



**Tithe an
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Tithe an Oireachtais

An Comhchoiste um Dhlí agus Ceart, Cosaint agus
Comhionannas

Tuarascáil maidir le héisteachtaí i ndáil le Scéim an Bhille um
Leanaí agus Cóngais Teaghlaigh

Bealtaine 2014

Houses of the Oireachtas

Joint Committee on Justice, Defence and Equality

Report on hearings in relation to the Scheme of the
Children and Family Relationships Bill

May 2014

31/JDAE/015

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1. Chairman's Preface

Following the publication of the General Scheme of the Children and Family Relationship Bill, the Joint Committee on Justice, Defence and Equality (hereafter the 'Joint Committee') was invited to review and consider the General Scheme, and report back to the Minister with any observations arising from a consultation process.

Accordingly, the Joint Committee invited written submissions from interested groups or individuals in relation to the Heads of the Bill. It was specified that submissions should deal with each Head individually and suggest amendments as necessary including the rationale for each. The Committee received 38 submissions and held public hearings on 9th April 2014.

This Report summarises issues relating to the General Scheme which have been brought to the attention of the Joint Committee. In particular, the Report attempts to summarise and set in context some of the points made in stakeholder submissions and subsequent presentations to the Joint Committee at public hearings.

It should be borne in mind that, the Heads of the Bill have no legal effect and what is published is only the General Scheme of Heads of a Bill which will require further work before they will be published.

On behalf of myself and the members of the Committee, I wish to thank all those who participated in this process either by way of written submission and/or oral presentation to the Committee.



A handwritten signature in black ink, which appears to read 'David Stanton', written over a horizontal line.

David Stanton TD
Chairman
May 2014

2. Conclusions

The proposed legislation was strongly welcomed by most stakeholders, and described by most as being progressive in seeking to ensure greater protection for children, and greater recognition for different forms of parentage. The conclusions outlined below arise from suggestions made by stakeholders as to how to improve further upon the legislation, during the public hearings held by the Committee. These conclusions are elaborated on in more detail under individual headings in the text of Section 7 of this Report.

7.1 Sanctions:

The Committee has concluded that no sanction should be imposed for breach of provisions in the Bill on the parents that would be against the interests of the child; and in particular, children should not be denied a legal identity because of some breach of the relevant provisions relating to surrogacy arrangements by their parents or prospective parents.

7.2 Definition:

The definition of surrogacy in the Bill should be expanded to include 'traditional surrogacy'.

7.3 Posthumous Conception:

The Bill should include a provision allowing and regulating limited posthumous conception.

7.4 Assignment of Parentage in Surrogacy cases:

These provisions, particularly the current time limits, require reviewing to ensure that there is no doubt regarding the child's parentage after delivery.

7.5 Child's right to Identity:

It should be considered whether the Bill could be amended to include some provision, for example in Head 10, concerning the right of a child to access information concerning their genetic identity.

7.6 Guardians acting jointly on medical consent:

Head 36 requires reviewing to ensure greater clarity, and to ensure further that there is no conflict with existing law concerning the age at which persons may consent to medical treatment.

7.7 Changes to Guardianship:

The requirement that unmarried cohabitant fathers must show that they have been cohabiting with the child's mother for at least 12 months prior to the child's birth should be reviewed, as some commentators expressed the view that it was too long a period.

A central register should be established in which statutory declarations of guardianship could be retained.

The language of 'guardianship', 'custody' and 'access' should be replaced with more appropriate and contemporary terms such as 'parental responsibility', 'day-to-day care' and 'contact.'

7.8 Parentage:

Greater clarity is needed in the terms of Heads 8 and 10 in this respect.

7.8.1 Adoption by civil partners and parentage recognised abroad: The Bill should ensure adequate recognition of foreign adoption orders and marriage/civil partnerships celebrated abroad.

7.9 Views of the Child:

Greater clarity is needed on how the provisions of Head 32 concerning the right of the child to be heard should be implemented in practice without imposing undue burden on the child.

7.10 Procedures:

The rules on section 47 reports outlined in Head 58 of the Bill should be strengthened, with provision for the funding of the Guardian Ad Litem, and recognition of child contact centres.

7.11 Adoption by Step-Parent:

Part 12 of the Bill should be amended to allow for step-parent adoption, so a birth parent does not have to relinquish rights where civil partners jointly adopt.

3. Introduction

The General Scheme of the Bill includes proposals on a wide-range of issues affecting family life, including: parentage; assisted human reproduction and surrogacy; guardianship, access and custody rights; mediation; DNA testing; maintenance; and reform of court practices among others.

The wide-ranging nature of the proposals in the Bill reflects the social change experienced by a significant proportion of families and households in Ireland (see section 4 of this Report) over recent decades, as well as the scientific developments which have taken place in assisted human reproduction. These developments have, in some cases, led to legal disputes around parentage and uncertainty for those in surrogacy arrangements or other forms of assisted human reproduction.

This section will provide the policy background relevant to the rationale behind the current proposals. The section will also include a brief summary of relevant cases which have been brought before the Irish courts.

3.1 Background to the General Scheme

In March 2000, the then Minister for Health and Children, Mr. Micheál Martin, TD, established the Commission on Assisted Human Reproduction. The Commission set out to examine how assisted reproduction may be regulated in Ireland. The terms of reference, approved by Government, were:

“...to prepare a report on the possible approaches to the regulation of all aspects of assisted human reproduction and the social, ethical and legal factors to be taken into account in determining public policy in this area.”

In the [*Report of the Commission on Assisted Human Reproduction*](#), which was published by the Commission in 2005, the term Assisted Human Reproduction, only refers to the handling of gametes and embryos. The report made 40 recommendations, many of which called for regulations around the use of embryos, including issues around the transfer, storage and creation of embryos. Recommendations called for a regulatory body to be established by the Oireachtas and guidelines regarding the freezing and storage of gametes and the screening of donors for genetic disorders and infectious disease. Recommendation 22 states that any child born through use of donated gametes or embryos should, on maturity, be able to identify the donor(s) involved in his/her conception.

Recommendation 25 of the Commission's report, recommends that the 'intent' of all parties should be used as a basis for the assignment of legal parentage, i.e. that the donor will not have any legal relationship with the child.

In terms of surrogacy, the 2005 report recommends (no.32) that a child born through surrogacy, upon reaching maturity, should be able to access the identity of the surrogate mother and where relevant the genetic parents. The report also recommends (no.33) that a child born through surrogacy should be presumed to be the child of the commissioning couple.

In 2009 the Law Reform Commission examined issues around guardianship as it relates to the rights and duties of fathers, as well as issues around fathers' custody and access to their children; and of the rights and duties of grandparents. The findings were published in a [Consultation Paper on Legal Aspects of Family Relationships](#).

Following on from this, the Law Reform Commission addressed the issue of the legal aspects of family relationships and made several recommendations together with a draft *Children and Parental Responsibility Bill* to implement these recommendations. This was published in the 2010 report [Legal Aspects of Family Relationships](#).

The report recommended that legislative provisions be introduced that would facilitate the extension of guardianship to civil partners and step-parents, either by agreement with other parties who have parental responsibility for the child, or by application to the court.¹

In reply to a PQ² on February 12th 2013, the Minister for Justice, Equality and Defence, Mr. Alan Shatter, T.D. acknowledged the reports by the Law Reform Commission and the Commission on Assisted Human Reproduction in his consideration of the present proposals:

"I am considering the detailed recommendations of the Law Reform Commission in its Report on the Legal Aspects of Family Relationships. The Commission recommends that legislative provisions be introduced to facilitate the extension of guardianship (parental responsibility) to civil partners and step-parents either by agreement with the other parties who have parental responsibility for the child or by application to court. In that context, I am considering the Commission's specific recommendations on legislative reform, which would put same-sex couples and step-parents on an equal footing with other couples in relation to their children. I am also reviewing existing legislation worldwide addressing the issues of parentage, assisted human reproduction

¹ Minister for Justice, Equality and Defence, Mr. Alan Shatter, T.D. written answers, Tuesday 14 February 2012. As cited in the Special Rapporteur for Child Protection's 2013 report.

² PQ 523

and surrogacy and considering the recommendations contained in the Report of the Commission on Assisted Human Reproduction published by the Department of Health in 2005. Those reforms must ensure that children in lesbian or gay family units are able to form a legal connection with their non-biological parent and that kindred relationships flow from such legal connection.”

The Special Rapporteur on Child Protection, Dr. Geoffrey Shannon, published and submitted a report to the Houses of the Oireachtas in January 2013³ which recommended a number of changes to current law and policy around Guardianship. An extract from Section 3 of that report is reproduced here:

“The State should extend automatic guardianship rights to unmarried fathers. In doing so the State should consider implementing the procedural reforms recommended by the Law Reform Commission in order to give effect to automatic joint parental responsibility. This approach is likely to encourage responsible parenthood by fathers, and sends out a signal that all fathers are equally responsible for their children.

The State should give further consideration to the issue of guardianship rights of parents in the context of assisted human reproduction. In this regard it is recommended that the State consider the possibility of enabling parties to opt-out of automatic registration of parental responsibility, where both parties consent, either at the time of initiating the assisted reproduction process or in any event prior to the birth of the child.

The State should implement the recommendations of the Law Reform Commission in relation to the extension of special guardianship rights to step-parents and civil partners.”

3.2 International Legal Framework

Dr. Geoffrey Shannon outlines the international legal framework surrounding children and families in his paper published on 10th April 2014.⁴ The major covenants and conventions are briefly referenced here. These are:

The United Nations’:

- (i) International Covenant on Civil and Political Rights (ICCPR).
- (ii) International Covenant on Economic, Social and Cultural Rights (ICESCR).
- (iii) Convention on the Rights of the Child (CRC).

According to Dr. Shannon, Article 24 of the ICCPR is of particular relevance to the present legislation as it recognises: a child’s rights to equality, to a name and birth registration, as

³ Shannon, G. (2013). *Sixth Report of the Special Rapporteur on Child Protection: A report submitted to the Oireachtas*. Accessed at http://www.childrensrights.ie/sites/default/files/submissions_reports/files/GShannon-SixthRapporteurReport0713.pdf

⁴ Shannon, G. (2014). *The Children and Family Relationships Bill 2014 – a Children’s Rights Perspective*. Accessed on 16 April 2014 at http://www.childrensrights.ie/sites/default/files/submissions_reports/files/GShannon-ChildrenFamilyRelationshipsBill2014ChildrenRightsPerspective0414.pdf

well as a nationality. Dr. Shannon also draws attention to the CRC, which he describes as a “...policy framework around which States must construct their domestic legislation.” The main principles of the CRC have been identified as:

- Non-discrimination (Article 2);
- Best-interests of the child as a primary consideration (Article 3);
- The right to life, survival and development (Article 6); and
- Participation (Article 12).

