



**Submission to the Oireachtas
Joint Committee on International
Surrogacy**

5th May 2022

Contents

Introduction and Background	2
Gaps in Assisted Human Reproduction Bill	4
International Surrogacy	4
Domestic Surrogacy & Retrospective Recognition of the Legal Parentage of Children Born through Surrogacy	5
Gaps in the Children and Family Relationship Act, 2015	6
Proposed Amendments to the Children & Family Relationships Act, 2015	7
Retrospective declaration of parentage where there is a known donor	7
Non-Clinical DAHR Procedures – Retrospective and Prospective Provision for the Recognition of Parentage	8
DAHR Procedure Conducted Outside of the Irish Jurisdiction	10
Citizenship	11
Conclusion	12

Introduction and Background

At present in Ireland, the majority of children born into LGBTQ+ families are prevented from having a legal relationship with both of their parents¹. The consequence of this fact is that our children are not equal to the majority of their peers in the eyes of our domestic laws.

The enactment of the Children and Family Relationships Act 2015 (CFRA 2015) was a significant and welcome step in the right direction for equality for children of LGBTQ+ parents. For the first time in the state, two same-sex intended parents could be listed on a child's birth certificate. This meant that LGBTQ+ headed family units became recognised by the state and a legal parent-child relationship could be established between both intended parents and child. However, both intended parents could only be listed on the child's birth certificate if the circumstances of the child's birth and conception fell within the strict parameters of the legislation.

In reality, the majority of children born to LGBTQ+ couples did not benefit from this legislation. The CFRA 2015 only allowed for recognition of the family unit if both intended parents were female, the child was conceived in an Irish clinic, the child was born in Ireland and a known/traceable donor was used. This meant that approximately 50% of children born to female same sex couples and all children born to male same-sex couples were omitted from the legislation², including:

- Children born to male same-sex parents who are born through surrogacy, which is the only option available to male couples
- Children of same-sex couples born outside of Ireland
- Children of same-sex female couples conceived outside of Ireland
- Children conceived by same-sex couples in a non-clinical setting
- Children conceived by same-sex couples using a known donor prior to May 2020

In the event you are a LGBTQ+ family who fall outside the parameters of the CFRA, only the parent who is deemed to be the birth and / or biological parent can be listed on the child's birth certificate. This precludes therefore, a recognised legal relationship between the child and the second parent. The second parent is a legal stranger to the child. The result is avoidable issues for children as they grow up in relation to citizenship entitlements, medical treatment, school enrolments, foreign travel, tax / inheritance rights to name a few.

EFC is primarily concerned with achieving equality for Irish Children born to LGBTQ+ parents who are precluded from having a legal relationship with both of their parents. The current legal position in Ireland is that the majority of children born to LGBTQ+ families are prevented from having a legal parent / child relationship with both their parents. Every same-sex couple who want to have a child born to them require some form of assisted human reproduction ("DAHR") to conceive. Despite this fact and the success of the marriage equality referendum, Irish law

¹ 53% according to recent research by Dr. Lydia Bracken, LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships (LGBT Ireland, 2021) available at <https://lgbt.ie/wp-content/uploads/2021/11/LGBTI-Parent-Families-Report.pdf>. This research was supported by the Irish Research Council New Foundations Scheme.

² Lydia Bracken, LGBTI+ Parent Families in Ireland: Legal Recognition of Parent-Child Relationships (LGBT Ireland, 2021) available at <https://lgbt.ie/wp-content/uploads/2021/11/LGBTI-Parent-Families-Report.pdf>. This research was supported by the Irish Research Council New Foundations Scheme.

does not provide the basic rights to children of LGBTQ+ couples and to recognise legal relationships in LGBTQ+ families.

EFC calls on the Oireachtas to ensure that the Government provides legislation to secure equality for all children born to LGBTQ+ families.

Gaps in Assisted Human Reproduction Bill

As drafted, the AHR Bill has significant gaps that need to be addressed in order to provide the meaningful inclusive legislative change that will ensure the safeguarding and protection of all intended parents, surrogate mothers and children born through surrogacy arrangements.

EFC supports the position of Irish Gay Dads on what is required from the Oireachtas in respect of providing substantial legislation for both domestic and international surrogacy. Irish Gay Dads perspective on surrogacy is entirely parallel with that of EFC and in particular that the central and enduring priority is and should be the wellbeing of children.

