March 22nd 2022

Re: Committee on International Surrogacy

Dear Deputy Whitmore,

I write to you in relation to your role as Chair of the Committee on International Surrogacy.

I am the current Chair of the Assisted Human Reproduction (AHR) Coalition, which is a broad grouping of stakeholders who have come together to progress our members' views regarding the AHR legislation.

We are pleased to see the Special Joint Committee on International Surrogacy has been established and that your work has begun. We believe that the recommendations from the committee will inform fundamental parts of the AHR legislation and will be crucial to creating a progressive, fit for purpose system for families in a modern Ireland.

As part of this process, we have recently received a copy of the 'issues paper' which was provided by the Department of Justice to Committee members. Having reviewed this document in detail, we are concerned with large portions of the details, both in its content and assertions. We feel the incompleteness and inaccuracies must be immediately corrected so as to ensure that Committee members are being provided with the most precise and relevant information available.

We have prepared the attached document which goes through our concerns in detail, and we are happy to make ourselves available to you and your officials to discuss these matters if needed.

We thank you for your work to date with the committee and look forward to engaging with you further in the coming months.

Your sincerely,

Elaine Cohalan

Chair of the AHR Coalition | elaine@equalityforchildren.ie |Tel: 086-8930914

Notes from the AHR Coalition on the Issues Paper on International Surrogacy for Special Joint Oireachtas Committee

- **Section1: Background:**
  - **a.** This section states "The majority of surrogacies dealt with in Ireland are commercial surrogacy arrangements undertaken outside the State, most often in Ukraine at present." We query what data exists to support the statement that most surrogacy arrangements are undertaken in Ukraine? The Report by the Joint Oireachtas Committee on Health in July 2019 stated that: "There is no official data or reliable source recording the number of children born as a result of surrogacy arrangements.
  - **b.** This section lists a number of "specific issues of concern" relating to the "parental status in Ireland of intending parents in international surrogacy arrangements" but omits the crucial area of citizenship, where a child born through surrogacy cannot access citizenship entitlements through both their intended parents.

- **Section 2: Surrogacy: The current position in Irish law**
  - a. This section sets out that "In Irish law, legal motherhood is based on birth rather than genetics." This is a common misconception arising from the commentary related to the seminal case of *MR and DR v an tArd Chlaraitheoir*.

    The finding in this case related solely to birth registration and the decision was to set aside the decision of the High Court which favoured the genetic mother. The decision of the Supreme Court set aside the decision of the High Court, which decided that the genetic mother should be registered on the birth certificate. However, it did not prefer the gestational mother over the genetic mother, but rather, it ensured that the genetic mother could not be preferred in all circumstances, as that would exclude gestational mothers.

    It was recognised that motherhood had split into genetic and gestational, and it was for the Oireachtas, in its extremely wide discretion on this social and ethical issue, to set the parameters of the importance of either link in parentage, guardianship, birth registration etc.

    The Oireachtas, in the Children and Family Relationship Act 2015 defined mother as the woman who births the child. This is solely related to donor assisted human reproduction (DAHR). It did not, for example, insert a definition of mother into the Interpretation Act 2005, which would apply the definition to all **legislation**, other than **legislation** where mother is otherwise specifically defined. There is no catch all

definition of mother in Irish law and there is nothing prohibiting a new Act that deals with surrogacy to define "mother" in other terms.

Essentially in all contexts where the gestational and genetic mother are the same person, they are the legal mother. In DAHR, a new context, the decision was made to make the gestational mother the legal mother, this is because it is in the context of third-party donation and the gestational and genetic aspect are severed in the contexts envisioned by that legislation. The same decision will have to be made in the context of surrogacy, where once more, the gestational and genetic is severed. It is entirely in the power of the Oireachtas to re-define "mother" to suit a new context, it has not been pre-determined by one piece of legislation and one context.

b. This section suggests that a father requires a declaration of parentage before he applies for guardianship under section 6A of the Guardianship of Infants Act. "Under Irish law, the biological or genetic father of a child born through surrogacy may apply for a declaration of parentage in respect of the child under section 35 of the Status of Children Act 1987. If the declaration of parentage is granted, the father may apply for guardianship under section 6A of the Guardianship of Infants Act 1964."