Dr. Shannon notes that in the context of the proposed legislation, Articles 2, 3 and 12 of the CRC are particularly relevant.

At European level, Dr. Shannon identifies the importance of the Council of Europe’s European Convention on Human Rights (ECHR) as well as the European Convention on the Exercise of Children’s Rights, the latter having been designed to supplement the participation rights in Article 12 of the CRC.

Article 8 of the ECHR requires States to respect private and family life. While marital families will always come within the term ‘family life’; for non-marital families the Court will conduct a “functional-based analysis of intentionality” in order to determine how the parties see their relationship. According to Dr. Shannon, the rights accorded to non-marital families by the ECHR are ‘far more extensive’ under the ECHR than under Irish law at present.

The European Union, through its Charter of Fundamental Rights (CFR) contains a number of provisions relevant to family life and child law, with Article 24 containing the main provisions relating to children. Article 24 provides that all institutions are obliged, in any action concerning a child, to have regard for the welfare of that child as a primary consideration. The Charter also recognises the rights of a child to have a personal relationship and direct contact with both of their parents, unless this is contrary to the child’s interests.⁵

Dr. Shannon notes that it is important to be aware that the EU legislative measures mentioned above crossover into the areas of private international law, allowing courts to determine the appropriate jurisdiction in which a case should be heard and when a foreign judgment should be recognised and enforced.

⁵ http://www.childrensrights.ie/sites/default/files/submissions_reports/files/GShannon-ChildrenFamilyRelationshipsBill2014ChildrenRightsPerspective0414.pdf

3.3 Relevant case law in Ireland

The Children's Referendum

There have been two legal challenges relating to the campaign undertaken by the Government leading up to the Children's Referendum and these are summarised in Box 1. The wording of the Thirty-First Amendment of the Constitution (Children) Bill 2012 is as follows:⁶

Children – Article 42A – to be inserted

1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

*4 1° Provision shall be made by law that in the resolution of all proceedings -
i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
ii concerning the adoption, guardianship or custody of, or access to, any child,
the best interests of the child shall be the paramount consideration.*

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

⁶http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/Child_Welfare_Protection/ChildrensReferendum.htm

Box 1: Legal challenges relating to the Children’s Referendum

*McCrystal v. The Minister for Children and Youth Affairs & Ors*⁷

In this case the appellant contended that a booklet and website published by the Government in relation to the pending Children’s Referendum breached the principles set out in *McKenna v An Taoiseach* (No. 2) [1995] 2 IR 10 (“the McKenna case”). This case established the principle that the expenditure of public funds to promote a specific result in a referendum offended the Constitution.

The case was taken before the referendum was held and was heard as a matter of urgency in the High Court, which refused the appellant’s application. An appeal was subsequently made to the Supreme Court.

The Supreme Court held that the McKenna case was intended to protect the right of the people to determine whether the Constitution should be amended. Due to the urgency of the application because of the pending vote on the referendum, the Court deferred issuing reasons for its decision, but held that the publications in places breached the principles set out in the McKenna case. A declaration to that effect was granted.

*Re Referendum of 10th November 2012, Joanna Jordan Petitioner*⁸

This case involved an application for leave to present a petition that the Minister for the Environment, Community and Local Government and the Government had, in breach of the Constitution, used public funding to put forward a particular viewpoint (i.e. for voters to vote “Yes” in the referendum) and that this had a material effect on the referendum outcome. The petitioner referred to a booklet, a website and advertisements that were published and circulated by or on behalf of the Government as evidence of this. Although the Supreme Court had ruled in *McCrystal* (see above) that parts of these materials amounted to breaches of the Constitution, the referendum nevertheless went ahead two days after the Supreme Court judgment, as scheduled.

Leave was granted to bring the petition. Deciding on the petition, the Court accepted that certain actions of the Government amounted to breaches of the Constitution as a result of the Supreme Court ruling in *McCrystal*. However, the Court was not satisfied that these actions materially affected the outcome of the Referendum, especially in light of the *McCrystal* ruling which was widely reported and could only have been of benefit to the “No” campaign. The Court found that there was clear evidence that the Government moved to minimise as much as possible the effect of the information campaign by immediately cancelling advertisements, taking the website offline and ceasing to publish and distribute booklets. The petition was therefore dismissed.

The decision of the High Court in this case has been appealed to the Supreme Court.

Surrogacy

M.R. & Ors. v An tArd Chláraitheoir & Ors [2013] IEHC 91

⁷ [2012] IESC 53

⁸ [2013] IEHC 458

This case is based on a legal dispute surrounding a surrogacy and the question of parentage between the commissioning couple and the surrogate mother.

An application to have the genetic mother registered as the mother of the children on their Birth Certificates was rejected by the Office of the Chief Registrar in 2011. The genetic parents of the twins then sought Declarations from the High Court under the [Status of Children Act 1987](#). The application was supported by the surrogate mother, who was a sister of the applicant. However, the Attorney General and Chief Registrar opposed the application arguing that the surrogate or gestational mother is in law the mother of the children.

In May 2006 the High Court under Mr. Justice Henry Abbott defined maternity as based on genetic or blood links and ruled that the genetic parents were entitled to be registered as the legal parents of the twins. The judgment has been appealed to the Supreme Court which has not yet ruled on the decision.

EP (An Infant) v Attorney General & Ors [2013] IEHC 300

This case involved a child born by way of a gestational surrogacy agreement in India. The child was born following in-vitro fertilisation using the applicant's sperm and an anonymous donor egg, with the resulting zygote placed in the womb of the surrogate mother. The applicant father and his partner, the 'intended parents', were named as father and mother of the child on her birth certificate which was issued in India and they had assumed a parenting role in respect of her.

The intended father was an Irish citizen and holder of an Irish passport. Genetic testing confirmed that he was the biological father of the child. The intended father was advised by the Passport office that in order for a passport to be issued in respect of the child, applications should be made to the courts for a declaration of parentage under s. 35 of the *Status of Children Act 1987* and for an order directing that a passport may be issued to the child without the consent of the surrogate parent. These applications were made to the Circuit Court, along with an application to have the intended father appointed guardian of the child. The applications were refused and an appeal was made to the High Court. The surrogate mother consented to the orders being made

Held:

Having considered the evidence submitted, the Court was satisfied that the intended father was the biological father of the child. The Court was also satisfied that the child had her habitual place of residence with the intended father and his partner who cared for her on a daily basis, and that since the child's birth the couple had the role of holders of parental

responsibility for her within the meaning of the Brussels II bis Regulations.⁹ It was recognised that the surrogate mother had no role as a parent other than that of a gestational mother under the surrogacy arrangement and that it was unlikely she would seek any parental role in respect of the child in the future.

Taking the interests of the child as being of paramount importance under the *Guardianship of Infants Act 1964*, the Court was satisfied that the best interests of the child was to be cared for and reared as a child in the so called *de facto* family of the intended parents.

The Court made a number of orders, including an order appointing the intended father guardian of the child pursuant to s. 6A of the *Guardianship of Infants Act 1964* and an order that the consent of the surrogate mother was not required to issue a passport to the child, pursuant to s. 14(3) of the *Passports Act 2008* and s. 11 of the *Guardianship of Infants Act 1964*.

Other relevant case-law

J.McD v P.L. [2010] 2 IR 199

This case relates to a man, J McD, who entered into an arrangement with a lesbian couple whereby he agreed to assist the couple to conceive a child by means of artificial insemination. In turn, it was agreed that the child would know the identity of his father and that the father would play a role in the child's life, as 'favourite uncle'.

However, after the birth of the child, relations between the couple and donor deteriorated. The couple informed the father that 'greater distance and formality were required.' They also planned to move to Australia with the child for a year.

The father then instituted guardianship proceedings, which led to a refusal in the High Court to make orders either allowing (a) J McD to be guardian of the child or (b) allowing him access to the child. The High Court declared that the agreement between the parties was unenforceable and that the child's best interests are of first and paramount consideration in any case to do with a child's future under s. 3 of the *Guardianship of Infants Act 1964*.

⁹ The Brussels II *bis* regulation repeals the Brussels II regulation and extends the scope to all judgments on parental responsibility. Guide on Brussels II regulations available at: http://ec.europa.eu/civiljustice/publications/docs/guide_new_bruussels_ii_en.pdf

However the High Court refused access because it argued that the hostility between the couple and their donor would persist and not be in the best interests of the child.

Significantly, the High Court treated the couple, together with the child, as a 'de facto' family unit protected by Article 8 of the European Convention on Human Rights. In the Court's view, these rights outweighed the claims of the biological father. Judge Hedigan also made a plea to the Oireachtas to consider the position of same-sex couples who wish to have children, so that further similar cases could be avoided.

This ruling was appealed to the Supreme Court which agreed that J. McD should not be appointed a guardian. However, the Supreme Court held that the High Court had not given sufficient weight to his position as the biological father of the child and decided that he should be given access rights, the details of which should be decided by the High Court.¹⁰

The Supreme Court also rejected the idea that 'de facto' families had any legal recognition or rights under Irish Law.

The Court referred to a statement by Henchy J in *State (Nicolau) v An Bord Uchtala* ([1966] IR 567):¹¹

"For the state to award equal constitutional protection to the family founded on marriage and the family founded on an extramarital union would in effect be a disregard of the pledge ... in article 41.3.1 to guard with special care the institution of marriage."

Furthermore the Supreme Court ruled that the obligations undertaken by a Government under the European Convention on Human Rights arose under international law and not national law and the *European Convention on Human Rights Act 2003* did not give direct effect to the European Convention on Human Rights.

Roche v Roche & Ors [2009] IESC 82

This case concerned the right of a woman to implant frozen embryos containing the genetic material of her (now separated) husband. The husband, however, did not wish to become a father again. The Clinic refused to release the embryos without consent from her husband, which he would not provide.

