

Initial Submission on the Children and Family Relationships Bill 2014 to the Joint Committee on Justice, Defence and Equality

February 2014



The Children's Rights Alliance unites over 100 organisations working together to make Ireland one of the best places in the world to be a child. We improve the lives of all children and young people by ensuring Ireland's laws, policies and services comply with the standards set out in the United Nations Convention on the Rights of the Child.

Alcohol Action Ireland
Amnesty International Ireland
Ana Liffey Drug Project
Arc Adoption
The Ark, A Cultural Centre for Children
Assoc. for Criminal Justice Research and Development (ACJRD)
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
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Barretstown Camp
BeLonG To Youth Services
Bessborough Centre
Border Counties Childhood Network
CARI Foundation
Carr's Child and Family Services
Catholic Guides of Ireland
Catholic Youth Care
Childhood Development Initiative
City of Dublin YMCA
COPE Galway
Crosscare
DIT – School of Social Sciences & Legal Studies
Doras Luimni
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dun Laoghaire Refugee Project
Early Childhood Ireland
Educate Together
School of Education UCD
EPIC
Focus Ireland
Forbairt Naíonraí Teoranta
Foróige
GLEN - Gay and Lesbian Equality Network
Headstrong - The National Centre for Youth Mental Health
Immigrant Council of Ireland
Inclusion Ireland
Inspire Ireland
Institute of Community Health Nursing
Integration Centre
International Adoption Association
Irish Association of Social Care Workers (IASCW)
Irish Association of Social Workers
Irish Association of Suicidology
Irish Autism Action
Irish Centre for Human Rights, NUI Galway
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Premature Babies
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation (IYF)
Jack & Jill Children's Foundation
Jesuit Centre for Faith and Justice
Junglebox Childcare Centre F.D.Y.S.
Kids' Own Publishing Partnership
Lifestart National Office
Marriage Equality – Civil Marriage for Gay and Lesbian People
Mary Immaculate College
Mental Health Reform
Mothers' Union of Ireland
Mounttown Neighbourhood Youth and Family Project
MyMind
National Association for Parent Support
National Organisation for the Treatment of Abusers (NOTA)
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
One Family
One in Four
OPEN
Parentline
Parentstop
Pavee Point
Peter McVerry Trust
Rape Crisis Network Ireland (RCNI)
Realt Beag
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
Society of St. Vincent de Paul
Sonas Housing Association
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Society
St. Patrick's Mental Health Services
Start Strong
Step by Step Child & Family Project
Sugradh
The UNESCO Child and Family Research Centre, NUI Galway
Treoir
UNICEF Ireland
Unmarried and Separated Families of Ireland
Yoobyoo
youngballymun
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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Contents



1. Introduction	4
2. Updating the Law on the Best Interests of the Child	5
3. Protecting a Child’s Right to Family Life	9
4. Participation of Children in Judicial Decision-Making	13
5. Rights of Children in Relation to Assisted Human Reproduction (AHR) and Surrogacy	16

1. Introduction

The Children's Rights Alliance unites over 100 organisations working together to make Ireland one of the best places in the world to be a child. We improve the lives of all children and young people by ensuring Ireland's laws, policies and services comply with the standards set out in the United Nations Convention on the Rights of the Child.¹

This submission has been produced through collaboration and through the formation of a Working Group to review the Children and Family Relationships Bill 2014. These members include: Barnardos, 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), Marriage Equality, 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 and the Children's Rights Alliance wishes to thank the members for providing much of the information and knowledge which has informed this submission.

The Children's Rights Alliance welcomes the publication of the Children and Family Relationships Bill 2014² as a positive step towards fulfilling a key commitment in the Programme for Government 2011-2016.³ The Bill aims to create "a legal structure to underpin diverse parenting situations and provide legal clarity on parental rights and duties in diverse family forms". We acknowledge the work of the Minister for Justice, Defence and Equality, Alan Shatter TD, and his departmental officials in producing this important draft legislation and hope that our observations and proposals will augment and strengthen the Bill as it progresses through the Oireachtas.

