

Opening Statement to the Joint Committee on International Surrogacy

19 May 2022



Founded in 1995, 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. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

Accompaniment Support Service for Children (A.S.S.C.)
Ag Eisteacht
Alcohol Action Ireland
Amnesty International Ireland
An Cosán
Aoibhneas
AsIam
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Barnardos
Barretstown Camp
Bedford Row Family Project
BeLonG To Youth Services
Blossom Ireland
Catholic Guides of Ireland
Child Law Project
Childhood Development Initiative
Childminding Ireland
Children in Hospital Ireland
Children's Books Ireland
Children's Grief Centre
Clarecare
COPE Galway
Cork Life Centre
Crann Centre
Crosscare
CyberSafeKids
Cycle Against Suicide
Dalkey School Project National School
Daughters of Charity Child and Family Service
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
Doras
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dyslexia Association of Ireland
Dyspraxia/DCD Ireland
Early Childhood Ireland
Educate Together
EPIC
Equality for Children
Extern Ireland
FamiliBase
Féach
Focus Ireland
Foróige
Gaelscoileanna Teo
Galway Traveller Movement
Good Shepherd Cork
Immigrant Council of Ireland
Inclusion Ireland
Institute of Guidance Counsellors
Irish Aftercare Network
Irish Association for Infant Mental Health
Irish Association of Social Workers
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Primary Principals' Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation

Jack and Jill Children's Foundation
Jigsaw
Katharine Howard Foundation
Kids' Own Publishing Partnership
Kinship Care
Leap Ireland
Let's Grow Together! Infant and Childhood Partnerships CLG.
LGBT Ireland
Mecpaths
Mental Health Reform
Mercy Law Resource Centre
Migrant Rights Centre Ireland
Mothers' Union
My Mind
My Project Minding You
Museum of Childhood Project
Music Generation
New Directions
National Childhood Network
National Council for the Blind of Ireland
National Forum of Family Resource Centres
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
Novas
One Family
One in Four
Parents Plus
Pavee Point
Peter McVerry Trust
Prevention and Early Intervention Network
Private Hospitals Association
Psychological Society of Ireland
Rainbow Club Cork
Rainbows Ireland
Rape Crisis Network Ireland (RCNI)
Realt Beag/Ballyfermot Star
Respond Housing
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
School of Education UCD
Sexual Violence Centre Cork
SIPTU
Simon Communities of Ireland
Social Care Ireland
Society of St. Vincent de Paul
SPHE Network
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
TASC
Teachers' Union of Ireland
Terenure College Rugby Football Club
Transgender Equality Network Ireland
The Anne Sullivan Foundation
The Ark, A Cultural Centre for Children
The Irish Red Cross
The UNESCO Child and Family Research Centre, NUI Galway
Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
Women's Aid
Youngballymun
Young Social Innovators
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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The Children's Rights Alliance thanks the Committee for the opportunity to present on this important topic.

The Alliance unites over 140 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children by making sure their rights are respected and protected in our laws, policies and services. We also provide legal information and advice to children, young people and their families through our legal information line and nationwide legal advice outreach clinics.

We understand the focus of today's hearing is to concentrate on:

- Protecting the right of the child to their history and identity, including their genetic, gestational and social origins.
- Ensuring that existing children born through international surrogacy arrangements can exercise their right to their history and identity, including their genetic, gestational and social origins.

Currently, there is no regulation of surrogacy in Ireland. The legal pathways for children born through surrogacy to have a relationship with one or both of their intending parents is limited, and this has left children in vulnerable legal positions for lengthy periods of time.

The Supreme Court in the case of *M.R. And D.R. (Suing by their Father and Next Friend O.R.), O.R. and C.R. v An Tard-Chláraitheoir, Ireland and The Attorney General*¹ observed in the context of surrogacy that:

There is a lacuna in the law as to certain rights, especially those of the children born in such circumstances. Such lacuna should be addressed in legislation and not by this Court. There is clearly merit in the legislature addressing this lacuna, and providing for retrospective situations of surrogacy.²

As noted by Professor Conor O'Mahony, 'The unavoidable reality is that children will continue to be born following international surrogacy arrangements and to be cared for by intending parents who may have no legal connection with the children.'³ The UN Special Rapporteur on the sale and sexual exploitation of children has recommended that it 'in the best interests of children to ensure that there is a clear decision-making framework in place to provide clarity and certainty.'⁴

The Health (Assisted Human Reproduction) Bill 2022 presents a significant opportunity to provide legal clarity for children who will be, and have been, born through domestic and international surrogacy.

1 [2014] IESC 60\1.

2 [2014] IESC 60\1 para 116.