The case raised both private and public law issues. (a) The private law issue was described as a contractual matter. (b) The public law issue is a constitutional issue, as it is the plaintiff's

¹⁰ http://www.flac.ie/download/pdf/110210_michael_farrell_article.pdf

¹¹ *Ibid.*

case that the frozen embryos constitute the "unborn" within the meaning of Article 40.3.3° of the Constitution of Ireland, and that the State is obliged to facilitate their implantation.¹²

However, the judge declared that the frozen embryos were not the "unborn" within the meaning of Article 40.3.3° of the Constitution and held that it was a matter for the Oireachtas to decide what steps should be taken to establish the legal status of embryos in vitro.

The next section of this Report sets out some relevant family and household statistics in Ireland.

¹² <http://app.vlex.com/#/vid/roche-v-ors-72829158>

4. Families and Households in Ireland - Statistics

A UCD (2011) study¹³ using census 2006 data contained some revealing facts about family life in Ireland, such as:

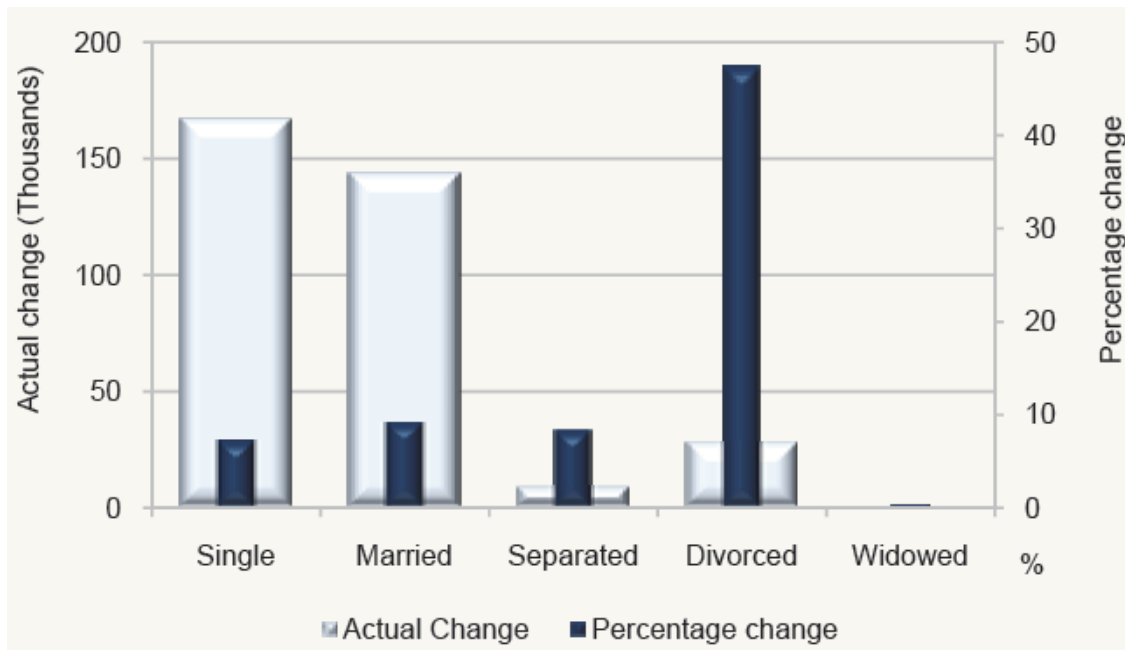
- One third of families in Ireland are outside the 'traditional' model of a married couple, both in their first marriage; while one in four children under the age of 21 does not live in such a traditional family;
- Alternative family structures in Ireland are dominated by never married cohabiting couples and lone parents;
- In one quarter of co-habiting couples at least one partner was previously married; and
- Compared with other developed countries, Ireland has a low rate of remarriage and second relationships but a high rate of unmarried lone parenthood.

This section also includes statistics from the CSO 2012 publication *Profile 5: Households and Families* and *This is Ireland* (CSO, 2011) which are both based on the 2011 census. For census purposes, a family is defined as a couple with one or more children, a couple without children or a lone parent with one or more children. Census 2011 shows:

- a 12% growth in the number of families since the previous 2006 census;
- an 800% increase in those who are divorced between 1996-2011;
- a 550% increase in those remarried following divorce or annulment between 1996-2011;
- that 1 in 4 families with children in Ireland is a one-parent family;
- a 14% increase in the number of children of lone parents between 2006-2011;
- that 4,042 same sex couples were living together in 2011. Of these 230 were couples with children, with the vast majority of these being female couples; and
- the number of children living in cohabiting households increased by 41% between 2006 and 2011.

¹³ <http://www.ucd.ie/news/2011/12DEC11/141211-Family-structure-in-Ireland-moving-beyond-the-traditional-model-study-shows.html>

Figure 1: Change in marital status 2006-2011



Source: CSO (2011) Living in Ireland

Civil Partnerships

The CSO press release for Marriages and Civil Partnerships, released on the 28th March 2014 report that:¹⁴

- There were 429 civil partnerships registered in 2012; 263 of these were male unions while 166 were female unions. The average age of partners in civil partnership couples was 41.6 years (male 41.1, female 42.2 yrs).
- Over 69% of the same-sex couples that entered into civil partnerships in 2012, reside in the Leinster area with 148 such couples (34%) living in Dublin City.
- Of the 858 individual partners, some 794 or almost 93% were previously single while 60 (7%) were divorcees.

4.1 Assisted Human Reproduction¹⁵

- One in six couples worldwide experience some form of infertility problem at least once during their reproductive lifetime.
- Most Assisted Reproductive Technology (ART) treatments take place in women aged between 30 and 39.

¹⁴

<http://www.cso.ie/en/newsandevents/pressreleases/2014pressreleases/pressreleasemarriagesandcivilpartnerships2012/>

¹⁵ European Society of Embryology and Human Reproduction (ESHRE). <http://www.eshre.eu/Guidelines-and-Legal/ART-fact-sheet.aspx>

- Europe leads the world in ART, initiating approximately 55% of all reported ART cycles.
- In 2010 France (79,427 cycles), Germany (74,672), Italy (58,860), Spain (58,735) and the UK (57,856) were Europe's most active countries, while the most active countries in the world are Japan and the USA.

4.1.2 IVF treatment in Ireland

There is no national database for information on the number of women undergoing IVF treatment in Ireland. However, statistics on Assisted Human Reproduction (AHR) and births following AHR in Ireland are available from the European Society of Human Reproduction and Embryology (ESHRE). The most recent statistics published by ESHRE concern data for 2008, and show that in Ireland a total of 1,740 IVF cycle treatments took place in that year. These statistics come from five reporting clinics and not all fertility clinics operating in Ireland participate in this data collection process.

4.2 Surrogacy

Precise statistics relating to surrogacy are difficult to estimate for the following reasons (European Parliament, 2013):

1. Traditional surrogacy does not necessarily require medical intervention and can be arranged on an informal basis between the parties concerned;
2. While gestational surrogacy does require medical intervention; officially reported statistics often only record the IVF procedure, rather than the surrogacy arrangement;
3. In many countries there is no formal reporting mechanism as there is no regulation of surrogacy.

5. Current law and policy

5.1 The family and the constitution

The non-marital family is not recognised by the Irish Constitution and it does not possess the same legal rights and obligations as the family based on marriage.¹⁶

Article 42.1 recognises the family as the “primary and natural educator of the child” and says that the State:

“...guarantees to respect the inalienable *right and duty* of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.”

The Law Reform (2010) take this to mean that there is a:

“...constitutional acknowledgment that parental rights do not exist without concomitant duties or responsibilities.”¹⁷

5.2 Civil Partnership in Ireland

The Irish Government enacted the [Civil Partnership and Certain Rights of Cohabitants Act](#) in 2010. A 2013 report by LGBT Diversity¹⁸ compiled primary data from a survey of 153 LGBT parents. The chart below is reproduced from this survey and shows the ways in which respondents became parents. As can be seen in the chart, most LGBT parents became parents through a previous heterosexual relationship, followed by Assisted Human Reproduction.

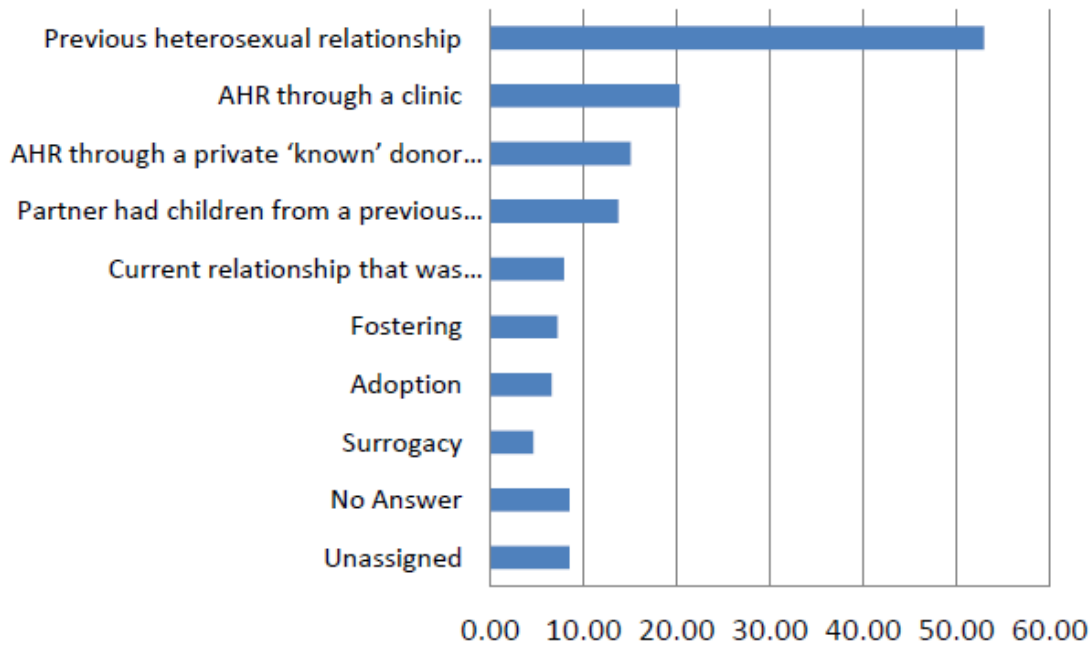
¹⁶

http://www.citizensinformation.ie/en/birth_family_relationships/cohabiting_couples/adoption_and_unmarried_couples.html

¹⁷ [http://www.lawreform.ie/fileupload/Reports/r101Family\(1\).pdf](http://www.lawreform.ie/fileupload/Reports/r101Family(1).pdf)

¹⁸ http://www.marriageequality.ie/download/pdf/lgbt_parents_in_ireland_full_report.pdf

Figure 2: Pathways to LGBT parenthood (%)



Source: LGBT Diversity 2013

In terms of living arrangements, 41.18% (63 persons), of LGBT parents, lived with their partner and children.¹⁹

Marriage Equality,²⁰ a not for profit advocacy organisation, has identified over [160 statutory differences](#) between civil partnership and civil marriage. The Gay and Lesbian Equality Network (GLEN), in their written submission to the Committee, note that the *Civil Partnership and Certain Rights of Cohabitants Act 2010* did not provide for children in a civil partnership, in respect of the civil partner of their biological parent. GLEN's [Submission to the United Nations Periodic Review: Ireland](#) outlines the disadvantages to these children, such as:

- Under the Civil Partnership Act, children living with civil partners will not be able to claim against the partner who is not their biological parent for maintenance in the event of dissolution, nor will the child have any claim against their non-biological parent's estate on the death of that partner.
- Protections provided to civil partners in respect of the shared home make no reference to the accommodation needs of children as a relevant criterion.
- Civil partners, unlike married couples, are not eligible to jointly adopt a child. Nor are there any other means through which the non-biological parent can acquire

¹⁹ Ibid.

