

MARRIAGE EQUALITY

Civil Marriage for Gay and Lesbian People

***LEGAL SUBMISSIONS IN RESPECT
OF THE GENERAL SCHEME OF THE
CHILDREN AND FAMILY
RELATIONSHIPS BILL 2014***

Author

***Justine Quinn BL, LL.B. (Dub), LL.M. (LSE),
Attorney-at-Law (New York).***

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Introduction

Marriage Equality welcomes the provisions contained in the General Scheme of the Children and Family Relationship Bill 2014. The proposals, if enacted, will eliminate many of the differences between marriage and civil partnership in the domain of parent-child relationships identified in Marriage Equality's *Missing Pieces* report (Fagan, 2011). It will also secure the best interests of children in gay and lesbian families addressing the concerns of those children as articulated in Marriage Equality's *Voices of Children* publication (Marriage Equality, 2010). This legislation is child centred and recognises the need for children to have legal certainty regarding their family status. It has been designed to ensure legal equality of children, regardless of the form their family takes.

The proposed legislation provides strong protections for the rights of the child.¹ The interests of the child in knowing his or her identity are referred to with reference to the provisions on paternity.² In this connexion it would be desirable for this Bill, or if required, subsequent legislation to address the right of children to information regarding their genetic heritage at an appropriate age.³ The General Scheme references the interests of the child in having legal certainty regarding their family and their parents.⁴ The legislation specifies the legal obligations imposed upon a child's

¹ General Scheme of the Children and Family Relationships Bill 2014, see Head 53-61 on safeguarding the interests of children for example.

² General Scheme of the Children and Family Relationships Bill 2014, notes on the presumptions of paternity, 15. The section provides that 'The modifications to the presumptions of paternity (and non paternity) are intended to help secure the right of the child to know his or her identity. This is considered to be in the best interests of the child concerned.'

³ A number of other jurisdictions have made legislative provision for such information to be provided to children conceived through donor insemination.

⁴ Head 11(7), see further 'notes', 25.

legal guardians.⁵ It provides that when any decision is made concerning the welfare of a child, the best interests of the child must at all times be a paramount consideration.⁶

This legislation also takes great care to protect women who act as surrogates for couples wishing to have children of their own. These have been carefully considered and strongly enhance the protection of surrogates under Irish law. It ensures that no surrogacy agreement will be enforceable against a surrogate and ensures that her consent is meaningful and effective. The proposed legislation favours altruistic surrogacy and not only prohibits commercial surrogacy but also advertisements in relation to surrogacy.

The proposed legislation ensures that Irish family law recognizes the lived experience of Irish children and protects their right to family life and to the care and support of their parents. The following submissions contain an analysis of the General Scheme of the Children and Family Relationships Bill 2014. It sets out the main provisions of the proposed legislation in so far as these provisions will have an impact on the legal status of LGBT parents and their children. These submissions seek to identify any aspects of the proposed legislation which may require further clarification in order to ensure that children who have lesbian, gay, bisexual or transgender parents are fully protected under Irish law.

Executive Summary

Marriage Equality has identified the following queries and seeks further clarification, if possible as to the interpretation or application of the following:-

- 1. Marriage Equality seeks information regarding whether a scheme for recognition of family relationships between parents and children who are recognized as family members in other jurisdictions, including other EU member states, will be established.***

⁵ General Scheme of the Children and Family Relationships Bill 2014, Heads 34-37.

⁶ *ibid*, Head 32.