3 Professor Conor O'Mahony, Special Rapporteur on Child Protection, *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (DECDIY 2020) 2.

4 Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (2019) UN Doc. A/74/162 para 20.

Best Interests of the Child

Article 3(1) of the UN Convention on the Rights of the Child states that the best interests of the child should be a primary consideration in all actions concerning a child.⁵

In 2013, the UN Committee on the Rights of the Child issued General Comment No. 14 to clarify how the best interests' principle should be interpreted.⁶ The Committee states that the principle should be determined on a case-by-case basis and 'should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs'.⁷ The best interests' principle has a three-fold meaning:

- *A substantive right*: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.
- *A fundamental, interpretative legal principle*: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.
- *A rule of procedure*: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.⁸

The Irish Constitution has elevated the best interests of the child beyond being a primary consideration in Article 42A.4.1⁹ which provides that in any matter concerning the adoption, guardianship or custody of, or access to, any child 'the best interests of the child shall be the paramount consideration.'

The UN Committee on the Rights of the Child's most recent concluding observations on Ireland in 2016 recommended that Ireland should:

[e]nsure that children born through assisted reproduction technologies, in particular with the involvement of surrogate mothers, have their best interests taken as a primary consideration and have access to information about their origins; in doing so, the State party should consider providing surrogate mothers and prospective parents with appropriate counselling and support.⁹

The Verona principles the protection of the rights of the child born through surrogacy, developed by the International Social Service, are supported by the UN Committee on the Child. They set out detailed guidance for how to respect the best interests of the child when making decisions on surrogacy arrangements.¹⁰

5 UN Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Art 3.

6 UN Committee on the Rights of the Child (2013) *General Comment No. 14: The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14.

7 *ibid.*

8 *ibid.*

9 UN Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland (2016) CRC/C/IRL/CO/3-4, para34.

10 International Social Service, *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (2021) para 6.1- 6.6.

They provide that ‘the best interests of the child shall be the paramount consideration in all decisions concerning legal parentage and parental responsibility related to a child born through surrogacy.’ In considering the best interests of the child, states should consider ‘the risk of short- and long-term harm to the child including but not limited to psychological and physical harm’.¹¹ The Principles also set out that in general, it is in the best interests of the child born through surrogacy to have a genetic link to at least one intending parent.¹² In international surrogacy where one State does not permit the specific arrangement the Principles set out that the State where the intending parents are intending to reside should conduct the best interests assessment.¹³

The Principles’ provide a non-exhaustive list of what is to be considered when conducting a best interests assessment:

- a. The parties’ intentions when entering into the surrogacy agreement;
- b. The child’s genetic and gestational links to each of the parties to the surrogacy agreement;
- c. All sibling relationships of the child;
- d. The suitability of each of the parties to be a fit and proper parent and/or carer of the child;
- e. The ability of each of the parties to facilitate the child’s relationships with other parties;
- f. The value of a stable family unit in the child’s development;
- g. The likely effect on the child including psychological and emotional impact, throughout the child’s life, of the decision;
- h. Any harm which the child has suffered or is at risk of suffering
- i. The likely effect of the decision on future generations;
- j. The child’s ascertainable wishes and feelings regarding the decision, taking account of the child’s age and understanding;
- k. The child’s characteristics which are considered relevant, including age and sex;
- l. The child’s particular needs, including physical and health needs;
- m. The child’s emotional and/or physical attachment to each of the parties;
- n. All circumstances in relation to the surrogacy arrangement;
- o. Potential involvement of illicit practices;
- p. Transparency in financial transactions; and
- q. The role of intermediaries.¹⁴

Part 7 of The Health (Assisted Human Reproduction) Bill 2022 makes reference to the best interests of the child, by providing that is one of the criteria to be considered when a court is deciding whether or not to grant a parental order¹⁵ and when to allow for an extension of time for making a decision.¹⁶ Consideration should be given to strengthening the best interests principle in the Bill so as to comply with the UN Convention on the Rights of the Child and the Verona principles.

Recommendation:

- Any regimes adopted in relation to surrogacy should provide that the best interests of the child is the paramount consideration and the test for best interests as contained in section 6.7 in the Verona Principles should be adopted. This principle should be central both in any legislation adopted and in the work of any bodies involved in future regulatory regimes.

11 *ibid* 6.1.

12 *ibid* 6.3

13 *ibid* 6.6

14 *ibid* 6.7.

15 The Health (Assisted Human Reproduction) Bill 2022, section 63(1)(a)(v).

16 *ibid* 63(5)(b).