²⁰ <http://www.marriageequality.ie/about/>

guardianship rights, except where guardianship is specifically willed by their partner in the event of their death.

The group welcome that the provisions in the General Scheme would give dependent children of civil partnership couples the same rights as children from a marital family. They also welcome that the provisions would allow for adoption by same-sex couples.

5.3 Guardianship, Custody and Access in Ireland

Guardianship

Guardianship in Ireland entitles a parent to make important decisions regarding their child's upbringing, including their: education, health requirements and general welfare. Guardians have a duty to maintain and properly care for the child.²¹ The rights of parents to guardianship are set down in [Section 6 of the Guardianship of Infants Act, 1964](#).

Guardianship is automatic for married parents who are joint-guardians of a child and have equal rights in relation to the child. For unmarried parents, only the mother has an automatic right to Guardianship. However, if the mother agrees the father can become the joint guardian of the child without going to court, by both parties signing a 'statutory declaration'. If there is more than one child, a separate declaration must be signed for each child.

If the parents of a child marry each other after the birth, then the father automatically becomes a joint guardian of the child. If a parent is in a same-sex relationship it is not possible for the partner in that relationship to apply for guardianship of the child.

In the case of a foster child, responsibility for that child rests with the Child and Family Agency (CFA) and the foster parents do not have guardianship.

Where a father is made joint guardian of a child, his consent will be required before decisions relating to the child's general welfare can be made e.g. making a passport application.

Unmarried guardians who have been appointed by a court can be removed from their position if the court is satisfied it is in the child's best interests. However, mothers can only be removed as guardians if the child is placed for adoption.

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http://www.citizensinformation.ie/en/birth_family_relationships/cohabiting_couples/legal_guardianship_and_unmarried_couples.html

Custody

Custody relates to the physical day-to-day care and control of a child or children.²² Where both parents are married and living together, they will have joint custody of a child. Where a married couple are not living together, the parent with whom the child lives will have custody. An order may be made by the Courts in relation to custody.²³ Ordinarily, it is only a guardian of a child who may apply for custody. The only exception to this is in the case of an unmarried father of a child who has not been appointed guardian, who may apply to the court for a custody or access order. At present, it is not possible for a person acting in *loco parentis* to a child to apply for custody of the child.

Access

Access refers to the right to visit and spend time with a child.²⁴ An order for access may be made by the Courts²⁵ and will ordinarily be made in respect of the parent who does not have custody of the child. It has been suggested that access should be considered as a right of the child, rather than of the parent and that recognising access as being in the best interest of the child is in accordance with Article 9²⁶ of the 1989 UN Convention on the Rights of the Child (UNCRC).²⁷

Access may be applied for by persons other than the parent of a child. Under s. 11B of the *Guardianship of Infants Act 1964*²⁸, any person who is a relative of a child, or has acted *in loco parentis* to a child may apply to the court for an access order. Such application involves a two-stage process. The person must first apply for leave to make the application.²⁹ If leave is granted, there is a substantive hearing on the issue of access.

5.3.1 Step-parents and civil partners

Currently there is no provision for conferring step-parents with guardianship. The special rapporteur for child protection, Dr. Geoffrey Shannon, points out that to do so, the step-parent would have to jointly adopt with their partner. This means that a biological parent

²² <http://www.justice.ie/en/JELR/Pages/Custody>

²³ Section 11(2) of the *Guardianship of Infants Act 1964*

²⁴ See Law Reform Commission – Report on Legal Aspects of Family Relationships, December 2010.

²⁵ Section 11(2) of the *Guardianship of Infants Act 1964*

²⁶ Article 9 of the UNCRC 1989 provides that the state should respect: ‘the right of the child who is separated from one or both parents to maintain personal relationships and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.’

²⁷ See Law Reform Commission – Report on Legal Aspects of Family Relationships, December 2010, p. 12.

²⁸ As inserted by s. 9 of the *Children Act 1997*

²⁹ In deciding whether to grant leave, the court must have regard to all the circumstances, including in particular, the applicant’s connection with the child, the risk, if any, of the application disrupting the child’s life to the extent that the child would be harmed by it and the wishes of the child’s guardians (s. 11B(3) of the *Guardianship of Infants Act 1964*)

would have to adopt their own child and the ties with the other biological parent would be severed.³⁰

Treoir describe the effect of step-parent adoption as:³¹

- the biological mother becomes the adoptive mother of her own child;
- the step-father becomes the adoptive father with all the rights and responsibilities to the child as if the child had been born into the marriage;
- the family can all have the same surname; and
- the biological father has no further rights or responsibilities to the child.

Similarly, civil partners do not have guardianship rights over their partner's child. A civil partner may be appointed testamentary guardian but in this instance they must act jointly with the surviving parent or guardian (in cases where their civil partner, the biological parent of the child, has died) and this may be a possible source of conflict.

In her advice regarding the *Civil Partnership Bill 2009*, the Ombudsman for Children suggested that the inclusion of special guardianship orders may benefit children in a range of circumstances, including civil partnership, step-families and/or the children of a widower. A special guardianship order is a means of providing legal security to children who cannot be cared for long-term by their parents.

5.4 Adoption and cohabiting couples³²

Cohabitants are defined in the [Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010](#) as two same-sex or opposite-sex adults who are:³³

- not married to each other and
- not in a registered civil partnership and
- not related within the prohibited degrees of relationship (broadly speaking, relationships which would make them ineligible to marry each other) and
- living together in an intimate and committed relationship.

Presently, the law is that:³⁴

³⁰ Shannon, G. (2013). Sixth Report of the Special Rapporteur on Child Protection: A report submitted to the Oireachtas. Accessed on 25 March 2013 at http://www.childrensrights.ie/sites/default/files/submissions_reports/files/GShannon-SixthRapporrtteurReport0713.pdf

³¹ <http://www.treoir.ie/cms-assets/documents/93836-106344.stepparentadopt2013.pdf>

³² http://www.citizensinformation.ie/en/birth_family_relationships/cohabiting_couples/adoption_and_unmarried_couples.html

³³ http://www.citizensinformation.ie/en/birth_family_relationships/cohabiting_couples/rights_of_unmarried_couples.html

- Unmarried couples may not jointly adopt a child.
- Under the adoption legislation, it is possible for a single person to adopt if the Adoption Authority permits it.
- A person living with a same-sex or opposite-sex partner may apply to the Adoption Authority to adopt a child in their own right, however, their partner would have no legal rights in relation to the child.

5.5 Maintenance and co-habiting couples

A married person or someone in a civil partnership is entitled to apply to the court for maintenance from their spouse/civil partner to cover their own expenses.³⁵ Cohabitants, who qualify under the provisions of the *Civil Partnership and Certain Rights and Obligations of Cohabitants 2010 Act*, may also apply to the Courts for a maintenance order.

The primary statute covering financial maintenance of children is the *Family Law (Maintenance of Spouses and Children) Act 1976*. This Act was subsequently amended by the *Status of Children Act 1987* to provide for the maintenance of non-marital children.

A maintenance order directs one parent (usually the father) to make payments to another (usually the mother) in respect of any dependent child, in such amounts and at such times as the court determines.

The court instead of making an order for weekly or monthly maintenance payments can order that a lump sum or sums be paid, particularly in cases where a father has sold property etc. and has access to a large sum of money.

A maintenance order can be enforced under the *Enforcement of Court Orders Act 1940* as amended. The District Court can issue a summons, or where there has been a history of default a warrant for the debtor's arrest. Where it is proven that the defaulting party is unwilling rather than unable to pay maintenance, this will amount to contempt of court and could result in imprisonment. However, where the defaulter is unable to pay (for example, as a result of a change in financial circumstances) the proceedings may be adjourned or the original order varied.

³⁴http://www.citizensinformation.ie/en/birth_family_relationships/cohabiting_couples/adoption_and_unmarried_couples.html

³⁵http://www.citizensinformation.ie/en/birth_family_relationships/parenting_alone/maintenance_and_unmarried_couples.html

Section 285 of the *Social Welfare (Consolidation) Act, 1993* also imposes a general duty on fathers, regardless of their marital status to maintain their children, and s 286 provides that any parent who is liable to maintain a child shall be liable to contribute such amount as may be deemed to be appropriate towards any benefit or allowance paid in respect of that child under the provisions of the Act (e.g. child benefit).

Where a person who is liable to contribute, fails or neglects to contribute towards the benefit or allowance, the competent authority may apply to the District Court for an order directing the liable parent to make such contribution.

5.6 Surrogacy internationally

There are two types of surrogacy:

- (i) traditional, where the surrogate woman's own egg is fertilized with the intended father's sperm, and
- (ii) gestational, where an embryo is created using IVF and implanted in the surrogate's womb.

The General Scheme of the Bill does not provide for traditional surrogacy.

A 2011 academic paper³⁶ outlines some of the legal difficulties surrounding surrogacy, such as:

1. establishing legal parentage;
2. facing fraudulent arrangements; and
3. resolving contractual disputes.