2. *In respect of Head 10 of this legislation with regard to recognition of legal parents, the father and mother of a child (as defined under Head 36) are automatically joint guardians. In cases of donor insemination where the parents are a lesbian couple, a donor will not be recognized father without his consent to being recognized a parent (under Head 10). If the birth mother is in a civil partnership or cohabiting, her civil partner is presumed to be other parent (Head 10). Does this mean that women in same-sex relationships will be automatic legal guardians. Does this apply regardless of whether or not they are married, or in a civil partnership provided that they are cohabiting in an intimate and committed relationship?*

3. *The combined effect of Head 10 and Heads 37-38 appears to be that the parents and guardians of such a child will be the female couple and only that couple. Recognition of more than two parents is expressly ruled out: Head 11(10). Can a donor subsequently apply for access to the child and are there circumstances in which a child will have more than one legal guardian?*

4. *Marriage Equality seeks clarification regarding whether section 10(3) can be applied to circumstances in which a genetic parent, has conceived a child through donor insemination and that child has been borne by their consenting, spouse, civil partner, or cohabitant (i.e. in cases of reciprocal IVF where the intending parents are female and in a same-sex relationship). Head 10(3) suggests that in circumstances where both parties fully intend to become legal parents and have not withdrawn consent at any time prior to the child's conception, both would be recognised. Perhaps the legislature could advise as to whether the above interpretation of the proposed legislation is correct.*

PART 1 - Preliminary and General

The Bill begins with a general introduction and the usual provisions on the commencement of different sections of the proposed legislation. The Minister with the power to commence various provisions aspects of this legislation is the Minister for Justice.⁷ The interpretation section of the Bill is set out at subhead 2 of the General Scheme. The Repeals provision in subhead 3 notes that the legislation will repeal the Guardianship of Infants Act, 1967 as amended.

PART 2 - Parentage and Presumptions of Paternity

Part 2 addresses 'Parentage and Presumptions of Paternity. Both this section and the interpretation section of the Bill make it clear that the term 'parent' includes not only the birth mother and biological father⁸ but also those determined, in accordance with part 3 to be the parents of children conceived through assisted reproduction including surrogacy. Assisted Reproduction is defined as 'a method of conceiving other than by sexual intercourse'⁹ The latter includes a surrogacy in which a woman 'gives birth to a child as a result of assisted reproduction, if at the time of conception she intended to relinquish that child' either to a person or persons whose reproductive materials were used to conceive the child,¹⁰ i.e. either sperm or ovum, or to one of the above individuals and their spouse, civil partner or cohabitant.¹¹ The above definition of surrogacy excludes situations in which a woman carries her own genetic child, with the intention of giving that child up. This so-called 'traditional surrogacy' is excluded from the scope of the legislation. The policy justifications advanced for this are persuasive.

¹²

⁷ General Scheme of the Children and Family Relationships Bill 2014, s. 2.

⁸ *ibid*, 5(2).

⁹ *ibid*, 2(1).

¹⁰ *ibid*, 2(1)(i).

¹¹ *ibid*, 2(1)(ii).

¹² The General Scheme provides that there are 'compelling public policy reasons to exclude such arrangements even if voluntarily undertaken, as the effect would be to allow the woman to "contract out" of her parental responsibility for a child which is clearly hers by genetics and by birth', General Scheme at 10.

The proposed legislation establishes presumptions of paternity in respect of a married man, whose wife gives birth to a child, either during the marriage or within ten months of its termination unless the contrary.¹³ These presumptions can be rebutted in accordance with the civil standard of proof namely the balance of probabilities.¹⁴ One of the many innovative features of this legislation is that it sets out a negative presumption, i.e. a presumption that the husband is not the father of a child born to his wife, in cases where the couple have been living apart, and where more than 10 months have elapsed since the last contact between them.¹⁵ This negative presumption also applies where a married woman has been living apart from her husband pursuant to a decree of judicial separation, deed of separation or separation agreement, and gives birth more than 10 months after any of the above.¹⁶

This section also provides that a man is presumed to be the father of a child where, he has 'cohabited with the child's mother for at least 12 consecutive months prior to the child's birth' and where that cohabitation ended less than 10 months before the birth.¹⁷ A presumption of paternity also arises where a man has been registered as the child's father under the Civil Registration Act 2004, at his request and at the request of the birth mother,¹⁸ or where he has been found by a court to be the father of the child.¹⁹ The reference in this section to a 'court of competent jurisdiction' will presumably allow for recognition of such orders from overseas or otherwise outside the jurisdiction of this state. This is an area in need of further clarification, in particular with reference to couples in same-sex relationships, including but not limited to those whose legal situation is addressed in Part 3 of this Bill.

