

Law Commission - 14th Programme of Reform – Submission

31/07/2021

Consultation Question 1: In general terms, what is the problem that requires reform?

There is an established right for people to know their origins and background, but when the state has intervened in a person's family life, the exercise of that right is not consistent.

People can be issued with birth certificates that do not reflect their genetic background, and there is no consistent way of establishing their birth roots and history of their early life.

Depending on a person's circumstances and the date of the statutory invention, there will be different agencies holding information, all subject to different statutory regimes and guidance. The extent to which the data protection rights of a birth family affect a person's right to receive information are unclear and the application of the DPA is inconsistent.

Consultation Question 2: Can you give us an example of what happens in practice?

It is a well-established principle that everybody has a right to know their origins, and UK law has provided various ways in which this right can be exercised.

For those people who have not grown up with their biological parents there are various routes to discovering their origins, depending on the legal framework underpinning their situation. Somebody adopted before 30 December 2005 has access to intermediary services to help them trace and contact birth relatives, and an adoption agency which has discretion to disclose information to them. They can register a veto preventing agencies contacting them on behalf of their birth relatives except in specified circumstances. A person adopted after that date does not have access to an intermediary agency structure to support them, but can request services direct from the adoption agency that placed them, and may get some details if and when the agency has contacted the birth family and sought their opinion.

A person taken into care as a child has the right to access their own social services records, but may well find them heavily redacted to prevent disclosure of somebody else's personal information. They may not be given the name of their foster carer, or told why their sister was placed in a different home, or how they lost contact.

For a person born as a result of assisted conception UK clinics no longer allow anonymous egg or sperm donors and a child born since 2005 has the right to know the identity of their biological parent. However, they may not know that there is the question to ask. The HFEA allows the partner of a woman having a child through

fertility treatment to register as the child's second parent, whether they, or indeed the mother, has any biological connection to the child. The commissioning parents of a child born through surrogacy can, after obtaining a parental order, re-register a child's birth. Many of these arrangements will involve same sex couples or single parents, and the children of these families will know that there are questions to be asked about the circumstances of their conception. The child of a male/female couple will have a birth certificate naming that couple as their parents, with no indication that their DNA has another source.

Consultation Question 3: To which area(s) of the law does the problem relate?

Administrative or public law, Medical or health law, Family law.

Consultation Question 4: We will be looking into the existing law that relates to the problem you have described. Please tell us about any court/tribunal cases, legislation, books or journal articles that relate to this problem.

- Children Act 1975
 - Adoption Agencies Regulations 1983
 - Human Fertilisation and Embryology Act 1990 Adoption and Children Act 2002
 - Gender Recognition Act 2004
 - Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005 Disclosure of Information (Post-Commencement Adoptions) Regulations 2005
 - Human Fertilisation and Embryology Act 2008 Data Protection Act 2018
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- Gaskin v UK (1989) 12 EHRR 36
 - Re X (Adopted Child: Access To Court File) [2014] EWFC 33 FL v Registrar General [2010] EWHC 3520 (Fam)

Consultation Question 5: Can you give us information about how the problem is approached in other legal systems? You might have some information about how overseas legislatures have responded or how the court or tribunals approach the problem.

We are not aware that any other jurisdiction has dealt with this issue.

Many states with codified systems of law will have their basic rights written into their code and so any new laws will have a consistent base in which decisions are made.

The balance between the privacy of a parent and the right of a child to know their parentage falls within a broad margin of appreciation at European Court of Human Rights level and different countries have fundamentally different attitudes. So, for example, in Europe all countries except Ireland and Slovenia allow an adopted person access to birth records, only half a dozen allow a donor conceived adult to discover the identity of their gamete donor.

The UK has a particular issue in that a high number of adoptions are of children from care, whereas in most other countries the majority of adopted children are relinquished by their birth parents.

Victoria, Australia, has a system which flags up the fact of donor conception to an adult when they access their birth certificate. We are aware of and support the Birth Registration Reform Campaign's submission to the Law Commission for a comparable scheme and their proposals will, if accepted, go some way to addressing this area of inconsistency for children in the future.

Consultation Question 6: Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

It occurs across all four nations, which have different regulatory schemes under the respective Children/Social Care and Wellbeing Acts and Adoption Acts, but the Data Protection Acts, Gender Recognition Act and Human Fertilisation and Embryology Acts are UK wide

Access to court records varies across the three judicial systems.

