

## Briefing Note on the Children and Family Relationships Bill 2015

4 March 2015

### Why the Bill is important for children and families

The Children's Rights Alliance and its members' Working Group warmly welcomes the publication of the Children and Family Relationships Bill 2015. The Bill represents the most important reform of child and family law for a generation and puts children at the heart of family law. The proposed legislation will go a long way in addressing discrimination currently faced by children in non-marital families.

#### Context

The structure of Irish family life has changed significantly in recent decades. This Bill recognises the reality of diverse family types and has the potential to impact positively on the lives of nearly half a million children who are growing up in many different types of families in Ireland. That is nearly one in every two children in the country.

- 36.2% of births were registered as being outside of marriage<sup>1</sup>
- 308,109 children are living with 186,284 lone mothers<sup>2</sup>
- 104,665 children are living with 60,269 unmarried cohabiting couples<sup>3</sup>
- 43,887 children are living with 29,031 lone fathers<sup>4</sup>
- 230 same sex couples are raising children<sup>5</sup>
- 42,960 people have divorced and remarried and of these 56% of remarried women and 22% of remarried men live in a household with children<sup>6</sup>
- 6,454 children are living in State care (6,001 of who are in a foster care placement)<sup>7</sup>
- There are no official statistics on how many children live full time with grandparents or other family members.

### Why we need this Bill

#### 1) To protect the child's right to family life

The Constitution of Ireland places great importance on the family and defines it as 'the natural, primary and fundamental unit group of society' (Article 41). The Courts have interpreted the 'constitutional family' as only referring to marital families.<sup>8</sup> Irish law does not currently provide an adequate legal structure for protecting the right to family life for the significant number of children in non-marital families.

**The Bill ensures that children living in non-marital and non-traditional families will now be in a position to enjoy a legal relationship with the person who provides them with day-to-day parental care.**

1 Central Statistics Office (2015) *Vital Statistics Quarter 3 2014*, Dublin: Central Statistics Office.

2 Central Statistics Office (2014) *Vital Statistics – 2013 Yearly Summary*, Dublin: Stationery Office, p.39.

3 Ibid.

4 Central Statistics Office (2012) *Census 2011 Profile 5 – Households and families*, Dublin, Stationery Office, p.22.

5 Ibid, p.27.

6 Ibid, pp.11-13.

7 TUSLA, *Monthly National Performance Activity Report October 2014*, p.4, <http://www.tusla.ie/data-figures>.

8 *The State (Nicolaou) v An Bord Uchtala & The Attorney General* [1966] IR 567; *N & Anor v HSE & Others* [2006] 4 IR 374.

**The Bill does this by creating six new forms of guardianship:**

- Parental guardianship – assigned by court order (Section 6A)
- Parental guardianship – assigned through a statutory declaration to civil partner and cohabitant (who meet the 12/3 month requirement) (Section 6B)
- Non parental guardianship (Section 6C) – assigned by court order to:
  - married/civil partner/3 year cohabitant of the parent of a child who has shared parental responsibility for the child for 2 years; or
  - a person who has provided day-to-day care for the child for 12 months and no parent is willing or able to exercise the rights and responsibilities of guardianship
- Foreign guardianship order – recognises guardianship assigned by foreign courts under Brussels II bis and the Hague Convention (Section 6D)
- Temporary guardian – allows a guardian to nominate another individual to be the child’s guardian where he or she is incapable of carrying out this role due to serious illness or injury. The Child and Family Agency will be notified of such court applications (Section 6E)
- Testamentary guardian – allows a guardian to appoint another individual to be the child’s guardian in the event of his or her death (Section 7).

**These provisions are welcome and should be retained.**

**Recommendation: The Bill does not address the situation of unmarried non-cohabiting fathers. We believe the Bill’s provisions could be further enhanced by setting out criteria under which guardianship could be granted to unmarried non-cohabiting fathers who are sharing the parenting of the child.**

**2) To ensure decisions are made in the best interests of the child**

While the principle of the ‘welfare’ or ‘best interests’ of the child is currently reflected in legislation – such as the Guardianship of Infants Act 1964, the Adoption Act 2010 and the Child and Family Agency Act 2013 – the best interest principle has never been defined in law.