¹³ Head 6(2)(a) refers to a birth 'during a subsisting marriage', and 6(2)(b) includes a birth within 10 months after the termination of the marriage, by death or otherwise.

¹⁴ Head 6 on presumptions of paternity mirrors section 46 of the Status of Children Act 1987.

¹⁵ This is one of the innovative aspects of the proposed legislation. Subhead 5 of the General Scheme provides that where a married woman 'who is living apart from her husband, gives birth to a child more than 10 months after the last occasion' when there was 'contact' between her and her husband. In such circumstances, the husband is 'presumed not to be the father of the child unless the contrary is proved on the balance of probabilities.'

¹⁶ Head 6(4) of the General Scheme of the Children and Family Relationships Bill 2014

¹⁷ Head 6(3)(a).

¹⁸ Head 6(3)(b).

¹⁹ Head 6(3)(c).

Recognition of Families from Other Jurisdictions

A number of Irish people have lived overseas and raised families there. If a same-sex couple, one or both of whom is legally recognized as parents or guardians in another jurisdiction return to Ireland, will they be recognized under Irish law? Difficulties have arisen for couples who are civil partners in exercising their freedom of movement in European Union law where the legislative schemes established in their home state and host state differ. In view of this experience, and for benefit of legal certainty it may be appropriate for a provision to be included in this Bill enabling the Minister to enact a statutory instrument on the recognition of foreign legal relationships between parent and child including in cases of assisted human reproduction, guardianship and/or adoption.

Marriage Equality seeks guidance as to whether or under what circumstances couples or individuals who are recognized as parents in other jurisdictions will be recognized as parents under Irish law.

If provision is made in this Bill for the enactment of regulations, these could operate in a similar manner to the current statutory instrument addressing the recognition of foreign same-sex relationships. The statutory instrument on the recognition of foreign same-sex relationships has been updated from time to time, to take account of legal changes in other jurisdictions.²⁰ The principle of mutual or automatic recognition could be applied to family relationships from other EU member states. This could be limited to cases where the relationships in question are not contrary to public policy in Ireland. Such provision would allow for mutual recognition of same-sex parenting in Ireland and the United Kingdom, this may be desirable given the number of Irish couples who currently reside in the UK and travel frequently between both jurisdictions. In view of the stringent and careful provisions contained in this Bill in respect of surrogacy it may be appropriate to exclude surrogacy from any provision on automatic recognition. The advantage of an approach based on mutual recognition would be to ensure full free

²⁰ As of the 13th of January 2011 Ireland now recognizes same-sex relationships from 27 other States.: S.I. No. 649 of 2010, Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010. This instrument has been updated regularly through the enactment of further statutory instruments, such as S.I. No. 642/2011 - Civil Partnership (Recognition of Registered Foreign Relationships) Order 2011.

movement of EU citizen parents and their children. This approach would be in keeping with the general legislative law and policy trends at European level in support of mutual recognition of family relationships.²¹

Head 7 Declarations of Parentage other than in Cases of Assisted Reproduction

This provision replaces section 35 of the Status of Children Act 1987. It allows for applications to be brought to court in cases where this is in any dispute or uncertainty, for a declaration that a given person is or is not a parent of the child.²² The provision does not apply to cases of assisted reproduction, surrogacy or adoption.²³ It allows a broad category of persons including the child, and any person claiming to be or claiming not to be a parent of the child, as well as a parent or guardian, or person who has custody of the child as well as 'any other person, who in the opinion of the court, has a sufficient interest in the matter' to bring such applications.²⁴ The Court has broad powers to direct that notice be given to the child or to 'any other persons as the Court thinks fit' such persons may be also be joined to the proceedings.²⁵ The Court also has the power to direct that tests be carried out to establish paternity.²⁶

The jurisdiction of the Court is also broadly defined. It includes applications involving Irish born children and children who are Irish citizens, and where an alleged parent resides in Ireland or is an Irish citizen. It also applies, where the child's parentage is relevant to other court proceedings, within the state.²⁷ Where it is established on the balance of probabilities that a man or a woman or both are the child's parents, the court is required to make a declaration. No declaration can be issued resulting in a situation where a child has more than two parents.²⁸ The question arises as to whether

²¹ The application of the principle of mutual recognition to family relationships has already been considered at European level. See Commission (EC), 'Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records' (Green Paper) COM(2010) 747 final, 14.12.2010.