In particular EFC requires the following issues to be resolved through their inclusion in the AHR Bill prior to its enactment:-

- (1) Retrospective recognition of the legal parentage of children born through both international surrogacy and domestic surrogacy - Professor Conor O'Mahony, Special Rapporteur for Children recommends in his report³ that provision should be made for a pathway to parentage in respect of surrogacy arrangements which occurred before the commencement of the new legislation.
- (2) Provisions for international surrogacy arrangements to include the recognition of legal parentage of children conceived through surrogacy conducted outside of the State from birth.
- (3) A provision for a Court Order to determine the parentage of the child preconception eliminating the necessity for a parental order to be obtained after the birth of the child (essentially an Order of the Court approving the intended surrogacy arrangement and acknowledging the parentage of the intending parents).

International Surrogacy

EFC are grateful to have been included for participation in the Assisted Human Reproduction ("AHR") coalition presentation to the Houses of the Oireachtas Joint Committee on International Surrogacy on April 21st. As noted during that session, it is a priority of EFC to ensure that proper legal provision is made for surrogacy arrangements both international and domestic in Irish law⁴. For male same-sex couples who want to have children born to them, surrogacy is the only option.

In this regard EFC have been made aware of a draft document prepared by Claire O'Connell (Part 7A) which proposes draft legislative provisions on international surrogacy for insertion in the AHR Bill. EFC having considered these draft provisions, endorses them and asks the Committee to secure their inclusion in the AHR Bill. In our view the Oireachtas now have a

³ Professor Conor O'Mahony, A Review of Children's Rights and Best Interests in the Context of Donor Assisted Human Reproduction Surrogacy in Irish Law, December 2020

⁴ Submission from the AHR Coalition to the Joint Committee, April 21st, 2022:

https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_international_surrogacy/submissions/2022/2022-04-21_opening-statement-elaine-cohalan-chairperson-assisted-human-reproduction-coalition_en.pdf

real opportunity to ensure that children born through international surrogacy arrangements are adequately provided for in Irish Law.

Domestic Surrogacy & Retrospective Recognition of the Legal Parentage of Children Born through Surrogacy

EFC welcomes the introduction of legislation in respect of domestic surrogacy as referenced in the AHR Bill.

The reality is, however, that what is currently proposed in the AHR Bill acts to exclude all existing children born through surrogacy and their number of families and amendments are required which will include all children.

Surrogacy in all its forms remains entirely unregulated in this country. This must change and must do so to protect and safeguard the realities of life for children born through surrogacy.

Gaps in the Children and Family Relationship Act, 2015

At present Irish Law makes very limited provision for the allocation of parentage to intending parents of children born through DAHR procedures. These limitations involve the exclusion of children born through non-clinical DAHR procedures and the large majority of children born prior to the enactment of the CFRA 2015. Given that all same sex couples who want to have children born to them require some form of assisted human reproduction procedure to conceive a child, the limitations on the allocation of parentage to intending parents created by existing Irish Legislation disproportionately affects children born into LGBTQ+ families.

For example, children who remain excluded from all equality under current and proposed Irish law are as follows:-

- Children conceived outside of Ireland;
- Children born outside of Ireland;
- Children conceived using non-clinical procedures;
- Children conceived using a known donor prior to May 2020;

The lack of legislation does not interfere with the practice of engaging with DAHR; it only impacts on the child's legal relationship with the person providing day to day care of that child and who assumes the parental role for all intents and purposes in the child's life.

EFC calls upon the Oireachtas to use the Health (Assisted Human Reproduction) Bill 2022 as an opportunity to offer comprehensive inclusion to children born through DAHR and to their LGBTQI+ families by inserting amendments to the Children and Family Relationships Act, 2015 to remedy the exclusions noted above.

EFC is in agreement with Special Rapporteur for Child Protection, Professor Conor O' Mahony's⁵ recommendations, specifically:

- 1 "The Oireachtas should amend the Children and Family Relationships Act 2015 to address a number of anomalies arising in respect of the recognition of family relationships in cases where children were born following DAHR procedures."
- 7 " The Children and Family Relationships Act 2015 should be amended to make provision for second parents of children born through non-clinical procedures to apply to the District Court at any time after the birth of the child for either parentage or guardianship."
- 9 "Provision should be made allowing the parents to provide information on the gamete donor to the National Donor-Conceived Person Register."
- 25 " The proviso in section 20(1)(d) of the Children and Family Relationships Act 2015 relating to known donors should be repealed. Sections 21 and 22 should be amended to provide that a known donor must be notified of an application for a declaration of parentage and given the opportunity to object. Where this occurs, the Court should have discretion to make the declaration of parentage applied for, or to deal with the case under the pre-existing guardianship regime, in line with its assessment of the best interests of the child."

