



**LGBT**  
IRELAND

For Inclusion  
For Equality  
For Everyone

06<sup>th</sup> May 2021

**Submission to the Department of Children, Equality, Disability, Integration and Youth in relation to the United Nations Universal Periodic Review Cycle for Ireland**

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**LGBT Ireland** is a national charitable organisation working to improve the visibility, inclusion and rights of LGBTI+ people living in Ireland. Through our national helpline, online, and face to face services we provide confidential support and information to thousands of LGBTI+ people and their family members each year. Informed by the issues and experiences raised through our frontline services, we also work extensively in the area of policy and legislative reform to ensure that LGBTI+ people’s voices are heard in the policy and practice developments that affect their lives. The submission below is informed by the issues and experiences of LGBTI+ people and their family members who contact us. As a network organisation with seven regional LGBTI+ member services, we also have a strong regional focus and the recommendations outlined below are deeply rooted in the knowledge and experience of our members working across the country.

## **1. Introduction**

1.1 This report is submitted by LGBT Ireland. It focuses on the children’s rights implications of the current and proposed legal framework for assisted human reproduction in Ireland, with a particular focus on the differential legal treatment experienced by the children of LGBT+ families and on emerging issues of concern in the Government’s proposals to regulate the practice of surrogacy.

## **2. Differential Legal Treatment of Children**

2.1 Since the previous UPR, the legal position of children raised by same-sex couples has improved considerably due to the full commencement of the Children and Family Relationships Act 2015 (‘the 2015 Act’) on 4 May 2020. Parts 2 and 3 of the 2015 Act provide legal mechanisms to enable some female same-sex couples to be jointly recognised (from birth) as the legal parents of their child(ren) in certain cases of donor-assisted human reproduction (DAHR) for the first time. However, some methods of DAHR conception do not come within the ambit of the 2015 Act, for example non-clinical DAHR procedures and DAHR conducted abroad.<sup>1</sup> In addition, although the 2015 Act allows for the retrospective recognition of legal parentage in certain cases of DAHR, this is only available where the donor is ‘unknown’.<sup>2</sup> The result is that some children are treated differently by the law when compared to other children due to their mode of conception or due to their parents’ marital status or sexual orientation. LGBT Ireland has called on the Government to address this issue.<sup>3</sup>

2.2 For children raised by female same-sex couples, the difference in treatment is particularly apparent when their legal position is compared to that of children born to married opposite-sex parents. In Ireland, where female same-sex couples engage in DAHR that falls outside of the ambit of the 2015 Act’s parentage provisions, regardless of whether they are married, have entered into a civil partnership or are cohabiting, the

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<sup>1</sup> Lydia Bracken, *Same-Sex Parenting and the Best Interests Principle* (Cambridge: Cambridge University Press, 2020), Ch 5.

<sup>2</sup> Children and Family Relationships Act 2015, s 20.

<sup>3</sup> LGBT Ireland, *Pathways to Parenting: Proposals for Reform* (LGBT Ireland, 2018), available at: <https://lgbt.ie/wp-content/uploads/2018/10/LGBT-Pathways-to-Parenthood-Proposals-for-Reform.pdf>

woman who gives birth to the child will be regarded as the legal mother but the non-gestational female parent will have no opportunity to be recognised as a legal parent upon the birth of the child. Consequently, she will not enjoy any automatic legal parental responsibilities and rights in respect of the child, and she will have to wait two years before she is eligible to apply to become a legal guardian of the child.<sup>4</sup>