²² Head 7(1).

²³ Head 7(2).

²⁴ *ibid.*

²⁵ Head 7(4) and (5).

²⁶ More detailed provisions on paternity testing are set out in Part 6.

²⁷ Head 7(8).

²⁸ Head 7(10).

it is possible for a child to have more than two guardians under this legislation. Part 7 of the proposed legislation does appear to contemplate (as is already the case under existing law) that in rare circumstances, a child may have more than two legal guardians. This may occur, for example where testamentary guardians are appointed, on the death of a parent, and the surviving parent or guardian is still alive.

In light of the above, clarification may be sought as to whether it will still be possible, under the proposed Bill, in exceptional or rare circumstances, for a child to have more than two legal guardians.

PART 3 - Parentage in Cases of Assisted Reproduction

Head 8(1) provides the definitions governing interpretation of the above. This head provides that;

A person who donates human reproductive material or an embryo for use in assisted reproduction without the intention of using the material or the embryo for his or her own reproductive use is not, by reason only of the donation, a parent of the child born as a result.²⁹

This part also clarifies that the spouse, civil partner or cohabitant of a surrogate is not a parent of the child, conceived through assisted human reproduction and born through surrogacy.³⁰ Head 10 addresses 'parentage in cases of assisted reproduction other than surrogacy'.³¹ This part establishes the following:

- Head 10(2) Where a child is conceived through the provision of donor ovum, to the child's intending parents, the child's parents are his or her birth mother, and the child's genetic father.³²

²⁹ Head 8 (2).

³⁰ Head 8(3).

³¹ Head 10.

³² Head 10(2). The notes after this section make clear that drafter's intention is that 'where an embryo is created using a donor egg and the intending father's sperm' that the child's parents are the birth mother and the genetic father, General Scheme of the Children and Family Relationships Bill 2014, 22.

- Head 10 (3) Where a child is conceived through the provision of donor sperm, the child's parents are the birth mother and;
 - (a) the person who was her spouse, civil partner or cohabiting partner at the time of the child's conception, provided that
 - (b) that person consented to be a parent of the child and did not withdraw that consent before the child's conception.³³ The consent of the latter is presumed by law "unless the contrary is proven."³⁴

- Head 10(4) where a child is born as a result of assisted reproduction to its genetic mother and father, they will be recognized as the child's parents irrespective of whether they are married, or cohabiting.³⁵ This provision recognizes parents who use assisted reproductive methods, for example, in cases where a couple has had difficulty conceiving through sexual intercourse.

- Head 10 (5) where a child is born as a result of assisted reproduction using both donor egg and donor sperm, the child's legal parents are the birth mother and her spouse, civil partner or cohabitant, if any. The wording of this provision is similar to Head 10(3) in that it is subject to the requirement that the latter have consented to becoming a parent of that child and did not withdraw such consent before conception.³⁶ A presumption that the latter consented similarly applies 'unless the contrary is proven.'³⁷

If the child is conceived by the couple using both donor egg and donor sperm the child's parents are his or her birth mother, and her spouse, civil partner or cohabitant.³⁸ This is provided in Head 10(5) as follows:

(5) If a child is born as a result of assisted reproduction without the use of human reproductive material or an embryo provided by a person for his or her own reproductive purposes, the parents of the child are the birth mother and a person who:

³³ Head 10 (3)(a) and (b).

³⁴ Head 10(6).

³⁵ Head 10 (4).

³⁶ Head 10 (5) (a) and (b).

³⁷ Head 10(6).

³⁸ Head 10(5) and see also notes at 22.