In practical terms, this is not required. The father could be registered on the birth certificate which constitutes a presumption of paternity, and it would be for another party to raise the issue in the guardianship proceedings in relation to his genetic relationship with the child and DNA tests to be requested by the court. He can also become a guardian with the consent of the surrogate through statutory declaration. There is also a mechanism under section 6D of the 1964 Act where the father can be recognised as a guardian where he has accrued those rights and responsibilities in another jurisdiction pursuant to the Hague Convention 1996 or the Council Regulation (EC) No. 2201/2003 (more commonly known as Brussels II bis).

c. Bar the generic note "the legal position is the same for a male intending parent who is not the genetic father of the child", the section does not make any reference to the fact that surrogacy arrangements are also pursued by male same-sex parents and the legal limbo they and their children can find themselves in.

d. We also note that surrogacy arrangements may also be the only avenue for some single male or female persons. This does not appear to have been considered in the issues paper.

e. This section states that "In some jurisdictions where commercial surrogacy is permitted, such as Ukraine, when a child is born through surrogacy, the intending parents are designated as the legal parents from the birth of the child, are registered as the child's legal parents and are stated to be such on the child's birth certificate.

However, foreign birth certificates or court orders are not necessarily binding in Irish law or upon Irish authorities as determinative of legal parentage under Irish law." Currently a child born abroad with an Irish citizen parent can be registered in the Foreign Births Register, become an Irish citizen and receive a Foreign Birth Registrar Certificate. As such, the Irish authorities do currently determine legal parentage under Irish law through foreign birth certificates.

We would also add here that the issue of a birth certificate issued in another country was recently considered in the EU Context in the case of C-490/20. Also, in *Mennesson v France* (ECHR), the Court held that: "*While it is true that a legal parent-child relationship with the first and second applicants is acknowledged by the French courts in so far as it has been established under Californian law, the refusal to grant any effect to the US judgment and to record the details of the birth certificates accordingly shows that the relationship is not recognised under the French legal system. In other words, although aware that the children have been identified in another country as the children of the first and second applicants, France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children's identity within French society" (para 96).*

f. This section refers to the 2012 Guidance Document. This document states that "Under Irish law the woman who gives birth to the child - in this case, the surrogate mother". This document pre-dates the case of *MR and DR v ATC* noted above and no longer aligns with Irish law, see above.

g. At the end of page 4 and start of page 5 the issues paper includes Article 42A of the Constitution quoted verbatim with no analysis of the impact of this Article on surrogacy.

- **Section 3: Health (Assisted Human Reproduction) Bill**

This section states that "The Health (Assisted Human Reproduction) Bill will explicitly prohibit commercial surrogacy in Ireland. This position follows rigorous analysis of the issues raised by commercial surrogacy and the concerns relating to the welfare and commodification of the children involved, as well as the potential risks of coercion and exploitation of vulnerable women to act as surrogate mothers."

The bill has been drafted and is not yet complete so it cannot be stated what the bill will explicitly do or not do.

The statement refers to "rigorous analysis of the issues raised by commercial surrogacy". The rigorous analysis noted is not cited or presented.

- **Section 4: Report of the Joint Committee on Health on Pre-Legislative Scrutiny of the General Scheme of the Assisted Human Reproduction Bill**

  This section selects excerpts from the Report of the Joint Committee on Health from July 2019. It quotes the report verbatim in terms of the noted risk of exploitation but did not note that the Committee did not take a position on commercial surrogacy and did not endorse any of the risks as a reason to prohibit such commercialisation. None of the recommendations relate to the endorsement or prohibition of commercial surrogacy.

- **Section 5: Case law of the European Court of Human Rights**

  This section refers to *Mennesson* and the Advisory Opinion by the ECtHR but does not refer to the more criticised case of *Paradiso and Campanelli v Italy* where the child was placed into care following a Russian surrogacy agreement when the Italian parents returned home. It also cites the two findings of the Opinion with no discussion or analysis of how the Court reached these conclusions.

  The Advisory Opinion responded to the question of the need to provide legal recognition between intended mothers who have not provided a genetic link, and where the embryo was formed with a donor egg. The opinion states that the "general and absolute impossibility" of obtaining legal recognition of the relationship between a child born abroad and their intended mother was incompatible with the child's best interests.