Children's Rights to Identity

Article 7 of the UNCRC protects the right of the child to know and be cared for by their parents insofar as is possible. In the context of Article 7, the term *parents* can include birth parents, genetic parents and those who care for the child for significant periods.¹⁷ It also provides that a child has a right to be registered immediately after birth and has 'the right to acquire a nationality'. Article 7 places a specific obligation on the State to ensure that these rights are implemented 'in particular where the child would otherwise be stateless.'

Article 8 of the UNCRC provides that the child has a right to 'preserve his identity including nationality, name and family relations'. It places an obligation on the state to provide a remedy when a child is illegally deprived 'of some of all the elements of his or her identity'.

The UN Special Rapporteur on the sale and sexual exploitation of children has noted that 'the rights of the child to identity, access to origins and to a family environment should not be adversely affected by surrogacy.'¹⁸ She has further recommended that the State of the intending parents be responsible for ensuring that statelessness does not occur¹⁹ and for protecting the right to identity and access to information about their origins, regardless of the legal status of the surrogacy agreement.²⁰

The Committee on the Rights of the Child's most recent concluding observations on Ireland in 2016 recommended that Ireland should, in the context of surrogacy, ensure that children can access to information about their origins.²¹

In Irish law, the right to identity was recognised as a personal right protected by Article 40.3 of the Constitution in the Supreme Court decision in *IO'T v B*.²²

The right to identity and parentage including biological parentage is provided for also by Article 8 of the European Convention on Human Rights (ECHR). The European Court of Human Rights has interpreted Article 8 as encompassing the right to identity,²³ and as requiring States to legislate for recognition of 'parent-child relationships arising from international surrogacy arrangements at a minimum in all cases involving a genetic link between the child and the parents'.²⁴

The Verona Principles provide further detail on how the State can implement its obligations to uphold the child's right to identity in the context of surrogacy, providing that:

States should ensure rigorous collection and storage to preserve in perpetuity identity information relating to all surrogacy arrangements. States should clarify under what conditions identity information will be stored and kept up-to-date, who can access this information, and when and how this information can be accessed.²⁵

17 UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2007) 105-106

18 Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, (2019) UN Doc. A/74/162 para 23.

19 Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, (2018) UN Doc. A/HRC/37/60, para 70.

20 *ibid* para 77 and 76.

21 UN Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland (2016) CRC/C/IRL/CO/3-4, para 34.

22 [1998] 2 IR 321 at 348.

23 *Gaskin v United Kingdom* (1989) 12 E.H.R.R. 36; *Mikulic v Croatia* (App. No. 53176/99) ECtHR, February 7, 2002; *SH v Austria* (App. No. 57813/00) ECtHR, April 1, 2010.

24 *Mennesson v France* (65192/11, 26 June 2014) at 99.

25 International Social Service, *Principles for the protection of the rights of the child born through surrogacy (Verona principles)* (2021) para 11.6.

The Principles also provide that States have a duty to ensure and assist children who are born through surrogacy to access information about their genetic, gestational and social origins.²⁶ The Principles provide that surrogacy should only involve surrogate mothers and donors who agree that their identifying information may be given to the child born through surrogacy.²⁷

Article 24 of the UNCRC provides that every child has the right to enjoyment of the highest attainable standard of physical health. The availability of information on genetic and gestational origins is of 'vital importance in the context of children's right to health'.²⁸

The UN Special Rapporteur on the sale and sexual exploitation of children recommends that children should be able to access to information about their identity 'in line with their evolving capacity'.²⁹ This position has been endorsed by Professor Conor O'Mahony, who recommends that a child should be able to access their right to identity while they are under 18, by having access to relevant non-identifying information about their genetic history. He makes the case that in the absence of regulation, international surrogacy will continue and regulation, if done correctly and on a children's rights basis, can achieve the highest level of protection for children.³⁰

Under Article 2 of the UNCRC, every child has the right to equal treatment irrespective of the status of their parents or guardian.³¹ The UN Special Rapporteur on the sale and sexual exploitation of children in context of surrogacy has stated that the overarching principle of non-discrimination signifies that children's rights should not be impacted by the method of their birth.³² While there may be practical difficulties in the international context, children, whether born through national or international surrogacy, should have access to information about their identity.

Recommendation:

- Any regimes adopted in relation to surrogacy should respect the right of the child to know their identity and a system should be developed for the collection, storage and preservation of identity information.
- Children and young people, born through national or international surrogacy, should be able to access information about their identity in line with their evolving capacity.

26 *ibid* para 11.3 and 11.4.

27 *ibid*

28 Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, (2019) UN Doc. A/74/162 para 23.

29 Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, (2018) UN Doc. A/HRC/37/60, para. 70 and 77.

30 Professor Conor O'Mahony, Special Rapporteur on Child Protection, *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (DECDIY 2020) 49.

31 UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989), Art 2.

32 Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, (2019) UN Doc. A/74/162 para 23.