- (a) was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the birth mother at the time of the child's conception, and
- (b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception.

The effect of this Part, is to make both parties the legal parent of any child born to them through assisted reproduction, if the couple were spouses, civil partners or cohabiting in an intimate and committed relationship at the time of the child's conception. These provisions have been given retroactive effect.³⁹ This Part recognizes that children need to have legal certainty regarding their parents and family relationships. It provides that Regulations may be enacted, specifying what form the consent should take and, the circumstances in which such consent will be deemed to have been withdrawn.⁴⁰ It establishes a presumption that the spouse, civil partner or cohabitant be a parent of the born child as a result of assisted reproduction 'unless the contrary is proven.'⁴¹ The consent of an intended parent is not valid after the death of that parent.⁴² The notes appended to this section indicate that it is not intended that this legislation provide for posthumous conception.⁴³ This Head provides welcome legal clarity for children conceived through assisted reproduction. Family relationships, i.e. siblings, grandparents, aunts, uncles etc. are, in cases of assisted human reproduction and surrogacy, determined in accordance with Part 3.⁴⁴ Thus, in cases where both parents are recognized, the child will be regarded as part of both families with grandparents, cousins, aunts, uncles and siblings in the same manner as any other child with two legally recognized parents.

³⁹ Head 10(7).

⁴⁰ Head 10(8).

⁴¹ Head 10(6).

⁴² Head 10(9).

⁴³ Head 10(9) and also the General Scheme at 23.

⁴⁴ Head 9.

Parenting by Couples in Same-Sex Relationships who have Conceived through Donor Insemination

The most significant provision in the above Part from the point of view of couples in same-sex relationships conceiving through donor insemination is Head 10(3) which provides as follows:-

- (3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a female person only, the parents of the child are the birth mother and the person who:
 - (a) was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the birth mother at the time of the child's conception, and
 - (b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before that child's conception.

The above section establishes that in the case of a lesbian couple, one of whom gives birth through donor insemination, her spouse, partner or cohabitant will also be recognized as the parent of that child provided that the former consented to be a parent and did not withdraw consent 'before that child's conception.'⁴⁵ A presumption of consent applies to this couple in the same manner as other couples.⁴⁶

The question arises as to whether in cases of so called 'reciprocal IVF', where a woman in a same-sex relationship carries her female, spouse, partner or cohabitants genetic child. A couple may have chosen to do this, for very considered reasons, for example where the birth mother is for health reasons, better able to carry a child to term. If both parties intend to be the legal parents of any children born through assisted reproduction in circumstances such as that described above, would they both be legally recognized as parents. A reading of Head 10(3) suggests that they would. This is because the section does not specify who the genetic parent must be. It can be interpreted to recognize the non-genetic parent as the child's birth mother and the genetic mother as the consenting spouse, civil partner or cohabitant of the child's birth

⁴⁵ Head 10(3)(b).

⁴⁶ Head 10(6).

mother.⁴⁷ The legislature may be in a position to confirm whether or not the above reading of the legislation is correct.

Marriage Equality seeks clarification regarding whether section 10(3) can be applied to circumstances in which a genetic parent, has conceived a child through donor insemination and that child has been borne by their consenting, spouse, civil partner, or cohabitant (i.e. in cases of reciprocal IVF where the intending parents are female and in a same-sex relationship). Head 10(3) suggests that in circumstances where both parties fully intend to become legal parents and have not withdrawn consent at any time prior to the child's conception, both would be recognised. Perhaps the legislature could advise as to whether the above interpretation of the proposed legislation is correct.

It is important to seek express clarification on this point. It may be prudent to inquire as to whether the legislature is minded to inclusion of a statement to that effect in any notes or preparatory documentation accompanying the legislation for the sake of clarity. If this is not done, in such cases an application may have to be brought to Court seeking directions. This would create considerable legal uncertainty for children who have two parents of the same-sex, one of whom is a genetic parent and the other being a person who consented to being recognized as a parent.

