Trusts wider scope to provide financial assistance to support kinship families in need. Within this context, the Department will publish guidance to Trusts on how to support informal kinship carers. This approach will give social workers the discretion they need to determine the level and nature of support to be provided to a family and on the basis of assessed need. It is anticipated that additional informal kinship carers will come forward to seek support from Trusts as a result of this wider provision.
- Enabling informal kinship carers to apply for an SGO and to seek support.

The Minister remains open to considering further legislative provision in the longer term if this is considered necessary to support kinship carers.

Clause 9 covers the general power to regulate adoption agencies. Again, I want to know the differences between those adoption agencies that are under the guardianship, care or the scrutiny of the regional health and social care boards and those agencies that are not. What regulates them? I want to see additional clarity on those differences when it comes to private fostering and adoption arrangements.

Within Northern Ireland, it is not possible for any 'body' to engage in the making of arrangements for adoption, without being regulated (that is, registered and inspected) by RQIA.

Statutory Adoption Agencies

There are 5 statutory adoption agencies in Northern Ireland which are the 5 HSC Trusts. Each Trust must provide an adoption service in its area which meets the needs of everyone connected to adoption in terms of assessment, placement and counselling services. Existing adoption legislation, and also the Bill, confers functions and duties directly on each Trust, as an adoption authority and agency.

Registered Voluntary Adoption Agencies

All voluntary adoption agencies who make arrangements for the adoption of children must be registered with RQIA under the Health and Personal Social Services (Quality, Improvement and Regulation) (NI) Order 2003 (the 2003 Order). Existing adoption legislation, and also the Bill, confers functions and duties directly on each registered voluntary adoption agency, as an adoption agency.

There are 3 voluntary adoption agencies registered with RQIA in Northern Ireland: Family Care Adoption Services; Adoption Routes; and Barnardo's NI.

Voluntary Organisations

There are 2 voluntary organisations who provide adoption support services to prospective adopters, adopters, adopted persons, and to birth parents and birth relatives in Northern Ireland. They are: Adopt NI; and Adoption UK (Northern Ireland).

These organisations are **not** registered with RQIA and are therefore not authorised to undertake adoption functions i.e. the approval of prospective adopters or making arrangements for the placement of children for adoption. They provide adoption support services only, and their services may be commissioned by the HSC Trusts. The adoption services currently provided by voluntary organisations include:

- Tracing services
- Intermediary services
- Support groups
- Adoption support services to adopted families

The Bill will enable some adoption support services to be provided by a voluntary organisation (which is not registered with RQIA) on behalf of a HSC Trust. Such services will be specified in regulations to be made under the Bill. However, as such organisations do not come within the definition of an adoption agency, the Bill does not place any duties on such organisations, although they will be specified in contracts if provided on behalf of a HSC Trust. This will be similar to a Trust having in place contracts or SLAs with voluntary organisations to provide a range of services, for example, advocacy or mediation services.

Regulation of adoption agencies

The adoption service provided by adoption agencies (the HSC Trusts and registered voluntary adoption agencies) is currently regulated by the Adoption Agencies Regulations (Northern Ireland) 1989.

These Regulations provide for the establishment of adoption panels by adoption agencies and for arrangements to be made by agencies in relation to their adoption work. They specify the procedures to be followed before and after a child is placed for adoption. They make provision for the confidentiality and preservation of case records and for access to case records and disclosure of information. They also make provision in respect of the transfer of case records between adoption agencies and progress reports to former parents of children who have been freed for adoption.

In addition, registered voluntary adoption agencies are regulated by the Voluntary Adoption Agencies Regulations (Northern Ireland) 2010.

These regulations are made under the Adoption (Northern Ireland) Order 1987 (the 1987 Order) and the 2003 Order. Part III of the 2003 Order provides for registration and inspection of establishments and agencies, including voluntary adoption agencies, by RQIA. The Regulations set out a number of requirements for the voluntary adoption agency, including:

- a requirement to have a statement of purpose setting out the aims and objectives of the agency;
- about the persons carrying on and managing a voluntary adoption agency;
- a requirement for a manager to be appointed for the agency, and information to be obtained in relation to the fitness of the manager;
- general requirements in relation to the proper conduct of a voluntary adoption agency, and the need for appropriate training;
- about the conduct of a voluntary adoption agency, in particular as to the protection of children, complaints, staffing, record keeping and fitness of premises.

The powers in the current adoption legislation, the 1987 Order, to make such Regulations have been carried forward into the Adoption and Children Bill (clauses 9 and 10) so that the Department will be able to continue to make Regulations to regulate adoption agencies.

Private fostering and adoption arrangements

As explained, private fostering arrangements are not made by Trusts or agencies; they are arrangements made privately by parents, with input from Trusts as necessary to safeguard a child or promote his/her welfare. Also, current adoption legislation only permits adoption agencies to make arrangements for the adoption of children. This will continue to be the case under the Bill. As a result, the issue of the regulation of agencies is not relevant.