Consultation Question 7: What do you think needs to be done to resolve the problem?

We believe that there should be equality of access to information and that the basic right of all people to information about their origins and genetic heritage is crucial for a person's well-being and should be considered in formulating future legislation. We suggest that all current legislation where access to information rights are potentially compromised or neglected should be reviewed in order to establish a consistent and non-discriminatory framework for all people seeking information about their heritage.

We believe that legislation will be needed to establish a single principle of access to information about origins, to unify the processes in existing legislation and to establish a standard for legislation in the future.

Consultation Question 8: What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

As of 31 March 2020, in England 80,080 children were in care and 3,440 children had been adopted in the previous year. The highest annual figure for adoption was 24,800 in 1968

The HFEA identify 390,000 children having been born as a result of IVF and donor insemination since 1991, although many of these will not have used donor gametes. This number is increasing year on year.

Consultation Question 9: What would be the positive impacts of reform? Benefits derived from law reform can include:

Fairness - every person removed from their family or whose genetic origins had been obscured would have the same right to information about their family and genetic background. A consistent framework would allow all persons seeking information to be confident that they can obtain all the available information from one source and would not have to apply to several (agencies/courts/local authorities) with, in some cases, fees to be paid.

Prevention of emotional harm - the growth in the use of commercial DNA profiling and accessibility of social media means that people are discovering that they are not genetically related to their legal families in informal and unsupported ways, causing damage to well-being.

We are aware from our experience of pre-1975 adoptions, that the concealment of genetic parentage can lead to adopted children making life decisions on the basis of false information and can see history repeating itself with donor conceived children.

Consultation Question 10: If this area of the law is reformed, can you identify what the costs or other negative impacts of reform might be?

Each agency holding information already has to comply with regulations about the disclosure of that information. There would be an initial training need if the disclosure regime was codified to be consistent across all agencies, but clarity should provide long term savings in time considering individual circumstances and where they fit into different regimes.

There will need to be a balance struck between the desire for privacy on the part of birth and legal parents against the right of the child to know their origins. This balance was considered in 1975 when adopted adults first had the right to obtain their

original birth certificates, and can result in short-term distress for some parents. In the case of adoption it has led to longer term culture change and children adopted since very rarely have that fact concealed from them. We would expect a similar experience for other forms of non-genetic parentage.

Consultation Question 11: Does the problem adversely impact equality, diversity and inclusion by affecting certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to criminal justice, existing problems might be more likely to have a disproportionate impact on BAME communities. Or, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

Children in care are more likely to come from lower income families and from minority ethnic backgrounds. Children leaving care at 18 are more likely than their peers to suffer mental health difficulties and to experience adverse life events such as homelessness or criminal convictions. Having supported access to information about their background can help them understand their backgrounds and perhaps address their issues.

Donor conceived children of same sex legal parents, or of single parents, will be aware that there must be another biological parent involved and that there is a question to ask. Donor conceived children of male/female couples may not be aware that their legal parents are not their genetic parents and so have greater chance of having been deceived about their origins.

Consultation Question 12: In your view, why is the independent, non-political, Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

This cuts across government departments and needs one body to be able to co-ordinate input from all relevant departments and to consider differences across the four nations. As each Government department has its own framework within which the issues of information about origins is dealt with, there is no particular need identified by individual departments for change. It is only by looking at all areas together that the inconsistencies and unfairness can be identified.

Consultation Question 13: Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

We have had discussions with the Law Commission who have suggested submitting this to them for consideration.

We have had discussions with the Information Commissioners Office about the way in which the DPA has impacted the rights of care-leavers to access information and this has resulted in practice guidance, but statutory reinforcement would be preferable.

Consultation Question 14: Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation on this issue, and why you think the Law Commission should also look into the problem.

The DCSF considered the issue of access to information for adopted adults in detail in 2002 - 2005 with the Adoption and Children Act and associated Regulations. However, the post-commencement regulatory framework is not clear and has been difficult to implement, particularly as it has coincided with the GDPR and a reluctance to disclose information unless the authority to do so is very clear. We are not aware that the issue has been considered across departments.

Consultation Question 15: Would you like to submit another idea for reform?

No

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