Parenthood is distinct from guardianship, i.e. a person may be a parent without being a legal guardian. The circumstances in which the couple will be regarded as joint guardians, are set out in Part 7 of this proposed legislation and are addressed towards the end of these submissions. Marriage Equality seeks clarification as to whether the following reading of these provisions is correct:-

⁴⁷ The proposed Bill continues to apply the maxim *mater semper certa est*, whereby the birth mother is recognized as a parent, regardless of whether or not she is genetically related to the child. This provision was recently considered by in *M.R. & Anor v An tArd Chláraitheoir & Ors* [2013] IEHC 91, and this decision is now on appeal to the Supreme Court. The application of this maxim ensures that the birth mother is always a child's parent, this has implications for surrogacy and Part 5 of this proposed Bill addresses the circumstances in which may issue declarations to the effect that the birth mother is not the legal parent and make and order in favor of the intending parent or parents.

- 1. In respect of Head 10 of this legislation with regard to recognition of legal parents, the father and mother of a child (as defined under Head 36) are automatically joint guardians. In cases of donor insemination where the parents are a lesbian couple, a donor will not be recognized father without his consent to being recognized a parent (under Head 10). If the birth mother is in a civil partnership or cohabiting, her civil partner is presumed to be other parent (Head 10). Does this mean that women in same-sex relationships can become automatic legal guardians? Does this apply regardless of whether or not they are married, or in a civil partnership provided that they are cohabiting in an intimate and committed relationship?***

Head 11 Declarations of Parentage in Relation to Assisted Reproduction other than Surrogacy

This Head is applicable to assisted reproduction, as described in the proceeding section. It does not apply to cases in which a child was conceived through surrogacy or was adopted.⁴⁸ It allows for application to be made to Court by various parties, including the child, their parent or guardian or a person who has custody of the child as well as any person claiming to be or not to be a parent of the child, and any other person whom the Court considers to have 'a sufficient interest' in the proceedings.⁴⁹ An application can be made even if one of the persons named as a parent of the child in the application has died.⁵⁰ There are broad provisions as to notice or addition of other interested parties to the proceedings by the court of its own motion, or on the application of such person.⁵¹ This can include the child at the centre of the proceedings if the court so directs.

⁴⁸ General Scheme of the Children and Family Relationships Bill, Head 11(2).

⁴⁹ *ibid*, Head 11(1), parts (a) to (g) inclusive.

⁵⁰ Head 11(3).

⁵¹ Head 11(4) and (5).

The Court is required to have regard to the presumptions as to parentage set out in Head 10 of this Bill.⁵² This section protects the rights of the child, in particular, it provides in Head 10(8) as follows;

(8) Where a declaration is sought by the person referred to in subhead (1)(c) and the court is satisfied that the presumptions set out in Head 10 are sufficient to safeguard the best interests of the child, the court may make a declaration that the applicant is not a parent of the child.

This ensures that the Court will take the best interests of the child into account in making any Order. The Court will make such an Order and only if it is satisfied that the presumptions set out in Head 10 'are sufficient to safeguard the best interests of the child'. The general scheme indicates that this section is intended to ensure that a 'known donor' does not become responsible for the child 'solely by virtue of genetic connection, to the detriment of his or her own family.'⁵³

This Head expressly provides that there can be no appeal from the decision. The question arises as to whether this provision would be considered to be an interference in the right of access to the Courts.⁵⁴ The policy justification offered is to ensure that 'the child's status as the member of a particular family is safeguarded'.⁵⁵ The child of married parents will also enjoy the protection afforded to the family based on marriage in Article 41, in such cases the provision that orders made under this section are final and cannot be appealed can be justified with reference to the constitutional position of the marital family. In other cases, the policy justification is strong, and the argument in favour of legal certainty is persuasive, although hardship could arise in cases of a dispute between different parties seeking to establish parentage. This will be mitigated in practice by the fact that recognition as a parent is distinct from guardianship. The section is arguably in the best interests of the child as it ensures legal certainty regarding recognition of their parents.

⁵² Head 11(6).

⁵³ General Scheme, 26.