The management of agencies in clause 10. What role, if any, will the statutory advocate have? Again, I welcome the advocate having statutory power and vires, but the role is not clear to me.

We assume that reference to a statutory advocate here means an advocate that will be appointed to the child under the arrangements to be made under clause 132 of the Bill for advocacy services.

Clause 132 of the Bill amends the Children Order to introduce a new duty on each authority i.e. Trust to make arrangements for providing advocacy services for looked after children, former looked after children, special guardianship children or adopted children who wish to make representations (including complaints) under Article 45 about the discharge of any of the authority's functions under the relevant part of the Children Order or in connection with adoption. Trusts will also be required to publicise their arrangements for providing advocacy services.

<u>The role of the advocate</u>

Advocacy is about empowering children and young people to make sure that their rights are respected and their views and wishes are heard at all times. In relation to complaints, we intend advocacy to mean the provision of assistance to and representation for individuals to make complaints. Our intention is that this should involve the advocate facilitating the making of a complaint which a child wishes to make, being led by the child's decision. An advocate should not prevent a child making a complaint because the advocate believes this is not in the child's best interests.

The advocate's role in representations and complaints procedures is to help the child at the earliest possible stage. Successful early involvement could prevent young people having to use a complaints procedure at all. The advocate's role in the complaints procedures is:

- to empower children or young people by enabling them to express their views, wishes or feelings, or by speaking on their behalf;
- to seek the resolution of any problems or concerns identified by the child by working in partnership with children and only with their agreement;

- to support children and young people pursuing a complaint through every stage of the complaints procedure and to provide them with information about their rights and options, helping them clarify their complaint and the outcomes they are seeking;
- to speak for or represent children at any stage of the complaints process, including at the informal stage or at any formal hearing or interviews.

At a meeting of the panel appointed to review the authority's initial consideration of the representations, the child or young person may be accompanied by his advocate and the advocate may speak on his behalf.

Independence of advocacy services

While the advocacy clause itself does not specify "independent" services, the clause does contain regulatory making powers that allow the Department to specify who may provide advocacy services. It is intended that this regulation-making power will be used to ensure independence by specifying that services may not be provided by a person who is or may be the subject of the representations; is responsible for the management of a person who is or may be the subject of the representations; manages the service which is or may be the subject of the representations; has control over the resources allocated to the service which is or may be the subject of the representations; or is or may become involved in the consideration of the representations on behalf of the Trust.

The intention is that no one who has an interest in the subject of the complaint and therefore in its outcome should be provided under the Trust's advocacy arrangements as an advocate in relation to that complaint.

It will be important for Trusts to ensure that the advocacy services that they provide have sufficient independence and distance from their policy development, their service provision, their complaints service, their care planning and resource management functions. The Bill provides a further regulation making power requiring authorities to monitor the steps that they have taken with a view to ensuring that they comply with

any regulations made for the purposes of ensuring independence [see reference above].

The option also remains to amend the clause to more clearly reflect that advocacy services will be independent of HSC Trusts. Any proposed amendment will be brought forward during Consideration Stage of the Bill.

Currently, the Voice of Young People in Care (VOYPIC) provides independent advocacy services on behalf of all Trusts on a non-statutory basis. It is expected that this model of provision, that is, the outsourcing of provision to a voluntary organisation, will continue once such services are placed on a statutory footing by way of the Bill. It is important that children experience and perceive the service as independent.

Clause 12 is headed: *"Independent review of qualifying determinations of adoption agencies".* I believe we need greater definition, because it is not there. For me, clause 12 also presented some concerns about, arguably, clause 60 and 61, which are on disclosure. I want to know what the rights of adopted children are, and the Bill is not very specific on them.

The establishment of an Independent Review Mechanism (IRM) under Clause 12 is intended to provide transparency and independence in the main in relation to the issue of whether a person or persons should be approved as prospective adopters, with the aim of encouraging more people to consider applying to adopt and building confidence in the adoption assessment process. A person who disagrees with an adoption agency's decision about their suitability to adopt will be able to apply to the Department for an independent review of that decision.

Clause 126 also amends the Children Order to enable the Department to make regulations which will also enable individuals to seek a review of a fostering panel's decision about them, e.g. whether they should be approved to foster.

The categories of decisions in respect of which the IRM will be available (referred to as "qualifying determinations") will be prescribed in Regulations, and will include:

- decisions where an adoption agency does not propose to approve a person suitable to adopt;
- decisions made by an adoption agency relating to disclosure of protected adoption information about an adult, including a decision not to disclose;
- decisions where a foster provider does not approve a person suitable to foster; and
- decisions where a fostering provider proposes to terminate or change the terms of approval of an existing foster carer.