- 2.3 By contrast, where the intended<sup>5</sup> mother is married to a man, upon the birth of the child conceived via DAHR that falls outside of the ambit of the 2015 Act, her husband will be presumed to be the legal father even where donor sperm was used to enable the conception.<sup>6</sup> As such, following the birth of the child, the adults can be registered as joint legal parents and will automatically be made joint guardians of the child.<sup>7</sup> The presumption in favour of the husband is a rebuttable one, but if it is not challenged, it will continue to apply.
- 2.4 The unequal application of the law as described above means that the children of female same-sex partners conceived through DAHR that falls outside of the 2015 Act are deprived of a legal relationship with the second intended parent for a period of time whereas the children of married opposite-sex couples automatically enjoy a legal relationship with both intended parents. This differential legal treatment may have implications for the child in terms of citizenship, inheritance rights and legal relationships with the wider extended family, among other things.
- 2.5 It should also be noted that, for children who were conceived through DAHR prior to the commencement of Parts 2 and 3 of the 2015 Act, parentage may be retrospectively allocated to an intended parent not previously recognised as a legal parent through application for a declaration of parentage.<sup>8</sup> In order for the declaration to be granted, the donor must have been and remain ‘unknown’ to the intended parents at the time of the application.<sup>9</sup> The result of the proviso is to create a distinction between children conceived prior to the coming into force of the legislation, and children conceived after the relevant provisions of the 2015 Act were commenced. Whereas the latter are able to benefit from a legal relationship with the second intended parent *and* have an express right to access information about the donor,<sup>10</sup> the former are only afforded one of these rights: the donor must either be unknown allowing for the second intended parent to be recognised or this parent is prevented from being recognised as a legal parent. This issue disproportionately affects the children of female same-sex couples because, as noted above, the children of married opposite-sex couples benefit from a presumption of paternity in favour of the husband of the birth mother and are therefore less likely to apply for a retrospective declaration of parentage.
- 2.6 During Ireland’s second UPR examination, the State supported a recommendation to ‘[u]ndertake measures to eliminate stigmatization and discrimination against children born out of wedlock by providing legal certainty in respect of their family name’

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<sup>4</sup> Guardianship of Infants Act 1964, s.6C(2)(a) as inserted by Children and Family Relationships Act 2015, s 49.

<sup>5</sup> For the purpose of this submission, an ‘intended’ parent is a person who requests the performance of a DAHR or surrogacy procedure.

<sup>6</sup> Status of Children Act 1987, s 46(1).

<sup>7</sup> Guardianship of Infants Act 1964, section 6(1).

<sup>8</sup> Children and Family Relationships Act 2015, ss 20-22.

<sup>9</sup> Children and Family Relationships Act 2015, s 20(1)(e).

<sup>10</sup> Children and Family Relationships Act 2015, s 34(1).

(136.26).<sup>11</sup> Same-sex marriage became possible in Ireland following a constitutional referendum in 2015. Yet, as noted above, discrimination continues to apply in cases of children born into families headed by same-sex parents, both married and unmarried, as they do not always have legal certainty as regards their family relationships and may experience differential treatment under the law when compared to the children of married opposite-sex couples.

- 2.7 It is noted that Article 2 of the United Nations Convention on the Rights of the Child prohibits discrimination against children.<sup>12</sup> This Article encompasses all forms of discrimination, including that which is based on the civil and/or family status of their parents.

### 3. Proposed Surrogacy Legislation

- 3.1 At present in Ireland, there is no specific legislation to regulate the practice of surrogacy. The General Scheme of the Assisted Human Reproduction Bill 2017 contains proposals for the regulation of surrogacy. The General Scheme proposes to regulate domestic surrogacy only and to prohibit international surrogacy arrangements. Head 36(2) of the General Scheme specifies that ‘it is prohibited for any person to intentionally provide a technical, professional or medical service that is to facilitate or give effect to a surrogacy agreement not permitted.’ The explanatory note accompanying this Head explains that this prohibition includes the provision of ‘legal or practical advice on a professional basis to people seeking to engage in surrogacy abroad.’<sup>13</sup> The explanatory notes further specifies that it would be an offence for any person to engage in surrogacy that is not permitted, ‘whether through provision of treatment or acting as a surrogate or intended parent.’<sup>14</sup> Head 86 explains that a person who contravenes Head 36(4) ‘commits an offence and shall be liable – (a) on summary conviction, to a class A fine, or imprisonment for a term not exceeding 1 year, or both, or (b) on conviction on indictment, to a fine not exceeding €20,000, or imprisonment for a term not exceeding 2 years, or both.’<sup>15</sup>
- 3.2 LGBT Ireland is concerned about the proposed restrictions on obtaining legal advice in respect of surrogacy that takes place in accordance with the laws of another State and the proposed penalties in respect of same. LGBT Ireland is of the view that the proposed prohibition of international surrogacy is at odds with the jurisprudence of the European Court of Human Rights (ECtHR), in particular *Mennesson v France*,<sup>16</sup> which found a violation of the children’s right to private life in a situation where the State refused to recognise the biological relationship between a genetically-related intended father and children who had been born through surrogacy. According to the ECtHR in that case, respect for private life ‘implies that everyone must be able to establish the substance of

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<sup>11</sup> *Report of the Working Group on the Universal Periodic Review: Ireland*, (Human Rights Council, A/HRC/33/17, 18 July 2016), Rec. 136.26

<sup>12</sup> UN Convention on the Rights of the Child, Article 2.