⁵ Professor Conor O' Mahony, "A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy and Irish Law"
<https://assets.gov.ie/130886/e66b52d7-9d3e-4bb4-b35d-cf67f9eea9fa.pdf>

EFC is determined to convince the Oireachtas that in doing so it will avoid a situation where children born through DAHR or surrogacy arrangements will be disadvantaged when compared to other children simply because the method of their conception or due to their parents marital status or sexual orientation.

Proposed Amendments to the Children & Family Relationships Act, 2015

Retrospective declaration of parentage where there is a known donor

The CFRA, 2015, created a framework in Irish legislation ensuring that children born through donor assisted human reproduction (DAHR) would have their rights to their genetic identity protected through the creation of the National Donor-Conceived Persons Register. In recognition that such a framework did not exist prior to the enactment of the CFRA, the legislation allowed for Declarations of Parentage where children were conceived using an anonymous donor prior to the enactment, May 2020. Paradoxically, however, the CFRA did not allow for Declarations of Parentage where a known donor was used prior to May 2020. We are calling on the Oireachtas to rectify this anomaly by amending the CFRA, 2015.

At present parts 2 and 3 of the CFRA 2015 contains provisions in relation to the regulation of DAHR procedures carried out in the State. The commencement of these parts was intended to clarify the legal position of all parties involved in a DAHR procedure carried out in accordance with the Act. In particular, the aim was to clarify the legal position and legal parentage of children born through these procedures. Since its enactment on the 5th May 2020, the current legal position is that in order for an intended parent to be granted a retrospective Declaration of Parentage in respect of the child born where a donor was used, the donor must have been and remains unknown to the intended parents at the time of the application for a Declaration of Parentage. This penalises intending parents who sought to vindicate their child's right to their origins by availing of a known donor, and in some cases, even where they knew that this would hamper their own pathway to parentage.

EFC proposes that in circumstances where an known donor was used to conceive the current court application process for retrospective declarations of parentage provided for in sections 21 and 22, of the CFRA, could be either:-

- (a) Amended or
- (b) Used as a template for a parallel form of application.

In the latter an application for a Declaration of Parentage could require that certain information is provided to the Court in support of an application and to satisfy the Court of the intention of all of the parties involved in the DAHR procedure prior to the birth of the child together with the intention of all the parties after the birth of the child. Such evidence could include:-

- (i) Evidence that the donor never intended to be recognised as the legal father of a child born through the use of his donor sperm;
- (ii) Consent of the donor to the intending parents application for a Declaration – same could be obtained pre or post birth;

- (iii) Confirmation that the donor is not, at the time of the application, registered as the legal father of the child;
- (iv) Declaration / confirmation from the donor that he was aware at all relevant times of the identity of the intending parents and agreed to act as a donor free from any duress, undue influence and / or misrepresentation.

EFC is aware of a number of families who have been created in circumstances where the intending parents have known their donor. The children born to these parents, through no fault of their own, are being treated differently by the Irish state by virtue of their parent's sexuality and, in terms of retrospective DAHR, based on the State's failure to provide a best practice model for intending parents engaging in such AHR.

Non-Clinical DAHR Procedures – Retrospective and Prospective Provision for the Recognition of Parentage

EFC is very conscious that a many female same-sex couples have children who were conceived outside of a clinical setting for a variety of reasons. Specifically, they did so in the absence of any framework directing them to do otherwise.

The CFRA, 2015, created a framework where children born using DAHR have to be conceived in private Irish fertility clinics in order to benefit from the legislation.

Private fertility treatment is expensive, invasive and, for the majority of same-sex female couples, entirely unnecessary as they do not necessarily require fertility treatment in order to become pregnant. Children can be safely conceived using non-clinical procedures, such as Intra Cervical Insemination, in the home without any medical intervention or fertility expertise. For many same-sex female couples, this is a safe, economic, non-invasive option that they can use in the comfort and safety of their own homes.