Regulations will also set out the duties and powers of the panel and also the duties of adoption agencies and fostering providers.

The detail on how the IRM will operate will be set out in the regulations which will be subject to public consultation.

Clause 60 and 61

The Department recognises the importance and value of providing adopted people with access to information to enable them to make informed decisions about their lives. Agencies, when making decisions about whether to proceed with an application for disclosure of protected information or whether to make a disclosure, will have a duty to consider the welfare of all parties involved and will be required to consider the implications of decisions and actions for everyone involved. Agencies will work in partnership with all parties involved, taking account of their views and wishes in decision-making. As far as possible, each agency will operate from the premise that all information relevant to his/her birth and adoption should be disclosed to an adopted adult, subject to the impact on other parties being fully considered and the necessary supports being put in place for each adopted adult seeking disclosure.

Clauses 60 sets out the duties on an adoption agency where a person applies to it for protected information about one or more adults, and clause 61 makes the equivalent provision where protected information about a child is applied for. Under the Bill, protected information includes identifying information about the people involved in an adoption, so that when taken alone or together with other information that the applicant possesses, would enable them to be identified or traced.

It will be possible for anybody to apply to an adoption agency for protected information subject to certain conditions being satisfied. The agency will have the discretion to release the information and will have to take various factors into account when deciding whether it will be appropriate to do so.

Protected information relating to an adult

In making a disclosure decision in relation to protected information in respect of an adult, the adoption agency must consider the welfare of the adopted person, any views obtained from the person the information is about, and other matters which may be prescribed in Regulations. It will also need to consider all of the circumstances of the case.

The Department proposes, subject to consultation, to provide in regulations a right to seek an independent review of an adoption agency's decision about whether or not to disclose protected information about an adult, for example where it has decided:

(a) not to proceed with an application from any person for disclosure of such protected information;

(b) to disclose information against the express views of the person the information is about; or

(c) not to disclose information about a person to the applicant where that person has expressed the view that the information should be disclosed.

Protected information relating to a child

The Bill introduces an additional layer of protection for children about whom protected information is held by an agency: such information will only normally be disclosed where the agency is satisfied that it is in the interests of the child's welfare to do so.

Where the information is about an adopted child, the Bill makes express provision to apply the paramountcy principle, as set out under clause 1, on the ground that the welfare of these vulnerable children is paramount and decisions in relation to information disclosure (i.e. from adoption records) must be carefully considered in order to protect the privacy and to safeguard the child from inappropriate disclosure of sensitive, personal information.

The paramountcy principle provided in the Bill only applies in relation to children to be adopted or to those who have been adopted. Disclosure under this group of clauses relates specifically to disclosure of adoption information, and the rights of the adopted person must be given particular consideration, given the sensitivities of adoption.

Where an adopted person is still a child, there is likely to be a greater impact, compared to a child who is not adopted, as the information being requested may relate specifically to that child's adoption. The information is likely to involve emotionally charged details, perhaps previously unknown to a child/young person who is at a particularly difficult life stage or whose adoptive family are at a difficult juncture. It is possible the child or young person may be re-traumatised by inappropriate disclosure

of information alongside the requirement to be cognisant of their adoptive parents having full parental responsibility and legal rights and duties.

Where the information is about a child who has not been adopted, the adoption agency remains under a duty to have particular regard to the welfare of the child.

The adoption agency will be required to take all reasonable steps to obtain the views of any parent or guardian of the child, and the child, if it considers it appropriate having regard to their age and understanding, as to the disclosure of the information. However, notwithstanding those views, the adopted child's welfare must continue to be the agency's paramount consideration in deciding whether to disclose the information.

The Minister mentioned data protection, and I welcome that, but I have looked across each chapter and clause, and data protection is not mentioned once. I think that is a mistake, because data protection has, as the term suggests, legal protections that are very clearly laid out. If they are not clearly laid out, there are implications for the Bill under articles 8 and 13 of the European Convention on Human Rights (ECHR).

UK data protection law will continue to apply in all of the circumstances governed by the Bill. For example, in all of their decision-making about the disclosure of adoption information, adoption agencies will be bound by the requirements of the UK General Data Protection Regulation (GDPR). All of the provisions of the Bill are fully compatible with both the principles and provisions of the GDPR. This is not made explicit in the Bill as it is understood that all new legislation must be drafted in such a way as to be compatible with existing Data Protection law.

For example, personal information contained within adoption records will remain subject to the provisions of UK Data Protection legislation. Adoption agencies will be required to act in accordance with the Data Protection Act when exercising their discretion to disclose information, where a question arises about the disclosure of personal or 'third party' information, such as identifying information about members of the birth family, adoptive carers, or former foster carers. In some circumstances, this will involve taking decisions about disclosure which balance a data subject's right of access against another individual's rights relating to their own personal data.