⁵⁴ This right has long been recognized by the Courts. See for example, *Macauley v. Minister for Post and Telegraphs* [1966] I.R. 345, *Byrne v. Ireland* [1972] I.R. 241, *Blehein v. Minister for Health* [2004] I.E.H.C. 374 (HC), 2008] IESC 40, [2009] 1 I.R. 275 (SC).

⁵⁵ General Scheme of the Children and Family Relationships Bill 2014, 25.

Head 12 – Parentage in Cases of Surrogacy

The provisions on surrogacy set out in the General Scheme are intended to be protective of the surrogate. They provide that the birth mother is recognized as a parent, until declared to be otherwise by a Court under Head 13(9).⁵⁶ If she does not consent, or withdraws her consent she will be (for the purposes of Irish law) the child's mother.⁵⁷ The only circumstance in which her consent is not required is if she has died or cannot be traced.⁵⁸ The Court is empowered to make a declaration of parentage in favour of a man or woman who has provided human reproductive material as his spouse, civil partner or cohabitant if that person consented to becoming the parent of a child conceived through surrogacy and that consent was not withdrawn before the child's conception.⁵⁹ A declaration can also be made in circumstances where both intended parents provided human reproductive material.⁶⁰ An order can only be made with the consent of the surrogate, who must be properly served with proceedings and who should be independently advised.⁶¹

PART 5 – Surrogacy Arrangements

This section sets out very stringent requirements which are designed to prohibit commercial surrogacy and protect surrogates from exploitation. No payment can be made other than for the "birth mother's reasonable costs".⁶² Such costs must be 'verified by receipts or other documentation.'⁶³ Advertisements in relation to surrogacy are also prohibited.⁶⁴ The proposed legislation sets out a minimum age for parenting through surrogacy of 21 and 45 years of age (the Bill requires at least one of the intending parents must be under the age of 45).⁶⁵ This is intended to ensure that 'at

⁵⁶ Head 12(1) and (2), and also Head 13(1), (4) and (9).

⁵⁷ Head 13(11) and (12), and also Head 17(1).

⁵⁸ Head 13(12).

⁵⁹ Head 12(1) and (2).

⁶⁰ Head 12(3).

⁶¹ Head 22. See also Head 17(b) which provides that the reasonable costs of same may be provided by the intending parents.

⁶² Head 18, and Head 17(3).

⁶³ Head 17(6)(b).

⁶⁴ Head 19.

⁶⁵ Head 21.

least one intending parent will live well into the child's adulthood' and therefore can be justified in the same manner as similar restrictions on adoption.⁶⁶ The legislature has also established a minimum age for the surrogate mother of 24 and include a requirement that she already have (or have at least shared custody of) children of her own.⁶⁷ This is designed to protect her physical and emotional well-being.⁶⁸ These aims are to be commended. Breaches of a number of the rules set out in the proposed legislation can be prosecuted as criminal offences. The creation of such offences is indicative of how careful the legislature has been to ensure that surrogates are not exploited and that commercial surrogacy is prohibited in Ireland.⁶⁹

The provisions on surrogacy represent a thoughtful and careful effort by the legislature to protect vulnerable women from exploitation. Commercial surrogacy is prohibited. Surrogacy agreements are unenforceable against a surrogate mother and great care has been taken to ensure that her consent is required, that her consent be meaningful and that she be of an age and level of maturity to understand both the legal and emotional implications of surrogacy. Each of these aims is laudable. The only concern which arises, is that a small number of children may already have been conceived, or may in the future be born to couples whose surrogacy arrangements are not in compliance with this legislation. It may be necessary for a more general provision to address what directions, if any, a Court may make in such cases to mitigate any injury to the child, and to protect their interests in circumstances where they are stateless or without recognized legal guardians.

PART 6 – Testing to Establish Parentage

This provision is very similar to that set out in section 37 of the Status of Children Act 1987 with some changes reflecting the technologies used. There is no need to discuss

⁶⁶ General Scheme, notes at 41.

⁶⁷ Head 20.

⁶⁸ See in particular the General Scheme at 40.