  The Court determined that each situation should be examined in the light of the particular circumstances of the case. It acknowledged that the reality of the issues went beyond the child's identity and that essential aspects of the child's private life came into play "*where the matter concerns the environment in which they live and develop and the persons responsible for meeting their needs and ensuring their welfare*".

  The Court concluded that the right to respect for private life within Article 8 of the ECHR requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, as the person legally established abroad as the legal mother.

  The Court advised that the uncertainty surrounding the legal relationship between child and intended mother should be as short-lived as possible and should be possible at the latest when it has become a practical reality.

  There have been a couple of subsequent cases such as *CE v France* and *D v France* that are not discussed at all– none involved a known genetic link (in D, the intended mother was

genetically related, but she didn't disclose this to the court in time for it to be considered). In *D,* the Irish judge on the Court, Siofra O'Leary noted the problematic nature of continuously adjudicating on cases where the genetic link could not be considered and how unfortunate it was, given that the courts were clearly continually evolving their findings in light of the ECtHR judgment and the Advisory Opinion following *Mennesson.* Judge O'Leary concluded by stating that the importance that the Court had previously placed on the biological link left it unclear as to whether the margin of appreciation would allow registration of a father's genetic link but not the mother's.

- **Section 6: Work of the Hague Conference on Private International Law on parentage and surrogacy**

  This section is incomplete in its analysis and does not delve into the preliminary report of the Hague Conference group from 2012, Ireland's response to the questionnaire from April 2013, the Study of Legal Parentage conducted in 2014, or that in the 10 meetings that have taken place between the working group, Ireland has never been represented.

- **Section 7: Forthcoming EU legislative initiative on recognition of parenthood**

  This section does not explore the two cases referred to or the findings of the December 2021 case. It merely says it was handed down. The section notes that the initiative will "propose harmonised rules on the recognition of parenthood of biological and non-biological children" but not the establishment of parentage. This explanation is very unclear, and we don't believe it accurately reflects the point of the project. What it actually says is that this initiative aims to ensure that parenthood, as established in one EU member state, will be recognised across the EU so that children maintain their rights in cross-border situations, in particular when their families travel or move within the EU.

- **Section 9: Key challenges arising from the Special Rapporteur's recommendations relating to international surrogacy**

  Section 9 takes a number of positions which are out of step with the remainder of the Issues Paper without any foundational basis or cited research:

  a. High Court applications for Parental orders in international surrogacy presents a number of difficulties – "risk of the Irish authorities being subject to undue pressure or left with no real choice in relation to the approval of international surrogacy arrangements that do not comply with safeguards and requirements". We feel this is quite insulting to the judiciary whose job it is to uphold and enforce the law. Currently

the domestic version contains zero discretion. It will be for a court to determine based on the facts in front of it and, having considered all the circumstances and factors to be regarded in its discretion, if any, it will make its determination.

b. It notes "significant practical difficulties around logistics, remote hearings, etc. " relating to the Special Rapporteur's recommendation of High Court applications for recognising parentage of international surrogacy arrangements. Surely logistical issues around the practicalities of court systems should not be used to deter the Oireactas from recognising family units in Ireland?

c. It notes that "The Special Rapporteur's proposals would appear to afford foreign surrogate mothers less protection than Irish surrogate mothers will be afforded under the Health (Assisted Human Reproduction) Bill." and "if legislation were to be brought forward to facilitate Irish residents in undertaking commercial surrogacy arrangements outside the State, while prohibiting such arrangements in the State, this would create a double standard in terms of the protection of children and surrogate mothers."

   We feel that these statements are disingenuous when it has to be recognised that there are two legal frameworks involved in a process where**in** Irish courts have **only one** jurisdiction (at least in terms of enforcing a foreign surrogacy agreement/removing a foreign surrogate's legal motherhood where to do so is incompatible with the law of the foreign country). Professor O' Mahony's report offers additional safeguards to surrogate mothers in that a High Court application versus a Circuit Court application is required, he recognises that he cannot control the laws in other countries but that surrogacy arrangements will continue to be made there and the outright prohibition does nothing but leave children in legal limbo.