All of the provisions in the Bill concerning the processing and retention of information - for example, in relation to the Northern Ireland Adoption and Children Act Register (NIACAR), the Adopted Children Register, the Adoption Contact Register and adoption records generally - are compatible with the overarching requirement to protect and manage information in accordance with the Data Protection Act and the GDPR. This will also be the case in relation to regulations made under the Bill.

The Bill and accompanying Data Protection Impact Assessment have been reviewed by the Information Commissioner's Office (ICO) prior to its Introduction and the Department has given a commitment to further consult with the ICO during the

development of any regulations relating to the processing or disclosure of information.

Clause 17 is headed "Advance consent to adoption". It cross-references with clause 51, which covers provisions that allow a parent to relinquish their child for adoption if they wish. In order to do so, they must have no further involvement with their child. Clause 51 should have a bit more of a focus on consent. When talking about clause 17, the explanatory and financial memorandum (EFM) uses language that we need to look at as it talks of a parent's consent to "his child" being adopted. As recently as yesterday, we mentioned that a woman has choices, and one of those choices is the adoption of her child. That needs to be reflected in the Bill.

Under clause 17, a parent or guardian can give advance consent to the final adoption order, at the same time they give consent to their child being placed for adoption, or at any subsequent time. As with clause 16 - placement with consent, such advance consent may be to adoption by the prospective adopters identified in the consent or by any prospective adopters who may be chosen by the agency.

They can also give notice, at the same time or subsequently, that they do not wish to be informed when an application for an adoption order is made (although they may retract such a statement later). This allows a parent to have no further involvement in the adoption proceedings, if they so wish. However, this is not a requirement for the giving of such advance consent. Also, giving advance consent to adoption does not mean that the parent must have no further involvement with their child.

At any time until the point that an application for an adoption order has been made, a parent or guardian can withdraw their consent and request the return of their child. Clause 51(8) sets out how a parent or guardian must notify the adoption agency that they have withdrawn their consent (i.e. it must be withdrawn by notice in writing to the adoption agency or on the form prescribed under court rules).

Where consent is withdrawn before the child has been placed for adoption, the adoption agency will not be able to place the child for adoption until it obtains a placement order. Where the child has already been placed and the birth parents

request the child's return, the agency will be required to comply with that request unless it applies for a placement order.

The provisions set out in clause 17 are also subject to the provisions in clause 51 which relate to what is meant by consent.

Clause 51 applies generally to parental consent to the placement of a child for adoption and adoption orders. It defines the meaning of consent as "consent which is given unconditionally and with full understanding of what is involved; a person may give consent to adoption without knowing the identity of the person(s) in whose favour the adoption order will be made". It also sets out provisions to be applied to references in Chapter 3 of the Bill to any parent or guardian of a child **giving** or **withdrawing consent** to the placement of a child for adoption, or the making of an adoption order (including advance consent to an adoption order as outlined in clause 17), and the way a parent or guardian must give their consent or withdraw their consent (i.e. by notice in writing to the adoption agency or on the form prescribed under court rules). Subsection (4) also provides that such consent is ineffective if the child is less than six weeks old.

The language used in the Explanatory and Financial Memorandum which refers to clause 17 and a parent who consents to his child being placed for adoption is an oversight and will be amended, at the earliest opportunity, to refer to a parent who consents to their child being adopted. We note that there are other such references; these will also be reviewed and amended, where appropriate.

Clause 18 relates to placement orders, and, again, it references the Children Order. The alignment of adoption law with the Children Order 1995 is very welcome. However, the 1995 Children Order will probably need to be amended, if not fresh legislation brought forward, because it needs to take into consideration and include reference to the Domestic Abuse and Family Civil Proceedings Act 2021.

The Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 (the DACPA) contains provision to amend the Children Order.

Specifically, section 35 (Factors relevant to residence and contact orders) of the DACPA amends Article 12A (residence and contact orders and domestic violence) of the Children Order to provide that where a court is considering whether to make a residence or contact order in a favour of any person, the court shall have regard to any conviction of the person for a domestic abuse offence involving the child. The amendment goes on to set out what is considered to be a domestic abuse offence against the child.

Section 37 (special measures directions in family proceedings) of the DACPA also amends the Family Law (Northern Ireland) Order 1993 to provide that rules of court must make provision enabling the court to make a special measures direction in relation to a person ("P") where—

(a) P is a party to or witness in family proceedings,

(b) P is, or is at risk of being, subjected to abusive behaviour by a person who is—

  (i) a party to the proceedings,

  (ii) a relative of a party to the proceedings (other than P), or

  (iii) a witness in the proceedings, and

(c) P and that person are personally connected.

“Family proceedings” includes family proceedings under the Children Order.

Sections 35 and 37 of the DACPA have not yet been commenced, therefore the amendments do not yet apply. It will be a matter for the Department of Justice to determine when such amendments should become operational.