At present in Irish law non-clinical procedures are entirely excluded and therefore there are no pathways to parentage provided for same in the 2015 Act. This creates an inevitable situation where any children born through non-clinical DAHR procedures either before or since the enactment of the CFRA 2015 do not have any opportunity to have a legal relationship with the second intending parent at birth. As it stands there is no provision contained in either the CFRA 2015 or the AHR bill which addresses this significant issue.

It could be argued that such processes are excluded by virtue of the protection of the child's right to identity which can be overseen by the operator of the clinic through the pre-conception requirement to register such information. However, the current framework requires unnecessary medical intervention for same sex female partners and does not provide a corresponding registration process in service of the child's right to identity. This process brings the family life of the intending parents into the public sphere unnecessarily and imposes onerous and unjustified interferences with the right to personal and marital privacy.

In order to secure the inclusion of children born through non-clinical procedures EFC proposes that to accommodate retrospective recognition of parentage in respect of non-clinical procedures, the CFRA 2015 could be amended by

A. updating the definition of DAHR procedure from
“DAHR procedure” means a donor-assisted human reproduction procedure, being any procedure performed in the State with the objective of it resulting in the implantation of an embryo in the womb of the woman on whose request the procedure is performed, where—

(a) one of the gametes from which the embryo has been or will be formed has been provided by a donor,

(b) each gamete from which the embryo has been or will be formed has been provided by a donor, or

(c) the embryo has been provided by a donor;

To

“DAHR procedure” means a donor-assisted human reproduction procedure, being any procedure performed in the State, that involved –

(a) The insemination of the woman on whose request the procedure is performed with a gamete provided by a donor on her cervix; or,

(b) The implantation of an embryo in the womb of the woman on whose request the procedure is performed where –

(i) One of the gametes from which the embryo has been or will be formed has been provided by a donor or

(ii) Each gamete from which the embryo has been or will be formed has been provided by a donor,

(iii) the embryo has been provided by a donor;

B. the inclusion of a new section (i.e. section 20(A)) which would ultimately specify to whom the new section applied and that would read as follows:-

“20(A)(i) this section applies to a child where,

(a) The child was born in the state or outside of the state

(b) The child was born as a result of a non-clinical DAHR procedure which was performed before the date on which this section comes into operation,

(c) At the time when the non-clinical DAHR procedure referred to in paragraph (b) was performed, a person was an intending parent of the children and was the only intending parent of the child,

(d) *At the time referred to in paragraph (c) the person, other than the mother of the child who provided a gamete which was used in the non-clinical DAHR procedure was not an intending parent of the child,*

(e) *At the time of an application under Section 21(a) the mother of the child is recorded as the mother of the child in the Register of Births and no person, or no person other than the person referred to in paragraph (c) is recorded in that register as the child's father or parents.*

- C. the inclusion of the below new sections,
- a. 21A for consent applications in the District Court
 - b. 22A for contested applications in the Circuit Court.
 - c. 23A to allow for donor consent to take place outside of a private fertility clinic

In the context of pathways to parenthood and the recognition of parentage on a prospective basis EFC supports the suggestion of Dr Lydia Bracken that an amendment to the Civil Registration Act 2004 could be affected to allow both intended parents to be registered as the legal parents of a child conceived through a non-clinical DAHR procedure through the provision of a statutory declaration or Court application⁶. Any such statutory declaration or Court application envisaged would involve the following requirements:

- A. that the parties each consent to the application,
- B. confirmation/declaration of each parties intention at the time of entering into the DAHR procedure and
- C. confirmation/declaration of each party's intention as to the legal relationship with the child conceived and born.

As far as EFC is aware the level of medical infertility among LGBTQ+ couples is no greater than in the general population (the HSE estimates that 85% of heterosexual couples are able to successfully conceive within a year without medical intervention⁷). Therefore, for most same-sex female couples, the only reason why they need to engage the services of a fertility clinic is to obtain parental rights for the second / non-biological parent. If the law provided a pathway to parenthood for children conceived in non-clinical settings it would allow same-sex female couples to have a child even if they can't afford fertility treatment, to avoid an unnecessary medical procedure and to conceive their child in a private and personal setting. The same safeguards which are conducted as part of the fertility treatment process i.e. independent legal advice for all parties, counselling for all parties and inclusion of information on the National Donor-Conceived Person Register could still be required in order for a Declaration of Parentage to be granted.