The author also notes the problem of 'statelessness' whereby a child is not resident in any State and cites the example of Samuel, a child born in Ukraine in 2008 to a surrogate commissioned by a married same-sex couple from Belgium. The child found itself in a legal limbo:

"Because Belgian law is silent on the legality of surrogacy, the Belgian government denied Samuel citizenship on the grounds that it had no legal basis to recognize the Ukrainian birth certificate, despite the fact that Samuel's biological father is a Belgian citizen. Samuel also could not be a Ukrainian citizen because Ukrainian law recognizes the intended parents as the child's legal parents."

As the child did not have a passport or legal identity the child was not allowed to leave Ukraine and spent the following two years in an orphanage and foster home until his citizenship was resolved and he was allowed Belgian citizenship. The author writes that

³⁶ http://www.cjicl.com/uploads/2/9/5/9/2959791/21.2_lin_cjicl.pdf

Stateless individuals are vulnerable to human rights violations, both internationally and domestically and that in the case of the latter: "...stateless persons may be denied access to education, health care, legal employment, and political participation."

As can be seen from this example, whether or not surrogacy is recognised in a particular country has huge implications for recognition of legal parentage.

Internationally, the legal approach to surrogacy differs. Four approaches are observed:³⁷

1. the law is completely silent on surrogacy and its legality is undetermined, e.g. Belgium and Ireland;
2. all surrogacy contracts, commercial and altruistic, are prohibited, e.g. France and Germany;
3. surrogacy is permitted if it is for altruistic, non-commercial purposes, e.g., United Kingdom; and
4. all forms of surrogacy are permitted, e.g. India, Ukraine and Israel.

Table 1 shows international surrogacy regimes around the world.

Table 1: International surrogacy regimes

Prohibited	Unregulated	Regulated	Permissive
<p>Surrogacy explicitly prohibited.</p> <p>Criminal sanctions may apply (particularly to intermediaries facilitating the arrangement).</p> <p>Surrogacy arrangements are not enforceable.</p>	<p>No express prohibition, although commercial surrogacy may be expressly prohibited in some states.</p> <p>Surrogacy arrangements are not enforceable.</p>	<p>Certain forms of surrogacy for defined eligible persons permitted. Surrogacy agreements not generally enforceable.</p> <p>Generally only altruistic surrogacy permitted, often enforced by criminal provisions.</p>	<p>Commercial surrogacy permitted. Frequently no residency requirements.</p> <p>In some countries, there may be an absence of regulation (general law applies), in others surrogacy is regulated.</p>
Country examples (2012)			
<p>Italy, Germany, Turkey, France, Sweden, Switzerland, mainland China, some US states e.g. Arizona.</p>	<p>Ireland, Belgium, Brazil, Czech Republic, Netherlands, Japan, some US (e.g. Michigan) and some Australian states or territories (Northern Territory).</p>	<p>China (Hong Kong SAR), Greece, Israel, South Africa, UK, some Australian states (e.g. Queensland)</p>	<p>Georgia, India, Thailand, Uganda, the Ukraine, and some US states (e.g. California, Maryland, <i>et al</i>)</p>

Source: compiled by Oireachtas Library & Research Service, information from HCCH (2011 and 2012)

³⁷ Ibid.

5.7 Surrogacy in Ireland

As can be seen from Table 1 above, surrogacy is not regulated in Ireland. Nevertheless numerous couples have entered and continue to enter surrogacy arrangements.

A recent *Spotlight* (No.3 of 2013) by the Oireachtas Library & Research Service³⁸ examined the issue of surrogacy in Ireland and internationally and refers to the recent case of *M.R.* and the resulting High Court ruling which makes the presumption of parenthood for the birth mother a 'rebuttable presumption.' The State has appealed the High Court's decision to the Supreme Court on the basis that the birth mother is the legal mother of a child born through surrogacy. On 6th February 2014, the Supreme Court reserved judgment on the State's appeal.

The Department of Justice and Equality has issued a [document](#) to provide guidance as to the principles that will be applied by the Irish authorities when considering:

- (i) whether a child is an Irish citizen; and
- (ii) who the child's legal parents and guardians are.

The document specifies that:

- In determining whether a child born outside the State is an Irish citizen, it is necessary first of all to establish whether the child was born to an Irish parent, as only a parent or guardian of a child may apply for a passport on his or her behalf.
- Under Irish law the woman who gives birth to the child - in this case, the surrogate mother - is the legal mother of the child.
- If the surrogate mother is married, then under section 46 of the *Status of Children Act 1987*, the surrogate mother's husband is presumed by law to be the father of the child. The genetic father of the child may however make an application to be recognised as a legal parent.
- However, because the commissioning father is not married to the surrogate mother, he is not automatically a guardian of the child under Irish law, even if he has been granted a declaration of parentage.
- If the surrogate mother is not married, and the commissioning father is the genetic father of the child, then the Irish authorities may recognise his paternity of the child on receipt of reliable DNA evidence.

³⁸ Spotlight: Surrogacy, parentage, and citizenship: Ireland in the wider world. See <http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/spotSurrogac.pdf>

- A passport will be issued only where guardianship has been established but the Irish authorities may issue an Emergency Travel Certificate to enable the child to enter the State.

5.7.1 Commissioning mothers and the right to maternity/adoption leave

A recent decision by the European Court of Justice (18th March 2014), relating to the rights of commissioning mothers to leave from work after a birth through surrogacy finds that European law does not require States to provide maternity leave or adoption leave to mothers who have a child through a surrogacy arrangement.³⁹ The court ruled that the EU's Pregnant Workers Directive was designed only to help workers who had recently given birth, however, the court ruled that member states could, if they wished, extend this right to commissioning mothers. The court outlined its reasoning as follows:

“The Court adds that although maternity leave is intended to ensure that the special relationship between a woman and her child is protected, that objective concerns only the period after ‘pregnancy and childbirth’. It follows from this that the grant of maternity leave pursuant to the directive presupposes that the worker concerned has been pregnant and has given birth to a child. Therefore, a commissioning mother who has used a surrogate mother in order to have a child does not fall within the scope of the directive, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.”

Irish MEP Emer Costello said the ruling “has again highlighted the need for Irish legislation on assisted human reproduction”.⁴⁰ The General Scheme does not contain provisions which would entitle a commissioning mother to maternity leave or adoption leave.

5.8 Assisted Human Reproduction and a child’s rights to know the identity of its parents

On 9th April 2014, Dr. Mary Wingfield, of the Institute of Obstetricians and Gynaecologists, said that as there is no sperm bank in Ireland, all sperm is imported. Dr. Wingfield also stated that all sperm available in Ireland is donated anonymously.

The Commission on Assisted Human Reproduction in their 2005 report recommended that any child born through use of donated genetic material should, on maturity, be able to identify the donor(s) involved in his/her conception.

In 2005 the United Kingdom Government changed the law to enable children born as a result of sperm, eggs or embryos donated after April 2005 to access the identity of their

³⁹ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-03/cp140036en.pdf>

⁴⁰ <http://www.irishtimes.com/news/social-affairs/surrogacy-no-grounds-for-maternity-leave-rules-ecj-1.1729834>

donor when they reach the age of 18. Since 2005, donors must agree to the disclosure of their identity to any offspring reaching the age of 18.⁴¹ Also, egg and sperm donors are entitled to partial, non-identifying information about their donor-conceived offspring like sex and year of birth.⁴²

A report by the British Fertility Society (2006) suggested that this change has resulted in fewer sperm donors, however this is disputed by Human Fertilisation and Embryology Authority who have published data to support their claims.⁴³

In the state of British Columbia, Canada, however, a court ruling in May 2011 which ordered a permanent injunction against destroying donor records was reversed in the British Columbia Court of Appeal on the basis that offspring had no legal right to know their genetic information and that a ruling to change this may infringe upon other peoples' rights to privacy.⁴⁴

Under Article 8 of the European Convention on Human Rights (Right to respect for private and family life),⁴⁵ the following will not normally amount to family life:

- The relationship between a sperm donor and the child born as a result.⁴⁶ Such a relationship will not normally amount to family life under Article 8 unless there is sufficient evidence that the parties enjoy close personal ties in addition to the blood link.

5.9 Putting children's 'best interests' first

As stated by the Department, a key principle of this legislation is that the welfare and best interests of the child must be central to legislation governing familial relationships.

The position of children in society and respect for the rights of children has been in the public spotlight in recent years, largely due to official reports exposing breaches of these rights, such as the Report of the Commission to Inquire into Child Abuse (Ryan Report) 2009, the Roscommon Child Care Inquiry Report 2010, and the Report of the Child Death Independent Review Group 2012.

⁴¹ Frith et al. (2007). UK gamete donors' reflections on the removal of anonymity: implications for recruitment. *Human Reproduction* Vol.22, No.6 pp. 1675–1680, 2007. Accessed on 19th March 2014 at

<http://humrep.oxfordjournals.org/content/22/6/1675.full.pdf>

⁴² <http://www.coparents.co.uk/sperm-donors-laws-in-UK.php>

⁴³ Frith et al. (2007). UK gamete donors' reflections on the removal of anonymity: implications for recruitment. *Human Reproduction* Vol.22, No.6 pp. 1675–1680, 2007. Accessed on 19th March 2014 at

<http://humrep.oxfordjournals.org/content/22/6/1675.full.pdf>

⁴⁴ http://www.bionews.org.uk/page_221579.asp

⁴⁵ http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁴⁶ See *G v. The Netherlands* (1993) 16 EHRR.

The Thirty-first Amendment of the Constitution (Children's rights) Referendum resulted in repeal of Article 42.5 of the Constitution and the insertion of a new article, Article 42A 2.1 into the Constitution. Any resulting change to the Constitution, however, is pending the Supreme Court's decision in the Jordan case.

The purpose of the amendment, as articulated by the Government, is to expressly recognise children in their own right within the Constitution and to enshrine and give firmer recognition to the protection of children under the Constitution.