In addition, the Department has also given a commitment to review the current proposed amendment to the definition of "Harm" in the Children Order. Currently, the Bill adds to the definition to include as an example "*impairment suffered from seeing or hearing the ill-treatment of another*". It was introduced in response to a recommendation made during public consultation on the Bill that it should provide for stronger protection of children affected by domestic abuse. As a result, courts, police and authorities will be required to consider the effect on a child of witnessing domestic abuse when making critical decisions about their care or upbringing.

While welcoming this amendment, some stakeholders consider that it does not go far enough and should be extended to also include where a child has been adversely affected or impacted as a result of being present during the ill-treatment of another, although not witness to it. For example, where they are living in a house where domestic abuse has taken place but they have not necessarily seen or heard that abuse.

The Department is exploring this further with Department of Justice officials and also Counsel, with a view to bringing such an amendment forward during Consideration stage of the Bill. As part of this, we will consider whether the definition can be linked to the provision in the DACPA.

I found clause 32: *"Return of child in other cases"* and clause 33 difficult to read. We are talking about human beings here, but it reads as though we are talking about returning items. I found that wording a bit inappropriate.

The technical, and sometimes impersonal, nature of legislative terminology is in no way indicative of the Department's strong commitment throughout the development and implementation of this Bill to promote the needs and best interests of the vulnerable children and young people it is designed to support. To amend the drafting of clauses 32 and 33 would be to risk introducing unintentional ambiguity and confusion to the law in this area, which would in turn create the potential for unnecessary delay in safeguarding or securing a permanent home for a child. Also, it is consistent with terminology used in equivalent legislation in other jurisdictions.

Clause 38 concerns recovery orders. The reasons for those have been listed in the context of breaches that are outlined in clauses 15 to 37. Again, we need to look at the definition of harm in clause 133, and at the introduction of subsequent legislation.

A court can issue a recovery order where a child has been taken away from an adoption placement in contravention of the Bill or where there are grounds for believing that someone is intending to take him or her from a placement.

Clause 133 amends the definition of harm as it applies both in the Children Order and the Bill. This means that a court will be under a duty to have regard to any harm a child has suffered or is likely to suffer when taking decisions relating to a child's adoption or, for example, when determining a question with respect to a child's upbringing during care proceedings. Clause 1(7)(b) makes clear that the welfare checklist (including harm or risk of harm to a child) applies not just when a court is deciding whether to make an adoption or placement order, but when it is deciding whether to grant leave in respect of any action (other than initiating court proceedings) that an adoption agency or individual may take under this Act. In the context of clause 38, this means that a court will have to consider harm or risk of harm to a child when deciding whether to authorise someone to take a child who has been, or is at risk of being, unlawfully removed from a placement or whether to authorise a constable to search premises for a child in those circumstances.

The new definition of "harm" would continue to apply in any subsequent legislation that might make provision about decision-making relating to the adoption of a child, as defined in clause 1, in proceedings for court orders under Article 3(4) of the Children Order, and in the full range of circumstances under both the Children Order and the Bill where "harm" must be taken into account. Using the same definition for both the Adoption and Children Bill and the Children Order will ensure consistency of approach by courts when they take decisions in relation to which the child's welfare must be the paramount consideration.

We need to consider a welfare checklist. I looked for such a checklist in the Children Order and in the Bill, but I could not find it, even though children's welfare is mentioned throughout the Bill. It is important that the concept of consent be included in the checklist. It is mentioned in clause 1(4) and is relevant throughout the Bill, particularly in clause 52, which concerns the modification of the Children Order in relation to adoption. The welfare checklist is important in every clause, but certainly in relation to kinship, which has been missed in that clause and should be included.

The welfare checklist is set out in Article 3(3) of the Children Order and specifies what the court must have regard to when coming to a decision about the care and supervision of a child.

A similar welfare checklist will be introduced by the Adoption and Children Bill under clause 1(4), which the courts and adoption agencies must have regard to when making decisions on adoption. It includes a requirement on the court or adoption agency, for example, to consider the value to a child of a stable and harmonious family unit, have regard to the child's ascertainable wishes and feelings, and the views of the child's relatives, about the decision relating to the child's adoption.

This checklist is modelled on the equivalent Children Order provision, tailored to address the particular and lifelong circumstances of adoption. The Bill makes the welfare of the child the paramount consideration for courts and adoption agencies in all decisions relating to adoption, including in deciding whether to dispense with a birth parent's consent to adoption.

Clauses 60 concerns disclosing protected information about adults. Often, as I know from some of my constituents who found out that one of their grandparents had been adopted as a child, people want to know about their family history. They want to find things out. We need to look at that. While we need to protect people's rights, people need to be able to access information. That is vital.