For the first time in Irish law, the Bill provides comprehensive guidance to the Courts on what considerations to take into account when making a determination on the child’s best interests. This will provide much-needed guidance for the judiciary and will promote consistent application across the country. The guidance set out in the Bill is in line with Article 3 of the UN Convention on the Rights of the Child. It is ground breaking and will make Ireland a world leader in this area.

**The Bill provides a comprehensive definition of the ‘best interests’ principle, and provides that the best interests of the child will be paramount in any decisions on guardianship, custody or upbringing of, or access to, a child (Section 41(3)(1)). These provisions are welcome and should be retained.**

**3) To ensure the participation of children in judicial decisions affecting them**

Legislative provisions recognising the right of the child to have his or her voice heard in judicial decision-making in family law proceedings (under Children Act 1997) were never commenced and practice is *ad hoc*.

**The Bill will ensure that a child’s voice is heard and considered when important life changing decisions are made in relation to guardianship, custody and access. It will provide for the appointment of an expert by the Court to determine the views of the child and convey these to the court. The cost of the expert must be borne by the parties to the cases (eg. the parent or guardian).**

**Recommendations: We believe the Bill’s provisions could be further enhanced by:**

- Establishing a mechanism to fund expert reports in cases where parents cannot afford to fund such a report under Section 32(9) of the 1964 Act (under Section 58 of this Bill). The creation of this fund is vital to ensure that every child has the right to have their voice heard.

- **Mandating the Minister to introduce regulations on the required qualifications and experience held by a child’s views expert, their fees and minimum performance standards. This would require amendments to Section 32(10) and (11) of the 1964 Act (under Section 58 of this Bill), replacing the phrase ‘may’ with ‘shall’ in each of the provisions.**

#### 4) To protect the child’s right to identity

Assisted human reproduction and the use of anonymous donated genetic material are not currently regulated in Ireland. Children do not have a legal right to know their genetic identity and the parentage of children born through assisted reproduction is uncertain. Under Articles 7 and 8 of the UN Convention on the Rights of the Child, every child has a right to know his or her parents and have access to information concerning their genetic identity.

**The Bill prohibits anonymous donation and establishes a national donor-conceived person register and protects the child’s right to identity. It also recognises parentage in cases of children born through assisted reproduction (through a hospital or clinic) using donor material. These provisions are welcome and should be retained.**

#### Other reforms needed

There are three key issues which are not addressed by the Children and Family Relationship Bill 2015 that require immediate action by Government:

- The Government should ensure the establishment of a **Guardianship Register** to provide a clear and accessible register of the named guardians of a particular child. This will be an invaluable register for the judiciary and for parties affected by the six new forms of guardians. The register will be able to clarify who is a guardian and what level of rights have been assigned to a court appointed guardian. For example, the lack of a register means a situation may arise where an unmarried father who has secured guardianship rights through a statutory declaration (voluntarily signed by both parties) may be unable to prove his guardianship status if the statutory declaration document is lost, withheld or destroyed. Without such a register there is no official record that the agreement ever took place.
- The Government should ensure the establishment of a specific **family court system** and a **comprehensive court welfare service** to support the roll-out of this legislation. The court welfare service would provide an appropriate mechanism to carry out assessments of the child’s welfare and best interests, ascertain his or her views, while also carrying out family and risk assessments, as required. It would also ensure, where appropriate, that supports and services are available to the child and family, such as mediation services and child contact centres.
- The Government should reform the provisions on **step-parent adoption**. Reform is needed to address the unacceptable situation where a lone parent who marries must adopt their own child if their new husband/wife wishes to adopt that child.

#### Who we are

*The Children’s Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. Our work on the Children and Family Relationships Bill has been informed and led by a members’ Working Group comprising Barnardos, Empowering People in Care (EPIC), the Law Centre for Children and Young People (Ireland), Gay and Lesbian Equality Network (GLEN), Irish Council for Civil Liberties (ICCL), Immigrant Council of Ireland, Irish Association of Social Workers, Irish Society for the Prevention of Cruelty to Children (ISPCC), Irish Refugee Council, Marriage Equality, National Youth Council of Ireland (NYCI), One Family, Pavee Point, Treoir and Youth Advocates Programme (YAP). These members represent the interests of a wide range of groups working with children and families in Ireland.*

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