Also, the UCD School of Law provide [A Guide to the referendum on the 31st Amendment to the Constitution](#).⁴⁷

Article 42A.4.1 states that provision will be made by law that the best interests of the child will be of paramount importance in all proceedings: "concerning the adoption, guardianship or custody of, or access to, any child..."⁴⁸, while Article 42A.4.2 states that provisions must be made by law which secure the views of the child in the proceedings listed above. The amendment reflects provisions already contained in International and European Instruments, such as Article 12 of the United Nations Convention on the Rights of the Child.⁴⁹ Dr. Geoffrey Shannon highlights Article 24 of the EU Charter of Fundamental Rights which contains human rights principles drawn from the UN Convention on the Rights of the Child, including the right of the child to have his or her voice heard. Children also have the right under this article to regular and direct contact with their parents, unless it is contrary to their best interests.⁵⁰

The National Children's Strategy *Our Children - Their Lives*⁵¹, (2000-10) draws together policies from many departments to form a strategy for action. The strategy is to be followed up by the new Children and Young People's Policy Framework, which will build on its predecessor and cover the period 2014-2018.⁵² The Policy Framework will:

"...provide a means for cross departmental collaboration to promote the well-being of children and young people and a fresh impetus to a whole-of-government approach to current and emerging issues."

⁴⁷ Available at http://www.ucd.ie/t4cms/Guide_to_the_31st_amendment.pdf

⁴⁸ http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/Child_Welfare_Protection/ChildrensReferendum.htm

⁴⁹ Shannon, G. (2013). Sixth Report of the Special Rapporteur on Child Protection: A report submitted to the Oireachtas. Accessed at http://www.childrensrights.ie/sites/default/files/submissions_reports/files/GShannon-SixthRapporteurReport0713.pdf

⁵⁰ Ibid.

⁵¹ Available at <http://www.dcy.gov.ie/documents/Aboutus/stratfullenglishversion.pdf>

⁵² <http://www.dcy.gov.ie/viewdoc.asp?fn=%2Fdocuments%2Fpolicy%2Fchildandyoungpolicyframework.htm>

6. The General Scheme of the Bill

6.1 General points

In examining what has been published to date, it is important to draw the distinction between the General Scheme of the Bill and the Bill as will be presented at first stage in the parliamentary legislative process (which is known as “initiation”, i.e. publication). Most Government departments have their legislation drafted by the Office of the Parliamentary Counsel (OPC)⁵³ by supplying Heads of a Bill which broadly set out policy objectives. Typically, a General Scheme can be considered to be in draft format and as such is still subject to the legal advice of the Office of the Attorney General. It may include an explanatory note to accompany each Head unless the Heads are self-explanatory (see Appendix 1 for further details on the preparation of legislation).

It is important to note that **the General Scheme has no legal effect** and the proposals it contains may well evolve over time as the legislative process progresses.

However, the publication of the General Scheme presents an important opportunity for interested stakeholders to comment on the general principles and themes at an early stage in the Bill's development. In this case, the Joint Committee have formally invited written submissions in relation to the General Scheme of the Bill.

Finally, it should be noted that this process allows the Committee, through their report to the Minister, the opportunity to have a discernible impact on the shaping of the proposed legislation. The Bill, when published, could be compared by the Members of the Committee with their report to evaluate whether or not their comments or recommendations have been taken into account.

The draft legislation which follows a General Scheme of a Bill can potentially vary, to a greater or lesser extent, from the General Scheme as issues are further refined during the drafting process.

Conscious that the General Scheme is at a very preliminary stage of the legislative process, this Report conducts a summary and analysis, as far as is possible, of some of the key themes which emerged during the consultation process with stakeholders.

6.2 The Scheme of the Children and Family Relationships Bill 2014

⁵³ The Office of Parliamentary Counsel to the Government is one of three offices that make up the Office of the Attorney General. The OPC comprises the Parliamentary Counsel who draft legislation and have responsibilities in the area of statute law revision.

The [press release](#) published with the General Scheme outlined some of the main provisions of the proposed legislation as follows:

- ensure our law reflects the principles, rights and obligations contained in Article 42A (if upheld) of the Constitution;
- update and modernise the law regarding parental rights relating to children living in diverse family relationships;
- establish that the best interests of the child is the paramount consideration in the resolution of disputes concerning the guardianship, custody of and access to children;
- spell out in detail for the first time in Irish law the rights and responsibilities of guardians of children;
- clearly set out how parentage is to be assigned in cases of assisted reproduction and non-commercial surrogacy and propose transitional provisions applicable to surrogacies which precede the Bill's enactment;
- extend automatic guardianship to non-marital fathers who cohabit for a specified period with the child's mother;
- render civil partners eligible to jointly adopt a child (presently single individuals regardless of sexual orientation may adopt, as may married couples but same sex couples cannot jointly adopt);
- allow step-parents, civil partners, those cohabiting with the biological parent and acting in loco parentis for a specified period to obtain guardianship and/or custody rights;
- enable members of the extended family to apply for access to a child;
- put in place a series of provisions aimed at making parenting work where estranged parents are in continuous disputes to ensure, insofar as is possible, that court orders made to maintain a child's connectivity with each parent are respected;
- make express provision to facilitate the use of DNA to determine parentage disputes without the necessity of a blood sample by the use of mouth swabs and other appropriate samples;
- reform child maintenance laws so that the courts, when making child support and lump sum orders, treat all children equally irrespective of the circumstances relating to their conception and birth; and
- encourage the use of mediation to resolve disputes relating to children between estranged parents.

The Department published a [briefing note](#) on the Bill in 2013 as well as a [policy rationale](#) along with publication of the scheme of the Bill in which it stated that the proposed legislation is underpinned by two key principles:

- The welfare and best interests of the child must be central to legislation governing familial relationships;
- The effect of the provisions should be to promote the stability of families caring for children and to ensure that children are enabled to enjoy relationships of care and support with parents, guardians or those acting in loco parentis.

More detail of what is contained in the General Scheme of the Bill is contained in Appendix 2. The next section looks at the main issues raised by stakeholders with regard to the General Scheme.

7. Main issues raised by stakeholders

It should be noted that the proposed legislation was welcomed by most stakeholders. These stakeholders regarded the legislation as progressive with the potential to positively impact thousands of families and children throughout Ireland. This section will explore, in more detail, some of the issues most commonly discussed among stakeholders and which have arisen in other countries, so that best practice, where possible, may be identified. This is in the context that some stakeholders in their written submissions and presentations to the Joint Committee, felt that some aspects of the General Scheme merited further scrutiny; with a view to making amendments which would ensure that the Bill, when published, would better fulfil its overall objectives.

7.1 Commercial surrogacy

The proposed legislation will ban commercial surrogacy and will not allow surrogacy services to be advertised. This means that a woman cannot be paid by commissioning parents to become a surrogate. However, the reasonable expenses incurred by the surrogate in respect of the pregnancy can be paid by the commissioning parents.

The ethical concerns in relation to surrogacy (including commercial surrogacy) have been identified by Lin (2013)⁵⁴ as:

- the surrogate woman's rights over her body;
- the preservation of human dignity (The German ambassador to India, Thomas Matussek, stated that surrogacy is illegal in Germany because "it is not compatible with our idea of human dignity, which is enshrined in our constitution.")
- the possible exploitation of indigent surrogates and gamete donors; and
- the commodification of children.

The European Parliament (2013) observe that:

"Most religions and relevant organisations are against surrogacy, particularly its commercial aspects, since they see it as immoral, against the unity of marriage and procreation, or against the dignity or the child to be carried by their biological mother."

Lin (2013) also cites the main arguments in favour of commercial surrogacy, which are that:

- surrogacy is a mutually beneficial arrangement; and

⁵⁴ Lin, T. (2013). Born lost: Stateless children in international surrogacy arrangements. **Cardozo Journal of International and Comparative Law** (CJICL). Accessed on 10th March 2013 at http://www.cjicl.com/uploads/2/9/5/9/2959791/21.2_lin_cjicl.pdf

- restricting or prohibiting surrogacy is an infringement upon reproductive and contractual freedom.

Perhaps the most commonly expressed criticism of commercial surrogacy relates to the exploitation of women, particularly as commercial surrogacy is often carried-out in low-income, developing countries.

A recent report by the European Parliament (2013) includes an overview of the legal approach to surrogacy in EU Member States. The report shows that commercial surrogacy is prohibited in Belgium, Denmark, Greece, Hungary, Latvia, Netherlands, and the UK.

Most stakeholders commenting on the present proposals welcomed the ban on commercial surrogacy, though Dr. Deirdre Madden, Senior Lecturer in Law, University College Cork objects, in her submission, to what she views as the “paternalistic and discriminatory position” of this aspect of the proposed legislation, arguing that:

“Neither should it be assumed that simply because a woman is of lower socio-economic means that she is therefore unable to make a voluntary and informed choice to become a surrogate mother.”

The Law Society of Ireland, in their submission, suggests the possibility that altruistic surrogacy arrangements be:

“...made acceptable from countries which ban commercial surrogacy. It is submitted that these countries could be certified by order, in much the same manner as civil partnerships.”

A notable aspect of the proposed legislation, with regard to commercial surrogacy, is the provision to penalise those engaging in commercial surrogacy with imprisonment. The Institute of Obstetricians and Gynaecologists and Barnardos, in particular, expressed concern with this provision, arguing that it would not be in the best interests of the child to have its parents imprisoned. Generally, it was suggested to the Committee that no sanction should be imposed on the parents that would be against the interests of the child; and in particular, children should not be denied a legal identity because of some breach of the relevant provisions by their parents or prospective parents.

Also, it was reported in the *Irish Times* that Marion Campbell, a family law solicitor who has advised in high-profile cases regarding parentage, said that banning commercial surrogacy could result in driving such surrogacy underground.⁵⁵

⁵⁵ <http://www.irishtimes.com/news/social-affairs/new-laws-to-ban-commercial-surrogacy-1.1599964>

7.2 Traditional surrogacy

The definition of 'surrogate' in the General Scheme is that currently applied in the Government's guidelines on surrogacy. It specifically excludes any surrogacy in which a surrogate mother uses her own reproductive material, i.e. traditional surrogacy. The Department states that this exclusion is intended as a human rights measure to prevent a surrogate mother from being coerced into selling her own child⁵⁶ and also that the effect of allowing traditional surrogacy would be to permit the woman to "contract out" of her parental responsibility for a child which is hers both by genetics and by birth.⁵⁷

This issue received considerable commentary from stakeholders, through their submissions and presentations to the Committee.