The Bill promotes the right of an adopted person's birth relatives to seek information and/or contact with the adopted person and in some cases for the adopted person's birth relatives and relatives through adoption or marriage, including their direct descendants (i.e. children and grandchildren) to make contact with each other, subject to certain conditions and in the circumstances set out below. The provisions on this issue differ according to whether the information sought relates to an adoption that took place before or after the commencement of sections 55 to 64 of the Act, which relate to disclosure of information about a person's adoption. For ease of reference, these are described as "pre-commencement" and "post-commencement" adoptions.

Pre-commencement adoptions

For pre-commencement adoptions, there will be no change to how an adopted person or others will be able to seek access to adoption records. The framework under regulation 15(2) of the Adoption Agencies Regulations (NI) 1989 ("the 1989 Regulations") will continue to apply, so that adoption agencies will retain the discretion to disclose information, as appropriate.

An adoption agency will retain the discretion to allow access to its case records and disclose information from them as it thinks fit for the purposes of carrying out its functions as an adoption agency. This provides adoption agencies with flexibility to disclose as much information from its records as is reasonably possible, subject to other legislative requirements and considerations, e.g. Data Protection legislation. The discretionary powers can also be exercised retrospectively, enabling adoption agencies to allow access to records created in the past.

Where the question arises about the disclosure of personal or 'third party' information, such as identifying information about members of the adopted person's birth family, adoptive carers, or former foster carers, the agency must act in accordance with the Data Protection Act.

Clause 102 will enable an adopted person to access information about their adoption, including their birth certificate, and to make contact with their relatives through an **intermediary service**. Under the Bill, people with a prescribed relationship to an adopted person [see below] will be able to apply to the intermediary service for support in contacting that adopted person's relatives.

Using the powers provided in clause 102 and also the general regulation making powers in clause 9, Regulations will be made which will introduce a new framework allowing for an adoption agency to provide intermediary services to facilitate sharing of information and contact. Regulations will specify how adoption agencies will undertake an intermediary role, the mechanism by which a person can access intermediary services and will enable the sharing of information between adoption agencies and the Registrar General.

The new regulatory framework will also enable adoption agencies, when providing intermediary services, to facilitate contact and information sharing between adopted persons, their relatives (broadly their birth family/relatives) and persons with a prescribed relationship to the adopted person (broadly their spouses/partners, siblings through adoption and descendants), including in circumstances where the adopted person cannot be found, lacks capacity or has died. This would permit/facilitate the sharing of information, including birth certificate information, relating to a deceased adopted person with their descendants subject, where required, to the consent of birth relatives. It cannot be assumed that contact will be welcome and wanted in all cases.

Post-commencement adoptions

Clauses 55 to 64 concern access to information about post-commencement adoptions. Clause 60 will enable anybody to apply to the appropriate adoption agency for protected information about an adult, including for example their adopted relative - subject to certain conditions being satisfied. The agency will have the discretion to

release this information but will have a duty to consider the welfare of the adopted person and take into account the views of all of the people the information is about when deciding whether it should be disclosed. There will therefore be a balance to be struck between promoting the rights of people to access information about an adoption and the duty on agencies to protect the interests of the adopted person and others.

I ask for additional information about clause 61, which concerns disclosing protected information about children. Subsection (2) says:

> ***"The agency is not required to proceed with the application for disclosure for information unless it considers it appropriate to do so."***

I want to see the guidance and criteria for that. I understand that people are coming at this from a good place, but, in the past, particularly in the Magdalene laundries and mother-and-baby homes, information was power. That power was used to control people and prevent their access to information. An awful lot of power was in the hands of one or two people. It is hard to legislate for that, but we have an opportunity to ensure that that is not repeated.

Clause 61 relates to disclosure of adoption information which includes protected information about a child (as a child). It will apply to disclosure of information about adoptions made following the commencement of the Adoption and Children Bill and not to historical adoption cases, e.g. adoptions of children whose mothers were placed in Magdalene laundries and mother and baby homes. The provision introduces additional steps that an adoption agency must take, and further matters that it must take into consideration, when deciding whether it is appropriate to proceed with an application for the disclosure of protected information about a child, or whether to disclose such information. In factoring in this added layer of protection for children, the Department's objective is to protect the privacy of children and to safeguard them from inappropriate disclosure of sensitive, personal information. It is anticipated that protected information in relation to a child will only normally be disclosed where the agency is satisfied that the child's welfare is not compromised by making the disclosure.

Clause 61 sets out the matters that an adoption agency must take into account in deciding whether to proceed with an application for the disclosure of protected information about a child. Where the protected information is about an adopted child or a child who is to be adopted, the paramount consideration must be the welfare of the child to protect the privacy and to safeguard the child from inappropriate disclosure of sensitive, personal information. Information relating to an adopted child could

include emotionally charged statements, perhaps previously unknown to a child /young person who is at a particularly difficult life stage or whose adoptive family is at a difficult juncture. It is possible the child or young person may be re-traumatised by inappropriate disclosure of information alongside the requirement to be cognisant of their adoptive parents having full parental responsibility and legal rights and duties.