<sup>13</sup> General Scheme of the Assisted Human Reproduction Bill 2017, Head 36. Available at: <https://assets.gov.ie/19004/d250693cb05d44e2b2c45d7cf26614d3.pdf>

<sup>14</sup> General Scheme of the Assisted Human Reproduction Bill 2017, Head 36 Explanatory Note. Available at: <https://assets.gov.ie/19004/d250693cb05d44e2b2c45d7cf26614d3.pdf>

<sup>15</sup> General Scheme of the Assisted Human Reproduction Bill 2017, Head 86. Available at: <https://assets.gov.ie/19004/d250693cb05d44e2b2c45d7cf26614d3.pdf>

<sup>16</sup> *Mennesson v France*, Application No 65192/11, 26 June 2014.

his or her identity, including the legal parent-child relationship.<sup>17</sup> The ECtHR jurisprudence shows that, even if international surrogacy is prohibited in a particular country, the State must recognise the genetic relationship (where one exists) between an intended father and child.<sup>18</sup> In all cases concerning relationships formed through surrogacy, the ECtHR emphasises that the best interests of the child must be paramount. LGBT Ireland questions how imposing a fine or prison sentence on intended parents following the birth of their child through international surrogacy would secure the best interests of that child.<sup>19</sup>

- 3.3 Due regard must also be paid to the implications of the European Court of Human Rights, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*<sup>20</sup> in the context of cross-border surrogacy.
- 3.4 It is noted that section 2 of the European Convention on Human Rights Act 2003 requires the Irish courts to interpret and apply laws in a manner compatible with the ECHR, while Section 3 provides that every organ of the State shall perform its functions in a manner compatible with the State's obligations under the ECHR.<sup>21</sup>
- 3.5 It is further noted that Article 7 of the United Nations Convention on the Rights of the Child provides that the child has the right 'far as possible, the right to know and be cared for by his or her parents.' LGBT Ireland is concerned that the General Scheme as drafted would fail to vindicate this right as the intended parents would not have legal rights and responsibilities towards the child from the moment of birth under the current proposals. Legislation must prioritise the best interests of the child and ensure that the child can be fully cared for by the adults whom he or she regards as parents.
- 3.6 It is further noted that the General Scheme of the Assisted Human Reproduction Bill 2017 is prospective only and does not include provision for a retrospective recognition of parentage in cases where a child has already been born through surrogacy. If enacted, this would result in internal inconsistency in the law because, as noted above, the Children and Family Relationships Act 2015 creates a court process for retrospective declarations of parentage to be granted in certain cases of DAHR.

#### **4. Recommendations**

- 4.1 LGBT Ireland recommends the following:
  - a) Put measures in place to ensure that children raised by married and unmarried same-sex parents are not legally disadvantaged when compared to children raised by married opposite-sex parents.

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<sup>17</sup> *Mennesson v France*, Application No 65192/11, 26 June 2014, para 99.

<sup>18</sup> It should be noted that the case of *Paradiso and Campanelli v Italy*, app no 25358/12, 24 January 2017 demonstrates that there is no requirement to recognise a legal parent-child relationship in cases of international surrogacy in the absence of a genetic link.

<sup>19</sup> By analogy see *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

<sup>20</sup> European Court of Human Rights, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, Request no P16-2018-001, 10 April 2019.

<sup>21</sup> European Convention on Human Rights Act 2003.

- b) The State must ensure that any future surrogacy legislation and practice aligns with the jurisprudence of the ECtHR and with the provisions of the UNCRC.
- c) The State must ensure that any future surrogacy legislation and practice aligns with the best interests and rights of the child. In drafting new legislation, the State should examine international best practice in the field and learn from the experience of other jurisdictions with established surrogacy legislation.
- d) Any future surrogacy legislation should be consistent with existing DAHR legislation and should offer equivalent opportunity for retrospective declarations of parentage to be granted by the courts.