Barnardos, the Child Law Clinic,⁵⁸ and the Institute of Obstetricians and Gynaecologists all argued for the inclusion of traditional surrogacy in the legislation. The Child Law Clinic, in their submission, write:

"The policy rationale given in the heads of the bill for the exclusion of traditional surrogacy makes no allowance for the altruistic motivations that may form the basis of the decision of a woman to act as traditional surrogate nor does it contemplate the potentially beneficial consequences of her doing so."

Dr. Deirdre Madden, in her submission, writes that excluding traditional surrogacy is not in the best interests of the child in circumstances where a surrogate mother might be willing to use her own eggs, as it necessitates the introduction of a third party. Dr. Madden also argues:

"The argument that allowing traditional surrogacy would allow mothers to 'contract out' of their parental responsibility "displays a negative bias against surrogacy which is not appropriate or justified" and does not hold up. Studies of surrogate mothers commonly show that surrogates do not consider the children they bear to be theirs and therefore they are not 'contracting out' of responsibility for *their* children."

Furthermore Dr. Madden criticised the inclusion of the term 'selling' in the policy rationale which she argued was negative, emotive and inappropriate.

⁵⁶ Policy Rationale published with the General Scheme.

⁵⁷ Notes to Head 2 in the General Scheme.

⁵⁸ The Child Law Clinic at University College Cork is a pro-bono legal research service provided by students for lawyers and Staffed by colleagues at the Faculty of Law and students on the Faculty's PhD and LLM programmes.

The Child Law Clinic, Dr. Deirdre Madden and the Institute of Obstetricians and Gynaecologists highlight that traditional surrogacy, from a medical point of view, is a less risky procedure than gestational surrogacy. The Institute of Obstetricians and Gynaecologists also point out in their submission that:

“It is extremely difficult to obtain donated eggs in this jurisdiction and it may be easier for couples to access these donated eggs by accessing those of the intending surrogate.”

The Institute of Obstetricians and Gynaecologists expresses concern that excluding traditional surrogacy, from the provisions of the legislation, may lead some individuals to make local unregulated arrangements or engage in poorly regulated commercial services abroad.

7.3 Posthumous conception

The proposed legislation provides that the consent of an intended parent is not valid after the death of that intended parent, thus the Bill will not allow for posthumous conception.

Several stakeholders discussed this aspect of the legislation and many called for the inclusion of a provision which would allow limited posthumous conception. For instance Human Assisted Reproduction Ireland (HARI) argue that posthumous reproduction should be facilitated if written consent from the deceased can be produced.

Dr. Deirdre Madden looks to British Columbia for an example of effective legislation in this area, citing their *Family Law Act 2011* which came into force on 18th March 2013 and provides for parentage in posthumous conception if the deceased person gave written consent.⁵⁹ This Act was developed after consultations with over 500 organizations, community groups, the legal community and members of the public. Dr. Madden also writes that countries/jurisdictions including: England, Colorado, Delaware, Texas, Washington, California, New Jersey, Argentina, Belgium, Latvia, Netherlands, New Zealand and Spain permit posthumous insemination based on the written consent of the deceased man.

The Institute of Obstetricians and Gynaecologists also makes the point that allowing posthumous conception in certain circumstances would be common practice in many EU countries.

⁵⁹ <http://www.justicebc.ca/en/fam/index.html>

Patrick F. O'Reilly & Co. Solicitors recommend in their submission that the legislation would allow 'a very small window of opportunity' after the death, for the embryo to be transferred and that consent forms might include an option to permit posthumous conception in limited circumstances.

However, there are arguments against legislating for posthumous conception which mainly centre on concerns over the welfare of the child, as well as inheritance and property rights.

Dr. Madden notes in her submission to the Committee that the commencement or completion of treatment is time-limited in some countries:

"For example, it must be started within 6 months in Belgium and must be completed within one year in Spain, 2 years in Greece and Netherlands and within 3 years in Belgium. This is to ensure that the administration of the deceased person's estate is not unduly delayed pending the birth of any potential successors."

A recent court case in the UK High Court, *Warren –v- (1) Care Fertility Northampton Limited (2) Human Fertilisation and Embryology Authority*, concerned a 28 year old widow who contested the storage time limit imposed by the UK fertility regulator, which was due to expire in April 2015 as her husband was not alive to renew the consent form. In March 2014 the judge ruled in her favour and her husband's sperm may now be stored for a period of 55 years, up until April 2060.⁶⁰

7.4 Assignment of parentage in surrogacy cases

According to the provisions of the proposed legislation, the surrogate will be the legal mother of the child until the court assigns parentage to the intending parents. There is a time limit to the application of not less than 30 days and not more than six months after the child's birth. Parentage will only be assigned if the birth mother consents. Evidence of a genetic link to one of the intended parents as well as evidence that the surrogate mother is not the genetic mother of the child must be provided to the court.

Speaking to the Committee on 9th April 2014, Dr. Geoffrey Shannon expressed his support for this provision. He said:

"Under head 13(9), a birth mother who is a surrogate will remain guardian of the child until she gives consent that she is not the parent of the child, and her guardianship will be terminated if it is assigned under those proceedings. Otherwise, she will remain guardian until a guardian is appointed. This is a sensible and practical approach which will avoid the situation in which a child is left without a guardian."

⁶⁰ <http://www.britishandrology.org.uk/wp-content/uploads/2014/03/warren-judgment.pdf>

Other stakeholders expressed their dissatisfaction with the length of time it could take for parental rights to be assigned to the commissioning parents. Some stakeholders believed the timeframe was not in the best interests of the child; for instance, Barnardos wrote:

“...any important decisions to be made regarding the child’s health or welfare rests with the surrogate not with their intending parents.
At the very least, one of the intending parents should also be granted parentage upon birth of the child to ensure consistency in the care and decision-making relating to the child’s welfare.”

The Child Law Clinic go further by suggesting that the commissioning parents be presumed to be the parents of the child from the beginning of the arrangement. Dr. Deirdre Madden also proposes that declaration of parentage be made prior to the birth, as happens in New Hampshire. Dr. Madden argues this would ensure that:

“...there is no doubt regarding the child’s parentage after delivery. This ensures that the child’s best interests are prioritised and that custody and care of the child is situated with its intended parents.”

The Institute of Obstetricians and Gynaecologists call for greater clarity for the period of time before legal parentage can be transferred, including issues around consent.

A broader issue is raised by Patrick F. O’Reilly & Co. Solicitors, who take issue with the provision that a surrogacy arrangement may not be used as evidence of the intention or consent of the surrogate to the making of a Declaration of Parentage. They write:

“We cannot see how it could be in the best interests of the child if the obligations of the commissioning couple under the agreement to take the child, nurture and care for the child, are not enforceable.”

7.5 A child’s right to know the identity of their genetic parents.

A recommendation of the Commission on Assisted Human Reproduction in 2005 was that a child born through assisted reproduction should have the right to identify its genetic parent if it wished to do so upon reaching adulthood.

In this context Article 7 of the UN Convention on the Rights of the Child,⁶¹ is often referenced as it seeks to ensure that a child has the right, as far as possible, to know one’s parents and to be raised by them.⁶²

The General Scheme of the Bill does not contain provisions which would allow such access. Several stakeholders were critical of this. Barnardos, the Child Law Clinic, Children’s Rights

⁶¹ http://www.childrensrights.ie/sites/default/files/submissions_reports/files/UNCRCEnglish_0.pdf

⁶² European Parliament. (2013). A comparative study on the regime of surrogacy in EU Member States.

Alliance, Dr. Deirdre Madden, HARI, the ISPC, the National Infertility Support and Information Group (NISIG) and Treoir all argue that the legislation should provide some mechanism for a child to be able to access their biological parent(s) identity. This was seen as important for the child's sense of identity as well as their right of access to medical records.

The Children's Rights Alliance write:

"...the right to an identity (provided for by the UN Convention on the Rights of the Child) has been interpreted by the Committee on the Rights of the Child as requiring States to take all measures necessary to allow all children, irrespective of the circumstances of their birth, to obtain such information on the identity of their parents, to the fullest extent possible."

Dr. Deirdre Madden looks to international examples of countries which have prohibited anonymous gamete donation and established systems to assist donor-conceived people to identify the donors. Such countries include: Austria, England, Finland, the Netherlands, New Zealand, Norway, Sweden, Switzerland, Wales, and the Australian states of New South Wales, Victoria, and Western Australia.

The National Infertility Support and Information Group (NISIG) argue strongly for children to have:

"...access to certain identifying information regarding their donor when reaching the age of majority."⁶³

NISIG drew the Committee's attention to the Human Fertilisation and Embryology Authority (<http://www.hfea.gov.uk/7475.html>) for further information on best practice in this area.

Treoir meanwhile suggest that it may be necessary to implement a 'dual birth registration'; one showing the social parents and a second detailing the genetic lineage of the child.

7.6 Guardians acting jointly in relation to medical consent

There was some confusion over the wording of Head 36 of the General Scheme of the Bill, which relates to guardians acting jointly. Some stakeholders were uncertain as to whether or not the legislation would require joint medical decision-making. If this was the case, the concern was that this may lead to delays in a child receiving medical treatment. Commenting on this Head, Dr. Deirdre Madden writes in her submission:

"It is not sufficiently clear in the wording of the Head 36 whether this means each guardian singly may give consent, or whether in light of the foregoing provisions on the

⁶³ The age at which a person is recognized by law to be an adult.

obligation to act jointly, it must be interpreted that both guardians must exercise this responsibility jointly. If the latter interpretation is correct, this will be at odds with national policy and unworkable in the provision of health and social care services. I would strongly urge that this provision be clarified.”

The HSE – Quality and Patient Safety Division make a similar point and recommend that the default position in relation to medical consent be one parent/legal guardian consent in line with the HSE National Consent Policy to safeguard the best interests of children. The HSE National Immunisation Office also recommend this.

A separate concern is raised by the HSE (QPSD) in relation to the *Non-Fatal Offences against the Persons Act, 1997* and a possible conflict with the provisions of this legislation. Their submission states that:

“Clarification is required as this appears to conflict with the Non-Fatal Offences against the Persons Act, 1997 which states that persons over the age of 16 years can give their own consent for surgical, medical and dental procedures, and consent from their parents is not required.”

Also, Dr. Deirdre Madden notes in her submission that the General Scheme of the Bill defines a child as a person under the age of 18 years, which she suggests would imply that parents/guardians are entitled to give consent to medical treatment for their child until the age of 18.