Where the information is about a child who has not been adopted, the adoption agency remains under a duty to have particular regard to the welfare of the child.

Where the adoption agency decides to proceed with the application, clause 61 also places a duty on the agency to take all reasonable steps to obtain the views of any parent or guardian of the child, and the child, if the agency considers it appropriate having regard to their age and understanding, as to the disclosure of the information. Where a person applies to the agency for information that identifies both an adult and an adopted child, the agency must also take reasonable steps to obtain the views of the adult as to the disclosure of that information.

The Bill also enables the Department to make Regulations which may specify further matters that an adoption agency must consider in deciding whether to proceed with an application for the disclosure of protected information involving either an adult or a child. The Regulations will be subject to public consultation before being made.

Clause 65 concerns the meaning of adoption. It is laid out in chapter 4. When you look at areas around the border — Fermanagh, Cavan, Monaghan, Derry, Donegal — you see that some parishes there are all-island. That includes not only Catholic but Church of Ireland parishes. In the past, some of the religious institutions were adoption agencies, and those parishes were referred to on birth certificates as well as some of the paper work that people were subsequently able to retrieve. It is important that that is reflected.

From 1950, with the introduction of the Adoption of Children Act 1950, it became unlawful for any body to make arrangements for the adoption of children unless it was a registered adoption society or a welfare authority. However, at that time there was no statutory requirement for such societies to retain their records for a period of time or to transfer their records to another society, if they ceased to operate as an adoption society. From 1969, the Adoption Societies Regulations (NI) 1969 introduced a new duty for each registered adoption society to preserve its adoption records and documents for at least 25 years.

Previously in Northern Ireland there were 2 voluntary adoption agencies which were affiliated to different faiths: Family Care Adoption Services (FCAS) (formerly Family Care Society) and Family Routes (formerly Adoption Routes). FCAS was affiliated to the Catholic Church from 1969 until 2014; Family Routes was affiliated to the Church of Ireland until 2019.

Under the Adoption Agencies Regulations (NI) 1989 both FCAS and Family Routes will be required to hold the indexes to all adoption case records, and the case records where an adoption order was made for 75 years. FCAS holds case records from several agencies which placed babies for adoption and fostering in the past. Family Routes, as part of their separation from the Church of Ireland, manages and maintains the archive of the Hopedene Mother and Baby Home and Kennedy House records, as well as 467 historical adoption files. However, neither organisation would hold agency files for adoptions granted in the South. Any query about such an adoption would need to be directed to TUSLA.

Work is ongoing to consider the recommendations made by the Truth Recovery Design Panel in relation to the issue of access to adoption records which has emerged. To address these issues and to provide greater clarity on the issue of disclosure, work is underway to develop guidance for adoption agencies on the disclosure of adoption records held by them.

Clause 65 of the Bill provides for the recognition of adoptions made after the appointed day (i.e. after the commencement of Chapter 4 of the Bill), including Hague Convention adoptions and adoptions made in another country and recognised by the law of Northern Ireland. This will include adoptions made in the Republic of Ireland. For adoptions which took place before the appointed day, Article 39 (Meaning of adoption in Part V) will continue to apply in relation to the recognition of adoption orders made in countries outside of the United Kingdom.

If you wish to provide further clarification about what you would like to see reflected in the Bill in relation to this clause, we would be happy to consider the matter further.

I will raise an issue on clause 68. The legislative position has been that:
As a woman who is just over — well, a good bit over — 55, I wonder what that means. Does it relate to the life expectancy of an adoptive parent?

> ***"it must be presumed that once a woman has attained the age of 55 years she will not adopt a person after execution of the instrument".***

What is that? Our life expectancy is, thankfully, slightly longer now. Given that there is a shortage of people who can foster and adopt, it is important for that to be clarified.

Clause 68 sets out the rules when determining inheritance rights (particularly the distribution of property) involving an adopted person. It does not relate in any way to the eligibility to adopt.

Eligibility to adopt and age

The Bill does not contain an upper age restriction on applying to become an adoptive parent, but there is a minimum age of 21 years. This is consistent with the current law on adoption and age limits.

More broadly, age is one consideration among many that must be considered as part of the assessment of prospective adopters. Older and more experienced individuals could take on the care of older children, provided they will have capability, in health and other terms, to meet the child's varied demands in growing years and to be there for them into adulthood.

Clause 68 – purpose and rationale

Clause 68 sets out the rules of interpretation of instruments concerning the disposition (i.e. distribution) of property. A good example of an instrument of this kind is a will. The purpose of the provisions is to place the adopted child and any natural child of the adoptive family on an equal footing in respect of entitlement to property, insofar as that is possible.