⁶⁹ Head 23.

this section in detail for present purposes. One provision which is of significance is the reference to the best interests of the child.⁷⁰ Head 25(3) provides as follows:-

- (3) In determining whether to direct the taking of blood samples or non-intimate samples, the court shall determine the samples that are appropriate having regard to the overall circumstances of the case and the best interests of the child.

The inclusion of this provision again reflects, the clear emphasis throughout this legislation on the rights of the child. We will now address guardianship, custody and access, before considering the provision on adoption.

PART 7 – Guardianship, Custody and Access

As should be clear from the discussion of Head 10 of this legislation with regard to recognition of legal parents, the father and mother of a child (as defined under Head 36) are automatically joint guardians. In cases of donor insemination where the parents are a lesbian couple, a donor will not be recognized as father without his consent to being recognized as a parent (under Head 10). If the birth mother is in a civil partnership or cohabiting, her civil partner is presumed to be other parent (Head 10).

Where a gay man has created an embryo using his own genetic material, i.e. sperm (and therefore consents to being the parent) he will be the father of the child born subsequently and the birth mother will be the mother for legal purposes (Head 10). There is one aspect of this legislation where Marriage Equality seeks further guidance:-

The combined effect of Head 10 and Heads 37-38 appears to be that the parents and guardians of such a child will be the female couple and only that couple. Recognition of more than 2 parents is expressly ruled out: Head 11(10). Can a donor subsequently apply for access to the child and

⁷⁰ For an explanation of the reasoning behind this provision see General Scheme, notes at 47.

are there circumstances in the best interests of the child in which a child will have more than one legal guardian?

It might be noted in relation to this section that that some parts have been incorrectly numbered in the General Scheme. These are Head 37(2) – referred to as ‘Head 30(3) or 30(4)’. This should instead read ‘Head 31(3) or 31(4)’.

Head 38: Guardianship in cases of ART and Surrogacy

38(2): A very positive provision, which specifies that civil partner of birth mother using ART (assisted reproductive technologies) other than surrogacy (i.e. sperm donor in most cases) will automatically be guardian of a child with the mother when the child is born.

38(3): female cohabitant of birth mother for at least 12 consecutive months is also automatically a joint guardian. This is very welcome because it also recognizes stable lesbian relationships outside of the civil partnership framework, and acknowledges the lived reality of life for children with cohabiting same-sex parents.

38(4): will be of most relevance to gay men who start a family or are raising children conceived through surrogacy. The combined effect of this provision and Heads 12-13 is to enable a gay (or lesbian) couple to be jointly recognized as a child’s parents where they are civil partners or are cohabiting. The birth mother must consent to removal of her automatic guardianship rights. This process is again designed to protect her interests and entails applying to a court for a declaration regarding parentage (Head 13). This is a sensible requirement.

Heads 40-52: will advance best interests of the child as a whole.

PARTS 8-11

Marriage Equality welcomes the provisions contained in these Parts, which should further advance the best interest of the child. In particular Marriage Equality welcomes the equation of civil partners' parental responsibilities with those of spouses. This provision is consistent with best practice internationally and provides a stronger legal foundation for protection of the interests of the children of civil partners.

PART 12

Marriage Equality welcomes the extension of eligibility for adoption as a couple to civil partners. This provision benefits children who have been adopted by LGBT people and who without this provision would be regarded as being entitled to the care and support of one legal parent rather than two.

Conclusion

The Children and Family Relationships Bill takes a child-centered approach to LGBT parenting. This legislation addresses a number of gaps in existing law, in particular with reference to children who have lesbian, gay, bisexual or transgender parents and ensures that they have legal equality with other children, and can enjoy security and certainty regarding their family's legal status. Marriage Equality welcomes the legislation and looks forward to its enactment.

References

Fagan, Paula (2011) *Missing Pieces A Comparison of the rights and responsibilities gained from civil partnership compared to the rights and responsibilities gained through civil marriage in Ireland*. Marriage Equality, Dublin.

Marriage Equality (2010) *Voices of Children*, Dublin.