7.7 Changes to Guardianship

The proposed legislation will provide automatic guardianship for unmarried cohabitant fathers for the first time, putting them on the same statutory footing as married fathers. Cohabitant fathers will have to show that they have been cohabiting with the child’s mother for at least 12 months prior to the child’s birth, if that cohabitation does not end more than 10 months prior to the child’s birth.

Some stakeholders, such as the Children’s Rights Alliance and the Law Society of Ireland have queried the means by which fathers will have to prove their cohabitation with the mother.

Another important provision of the proposed legislation is that guardianship can be applied for by:

- a parent who is not automatically entitled to guardianship;
- a spouse/civil partner/cohabitant of the child’s parent; and

- a person who has day-to-day care of the child in the absence of a parent or guardian who is prepared to fulfil their responsibilities to the child (for example, a grandparent).

The General Scheme also provides for the appointment of substitute guardians (Head 41) by the guardian parent who has custody of the child, if the guardian parent is unable or unwilling to exercise their rights and obligations in relation to the child.

Commenting on this provision, the Dublin Solicitors Bar Association (DSBA) argue in their submission that this measure should be confined to situations where the other parent/guardian is also unwilling or unable to act as guardian. DSBA's concern is that the provision may be abused by the appointing parent "with a view to making life difficult for the other non-appointing parent." The DSBA remain concerned at this despite the provision enabling the other parent to object to the appointment. The Law Society of Ireland expresses the same concern and makes the same recommendation.

Treoir have expressed concern that confusion may arise from the appointment of multiple guardians and recommend that a consolidated definition of guardianship be used where there is a single guardian or several guardians acting jointly for a child. Furthermore, Treoir request the establishment of *A Central Register for Statutory Declarations for Joint Guardianship*. The Law Reform Commission (2010) also recommends a central register.⁶⁴ At present if a declaration is lost or destroyed there is no evidence that it existed. However, such a register would require considerable resources and keeping it up to date may be a challenge.

In 2005 the Law Reform Commission recommended that the terms 'guardianship', 'custody' and 'access' should be replaced with 'parental responsibility', 'day-to-day care' and 'contact'. Some stakeholders, such as Treoir, the Child Law Clinic and Dr. Geoffrey Shannon, recommend that these terms should be applied in this legislation as they are more appropriate and consistent with other existing legislation and EU regulations, such as *Brussels II bis*.

It was strongly recommended to the Committee that provision should be made in the bill for the establishment of a 'central register' where statutory declarations of guardianship could be retained.

⁶⁴ [http://www.lawreform.ie/fileupload/Reports/r101Family\(1\).pdf](http://www.lawreform.ie/fileupload/Reports/r101Family(1).pdf)

7.8 Parentage

The General Scheme clarifies parentage in different scenarios described in the general scheme. The rationale for Head 10 states that the intention is to:

“secure the best interests of the child by ensuring that he or she has legal links with his or her parents which cannot be undermined either by the parents in the event of a dispute, or by any other person”.

Head 11 (8) includes a provision to protect a ‘known’ donor from acquiring responsibilities for the child, solely by reason of a genetic link to that child.

In terms of parentage where a child has been conceived **without** assisted reproduction, the proposals will change presumption of paternity in the following ways:

- A man who has been cohabiting with the child’s mother for at least 12 months (if this cohabitation has not ended more than ten months before the child’s birth) will be presumed to be the child’s father.
- A married woman will be able to rebut the presumption of paternity in relation to her child if she can affirm that she is separated from her husband for more than 10 months.

Treoir recommend that a mechanism should be in place to verify that the requisite time for cohabitation (minimum period of 12 months) has been complied with. This is to avoid disagreements if the couple should later separate.

In cases where a child has been conceived **by assisted reproduction**, it is provided that the mother of the child **is always the birth mother**, whether or not she has a genetic connection to the child. The key change from present legislation is that, where a child is conceived through assisted reproduction, a non-rebuttable order can be made as to who a child’s parents are.

Some stakeholders, such as Mr. Brian Tobin, a law lecturer in NUIG, raised concerns with regard to Head 10 (3) which would allow parentage to be assigned to a lesbian partner of the mother of the child and not the man who donated the sperm. Mr. Brian Tobin, commenting on Head 10, states in his submission:

“I do not believe that legislation allowing a non-biological lesbian co-parent to be regarded as a parent of the child to the exclusion of a biological, known sperm donor father could, or should, withstand constitutional scrutiny if Article 42A eventually forms part of the Constitution.”

Mr. Brian Tobin also recommends that automatic guardianship should be extended to known donor fathers thus ensuring the child's right to the guardianship of both its biological parents upon birth. Mr. Tobin recognises that in the majority of cases:

“...a sperm donor may simply wish to be just a sperm donor and transfer his guardianship rights at the first legally available opportunity...”

Dr. Deirdre Madden seeks clarity around parentage in cases of single women who are conceiving through assisted reproduction. Dr. Madden writes that while Head 8 states that it is intended to provide that the donor is not the parent of the child, Head 10 (3) should include a provision to re-iterate that in the event of donor sperm being used by a single woman, the birth mother is the legal mother and that there is no second parent.

Family & Life (a charity organisation committed to opposing “all attempts to undermine the inalienable and imprescriptible nature of human life”) criticise Head 10 for allowing what it sees as:

“...the commissioning of an IVF baby by two women, thus deliberately depriving the child of a father-figure.”

Children's Rights Alliance expressed uncertainty over how the provisions regarding presumptions of parentage, as set out in Head 10, will be applied retrospectively on the birth certificate of a child. A private citizen, drew the Committee's attention to Australia where a lesbian partner can be added to a birth certificate retrospectively.⁶⁵

The Child Law Clinic do not agree with how presumption of paternity is determined in the General Scheme, arguing that:

“...a father's fact of parentage should arise by virtue of the genetic link with the child and not by virtue of the nature of his relationship with the mother of the child.”

They also recommend that the Bill should outline the rights and obligations that rest with a person once parentage status arises or is accorded by the court.

Treoir have expressed reservations that the General Scheme does not address the issue of unmarried non-cohabitant fathers and their children.

⁶⁵ http://www.bdm.nsw.gov.au/bdm_bth/bdm_abc.html

The National Women's Council of Ireland (NWC) seek clarity around the mechanisms for assigning parental rights in situations where neither intending parent has contributed genetic material.

7.8.1 Adoption by civil partners and recognising parentage declared abroad.

The Adoption Act 2010 allows adoption by a single person or a married couple. This means that while a gay or lesbian person may adopt a child, a same-sex couple cannot do so jointly. The proposals in this General Scheme would allow a same-sex couple in a civil partnership to adopt a child in the same way as married couples.

However, some stakeholders highlighted the situation regarding same-sex couples whose parentage was declared abroad and will not be recognised in Ireland, as they are not in a civil partnership. This situation applies to a private citizen, who wrote to the Committee to explain that when he moves to Ireland, his family will not be recognised under existing or proposed legislation.

He recommends that Head 77 be amended to allow cohabiting couples to apply to be considered for adoption or to have their foreign adoption order recognised. He writes:

“While I appreciate that the Constitution gives children being raised within a legally recognised unions, such as marriage or civil partnerships, specific rights, all children do have rights to a family. I hold that this should be further amended to allow cohabiting couples to also apply to be considered for adoption or to have their foreign adoption order recognised.”

Marriage Equality also ask if there are any circumstances under which couples or individuals recognized as parents in other jurisdictions will be recognized as parents under Irish law.

7.9 Views of the child and the right to participate

The best interests of the child are at the centre of this legislation as stated in the policy rationale. Also, Article 42A.4.2 of the Children's Referendum, if upheld, will oblige the State to enshrine in law provisions that would seek the views of children in legal proceedings concerning the adoption, guardianship, custody of, or access to any child. This is reflected in Head 32(3) of the General Scheme.

However, some stakeholders have questions as to how children are treated in the proposed legislation. The Children's Rights Alliance is unclear how the child's views will be heard by

the court. The CRA and the Irish Society for the Prevention of Cruelty to Children (ISPCC) stress that it should be ensured that children are not put under undue influence by any of the parties to the proceeding. The ISPCC seeks clarification as to what structure or framework will be put in place to facilitate this. Dr. Geoffrey Shannon, in his paper on the General Scheme,⁶⁶ writes that children must be given a voice but must not be burdened with decision-making responsibility.

The CRA also ask who will decide when a child is considered capable of forming views, for the purposes of this legislation. The CRA recommend that:

“Any mechanism that is put in place to elicit the views of the child should be accessible and child-friendly. Children should be provided with information on their right to participate and how they can assert this right in legal proceedings. They should also be provided with a complaints mechanism where they feel their views were not properly considered.”

In addition, Head 39 addresses the appointment of guardians and requires the consent from the child in relation to such applications; however the ISPCC note that a minimum age has been specified and seeks clarification on the reason for imposing that minimum in these instances and clarification as to why 12 years of age is the agreed minimum.

On a related point, the National Youth Council of Ireland (NYCI) argue that age is not a good indicator of the ability to have a say and that all children are entitled to express their view freely. The NYCI contend that children's evolving capacity and maturity are more important than age in determining the ability to express oneself.

Family & Life have serious concerns in relation to the General Scheme overall. Their submission argues that the focus of the Scheme is on satisfying adults, to the detriment of children's interests:

“The whole thrust of the Heads is entirely adult-centred and, despite reference to the child's ‘best interests’, the bottom line is that the Heads facilitate the creation of children to meet the desires of adults without any regard to the rights of those children to know their genetic parents and be cared for by them, or to be nurtured within an optimal family environment comprising of two parents, a mother and a father.”

However, Dr. Geoffrey Shannon sees the proposed legislation as an important advancement in children's rights. In his paper on the proposals he writes:

⁶⁶ <http://www.childrensrighs.ie/resources/children-and-family-relationships-bill>

“The new framework that will be implemented following the passage of this Bill will not only radically overhaul many existing rules, it will create new rights for parents, both biological and social, and, most critically, for children. As a result, it represents an important milestone on the road to recognition of children as rights holders.”

7.10 Procedures

The rules on section 47 reports outlined in Head 58 of the Bill should be strengthened, with provision for the funding of the Guardian Ad Litem, and recognition of child contact centres.

7.11 Adoption by Step-Parent

Part 12 of the Bill should be amended to allow for step-parent adoption, so a birth parent does not have to relinquish rights where civil partners jointly adopt.