It is important to note, however, that it remains open to any person agreeing to an instrument concerning the distribution of property (such as a will) to make their own

provision as to how an adopted child should be dealt with - see the reference to contrary intention in subsection (1).

Subsection (2) concerns the application of clause 66(1) and (2) of the Bill to dispositions which depend on the date of birth of a child etc. It sets out rules regarding when an adopted child is to be treated as having been born, for the purposes of the disposition. Subsection (2) provides examples of phrases in wills where subsection (2) can operate. Subsection (4) clarifies the effect of subsection (3) and makes clear that it does not effect for example, an adopted child's contingent interest in a deceased birth parent's estate after adoption.

Subsection (5) applies where it is necessary to determine for the purposes of a disposition of property effected by instrument (for example, a will) whether a woman can have a child. It answers the question, how should this be determined given that an adopted person is to be treated in law as if born as the child of the adopter (clause 66)? The problem is relevant, for example, where a deceased person (A) leaves a sum of money to be divided equally between the children of a living woman (B). If B can potentially adopt a child at any age (subject to the rules mentioned above), when can the money be divided between the children?

To solve this problem, subsection (5) creates a presumption that a woman who has attained the age of 55 years will not adopt a person after the execution of the instrument (i.e. after the instrument has been given legal effect). If a woman does adopt a person after that point, that person will not be treated as her child for the purposes of the instrument.

<u>Relationship with existing law</u>

Clause 68 mirrors Article 42 of the Adoption (Northern Ireland) Order 1987 which has been in operation since 1989.

Subsection (5) is also consistent with the rules against perpetuities set out in the Perpetuities Act (Northern Ireland) 1966. Those rules are designed to make sure that a future interest in property (e.g. a right to money under a trust created by a will) must vest within a defined period of time (known as the perpetuity period). Section 2 of the

1966 Act applies where there is a question that turns on whether a person can have a child at some point in the future. It creates a legal presumption that woman cannot have a child over the age of 55.

Will the Minister provide further detail on clause 76 on the adopted children register, specifically in the context of clauses 12, 60 and 105 in relation to privacy and disclosure? They are all connected and related to each other.

Clause 76 continues the duty on the Registrar General to maintain the Adopted Children Register and provide for entries to be made in it. The Register is not open to public search and inspection. Although it is not possible to scroll through and randomly search the Register itself, anyone will be able to search the index to the Register by populating an electronic enquiry form with the adopted person's forename, surname and date of birth. If a matching record is identified in the index, an image of the relevant entry in the Adopted Children Register can be viewed and a copy of the record obtained on payment of a fee.

So, in effect, as long as somebody knows an adopted person's forename, surname and date of birth, they will be able to get a copy of an adoption certificate for anybody over the age of 18. Unlike with the disclosure of protected information about adults, as provided for in clause 60, there is no element of discretion involved in the disclosure of information contained in extracts from the Adopted Children Register. It would not therefore be necessary to invoke the right under Clause 12 to seek a review of a decision about the disclosure of information held on the Adopted Children Register.

The Bill contains additional protections to safeguard adopted children: a copy of an entry in the Adopted Children Register for an adopted person under age 18 can only be provided if the applicant provides certain prescribed information – this is likely to be the adopted person's full name and date of birth, and the full name of their adoptive parent(s).

Information about the disclosure of protected information about adults under clause 60 is set out in response to the earlier question above.

Clause 105 relates to court procedures and the power to provide for a court to sit in private during adoption or any other proceedings under the Bill. This would not affect a person's right to access adoption or birth records.

I mentioned the welfare checklist that is specified in clause 119 on special guardianship. I appreciate that this is new and that it will be improved, but I looked for references to welfare checklists in article 3 of the Children Order, and they are not there. I assume that that is with the statutory authorities, but, when you scrutinise legislation, you should not assume anything; you get it clarified.

The welfare checklist is set out in Article 3(3) of the Children Order and specifies what the court must have regard to when coming to a decision about the care and supervision of a child.

The Bill provides that when considering making a special guardianship order, the child's welfare is the court's paramount consideration, and the welfare checklist in Article 3(3) of the Children Order applies. It does this by way of clause 119(2) of the Bill (see page 73 of the Bill) which amends Article 3(4)(b) of the Children Order to include special guardianship orders in the list of specified circumstances. As a result, the court must have regard to all of the matters set out in Article 3(3) when considering whether to make a special guardianship order.

I ask the Minister to look at contact arrangements and contact centres. They need to be age-appropriate. I know many in social services who try their best, but arrangements sometimes do not suit estranged parents or other siblings, particularly when they are trying to get everybody together and there are gaps in age. I ask for greater flexibility.

This query has been passed to the relevant policy branch to answer. I understand the policy branch has been in touch with you to seek further clarification and will provide an answer to your query as soon as possible.