d. It notes that "It would not appear to be appropriate to provide that a court can grant citizenship to a child born through international surrogacy, as suggested by the Special Rapporteur, as this would be inconsistent with existing legislation relating to citizenship and passports." This presupposes that no Bill interacts with other pieces of legislation.

e. It notes that "The issue of retrospective assignment of parentage to intending parents of children born through donor-assisted human reproduction was discussed in the Oireachtas debates on the Children and Family Relationships Bill 2015, during which the then Minister for Justice and Equality described the difficulties arising, which are illustrative of the challenges that may be faced in the area of surrogacy." and does not elaborate further on any positions or difficulties that were discussed.

f. It notes that "The Children and Family Relationships Act 2015 made provision for retrospective assignment of parentage to intending parents of donor-conceived children on the basis that, prior to the 2015 Act, parentage could not be assigned if the gamete donor's identity was known. Prior to commencement of the 2015 Act, Ireland's legal framework did not recognise gamete donation, and therefore if a sperm donor's identity was known, he was considered in law to be the father of the resulting child. This was confirmed by the Supreme Court in the 2009 case of *McD v. L*.".

This is incorrect. Prior to the CFRA, parentage was assigned based on proven biological link or presumed based on registration on the birth certificate or marriage to the mother or accepted with the consent of the mother. The knowledge or lack thereof of the biological father's identity had zero bearing on the assignment of parentage to a third party in the absence of the other criteria. *JMcD v PL and BM* did not prove anything in relation to identity versus non/identity of the donor – it was about a friend of the couple who acted as a sperm donor, playing the role of "favourite uncle" who changed his mind and sought more and more time with the child and subsequently guardianship and access. This all occurred at a time when there was no DAHR legal framework. Identification of the sperm donor had nothing to do with it.

- **Section 10. Verona Principles for the protection of the rights of the child born through surrogacy**

  This section on Verona Principles doesn't list the Verona principles. These principles include a best interests of the child determination in proceedings concerning legal parentage and states that courts should provide such interim orders as to parental responsibility as are necessary, including for the period immediately after birth.

- **Section 11.Some possible options for dealing with issues arising from international surrogacy**

  a. This section states in (b): "provide in Irish law for assignment of parentage in International surrogacy arrangements only where consistent with the requirements for surrogacy in Ireland" this presupposes the current AHR Bill is law and is our current framework. This is a proposed piece of legislation which has been introduced by the Government and not yet debated by the legislature of Ireland. The Issues Paper reads as if the decisions have already been made and can simply be

duplicated in the international context, without any debate by the Houses of the Oireachtas the proposed framework. Again (c) leaves the only option to accept the proposals in the Bill.

b. In (e) the paper states that “Step-parent adoption may be a route to parentage in some international surrogacy cases, even though it might not be favoured by some intending parents. Step-parent adoption is provided for in the Adoption (Amendment) Act 2017." However, it does not note that the Adoption Authority has not yet processed any adoption applications where AHR was involved in the conception of a child and their stated position is that they are waiting for the publication of AHR legislation.

c. In (f) it describes creating a route to legal parentage for an intending genetic mother as difficult, because a legal process would be required to legally terminate the parentage of the birth mother. The issue with this proposal is that it flies in the face of the current legislative process, which is to create pathways towards parentage in certain prescribed circumstances. The AHR Bill 2022 already proposes a legal process to legally terminate the parentage of the birth mother and so it is clear that this is not an obstacle to reform.

d. In (g) it states again that the AHR Bill, which has not yet been debated or passed, will “explicitly prohibit commercial surrogacy in Ireland”. It also refers to the position arising out of “rigorous analysis” which is not cited or presented.

- **Section 12. Key issues and challenges relating to international commercial surrogacy**

  This section states that “Requiring appropriate safeguards for the surrogate mother is not only essential for surrogate mothers but is also essential for the wellbeing of the child in later years. From the perspective of the child, informed by historic adoption practices, it can be hugely distressing for an individual to learn of possible exploitation of a birth mother." We strongly object to the reference to 'historic adoption practices' in this paragraph and it is unrelated to surrogacy legislation, unrelated to any individuals or advocacy organisations calling for progressive, inclusive regulation of surrogacy in the best interests of the children, families and surrogates and find that the use of the phrase in this issues paper to be disingenuous.

Ends.