DAHR Procedure Conducted Outside of the Irish Jurisdiction

The current provisions of the CFRA 2015 apply to children conceived through a DAHR procedure performed in Ireland only. Prior to the enactment of the CFRA 2015 there was no regulation of DAHR procedures or legal mechanism for the recognition of parentage of children born through these procedures conducted either in Ireland or outside of the jurisdiction. This

⁶ Dr Lydia Bracken, *Pathways to Parenting: Proposals for Reform*, on behalf of LGBT Ireland (pg 3-4)

⁷ <https://www2.hse.ie/conditions/fertility-problems-treatments/types-of-fertility-problems/>

therefore, has created a situation where inevitably and due to a complete lack of regulation, couples seeking DAHR treatment often chose to avail of same outside of the jurisdiction. The reasons for this range from genuine preference, financial limitations and a lack of any legal framework to include or exclude the chosen jurisdiction from consideration by the intending parents.

Some reasons why same-sex parents have turned to other jurisdictions is that DAHR procedures being offered by DAHR facilities in Ireland were simply unaffordable or at the time of their DAHR journey did not offer the particular service of which the intending parents were seeking to avail. In those circumstances no real alternative was available to them other than to seek these DAHR procedures outside of the jurisdiction and their children should not be excluded from having a legal relationship with both of their parents as a result.

As a result and certainly prior to the enactment of the CFRA 2015 a number of couples have children born to them arising from DAHR procedures in clinics outside of the jurisdiction who are not currently protected by the CFRA framework.

Despite the CFRA claiming jurisdiction in respect of DAHR procedures that took place in other jurisdictions prior to 4 May 2020, it made no such provision for children conceived through DAHR procedures performed in clinics outside of the jurisdiction on a prospective basis. EFC proposes that this be addressed by the Oireachtas and the CFRA 2015 be amended to include DAHR procedures conducted outside of the jurisdiction.

EFC is of the view that where a clinic providing DAHR procedures in another jurisdiction conforms to its own national standards from a legal, medical and child welfare perspective then it should be possible for parentage to be recognised in Ireland where the child has been born here. EFC proposes that the Oireachtas should give due consideration to the financial realities faced by people who require DAHR procedures to create their families and to establish a framework for the approval of foreign clinics so that intending parents have realistic options without the worry that their children will have no right to a legal relationship with them.

Citizenship

The CFRA, 2015 allows for intended same-sex parents to seek a Declaration of Parentage for children conceived or born prior to the commencement of the legislation. However, the Declaration of Parentage applies from the date of the court date rather than the child's birth date. This impacts a child's right to citizenship through both their intended parents as some countries require the relationship between intended parent and child to be recognised from birth in order for the child to be able to access citizenship entitlements. EFC proposes that the Oireachtas amend the Children and Family Relationships Act Section 23(a) with the insertion of

"(a) the person shall be deemed to be the parent, under [section 5](#) (1)(b), from the date of the birth of the child,"

for

"(a) the person shall be deemed to be the parent, under [section 5](#) (1)(b), of the child,"

EFC also urges the Committee to recommend that Government through the Department of Foreign Affairs recognises international birth certificates with same-sex parents listed at the parents of a child to ensure access to passports and citizenship entitlements.

Conclusion

The Children & Family Relationships Act, 2015 at the time of its enactment was presented as one of the most significant changes in family law that the Oireachtas had effected in a generation. The Government publicised it as a reform of family law in a way which was inclusive of and sensitive to the reality of contemporary family life in Ireland. It was designed as an attempt to meet the needs of children living in diverse family types. In reality the Act by its operation applies to a limited number of children born to opposite sex couples, female same sex couples and single women undergoing a DAHR procedure. Regrettably the CFRA 2015 has failed to achieve true inclusivity and does not, in its current form, reflect the reality of contemporary family life in Ireland. In particular, it sadly does not meet the needs of children living in diverse family types in Ireland and in fact renders these excluded children unequal to the majority of their peers.

Children born to LBGTQ+ families continue to be overlooked by the legislature in this country. Our proposals, we hope, can help bridge the legislative gap in the protections provided to our children. The Oireachtas has an opportunity now to act so as to ensure the inclusion of all children born through DAHR procedures. What is being proposed by EFC in the within document are amendments and changes to legislation which are readily capable of being effected. Our children cannot wait any longer, our child should not have to wait any longer. Please act now.