According to Census 2011, there were a substantial number of children living in different types of family units including:

- 60,269 unmarried couples cohabiting who had a total of 104,665 children
- 186,284 lone mothers with a total of 308,109 children
- 29,031 lone fathers with a total of 43,887 children

There has also been an increase in the total number of divorces as in 2011, 87,770 people indicated that they were divorced while 42,960 people were recorded as being remarried. While the Census does not provide details of how many of these people have children, it does provide some indication of the number of blended families there might be with almost 56% of remarried women living in a household with children while this fell to 22% when looking at the statistics of remarried men living in a household with children. Census 2011 'recorded only a small number of 230 same sex couples

¹ *United Nations Convention on the Rights of the Child* (1989)
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

² Children and Family Relationships Bill can be found here:
<http://www.justice.ie/en/JELR/General%20Scheme%20of%20a%20Children%20and%20Family%20Relationships%20Bill.pdf/Files/General%20Scheme%20of%20a%20Children%20and%20Family%20Relationships%20Bill.pdf> [Accessed 18 February 2014]

³ Government of Ireland (2011) *Programme for Government 2011*, Dublin: Stationery Office

had children'⁴ and the latest vital statistics for the second quarter of 2013 showed that there were two births registered as being within a civil partnership.⁵

Parents and families are central to a child's life and the rights of parents and children are inextricably linked. In most cases, a child relies on his or her parents or guardians to vindicate his or her rights. From a children's rights perspective, children are recognised as individuals with their own rights which must be respected, protected and promoted.

The proposed legislation puts children at the heart of family law reform and will address the current discrimination faced by children in non-marital families. This Bill will provide legal clarity around various family types and significantly reduce the number of cases going to court because of the current legal vacuum.

This is an initial submission and the Children's Rights Alliance will provide further in-depth analysis when the full draft legislation is published although we are cognisant that the Bill has been referred to the Ombudsman for Children who will also be analysing it from a children's rights perspective. This submission attempts to highlight the importance of retaining some of the key children's rights that the current draft legislation proposes as well as highlighting some of the key questions and concerns raised by members of our Working Group.

2. Updating the Law on the Best Interests of the Child

2.1 Introduction

Article 3 of the UN Convention on the Rights of the Child states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The concept of the child's best interests is a procedural rule which should be followed in all decisions that will have an impact on the rights of children. In 2013, the Committee on the Rights of the Child issued General Comment No. 14 to clarify how this complex principle should be interpreted.⁶ The Committee is clear that it 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'. The best interests principle has a three-fold meaning as it is:

⁴ Marriage Equality (2013) *Love, Commitment, Family, Equality - The case for Marriage Equality in Ireland*. Marriage Equality's submission to the Constitutional Convention, Dublin: Marriage Equality.

⁵ http://www.cso.ie/en/media/csoie/releasespublications/documents/vitalstats/2013/vstats_q22013.pdf

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

(a) 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. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) 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. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) 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. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

A different standard applies to the best interests principle in relation to access, guardianship, or custody proceedings where the best interests of the child should be the paramount or only consideration.

The UN Committee on the Rights of the Child, in its 2006 Concluding Observations on Ireland called on the State to:

Ensure that the general principle of the best interests of the child is a primary consideration without any distinction and is fully integrated into all legislation relevant to children.

The inclusion of the general principle of the best interests of the child in this key piece of legislation is a major milestone as it not only reflects the rights enshrined in the Convention itself, but this is the first time it is defined in domestic legislation in such a comprehensive manner.

2.2 Current Context

The Law Reform Commission 2009 *Consultation Paper on the Legal Aspects of Family Relationships* recognises the growing diversity of family formation and the need to ensure that the best interests of the child are recognised within the relevant legal framework. At present, the 'best interests principle' is increasingly being introduced as a procedural rule to help courts and decision-makers reach better decisions for children. For example, the Constitutional Amendment⁷ and Section 9(1) of the Child and Family Agency Act 2013 include obligations on the courts and on the Agency respectively to consider the best interests of children when making decisions about them. At present, law relating to guardianship and custody of children is governed primarily by the

⁷ See Children's Rights Alliance, *Summary and Explanation of the Children's referendum Wording*, <http://www.childrensrighs.ie/resources/summary-and-explanation-childrens>.

Guardianship of Infants Act 1964, as amended. Section 3 of the Act provides that when considering applications for guardianship and other related matters, the ‘welfare’ of the child shall be ‘the first and paramount consideration’. While this provision has been interpreted widely it falls short of the UN definition of the best interests principle.

2.3 The Proposed Legislation

Overall the proposed Heads of the Bill situates law reform in guardianship, custody and access in terms of the best interests of children and Head 31 provides a comprehensive definition to guide judicial decision-making. It includes ‘the physical, emotional, psychological, educational and social needs of the child including the child’s need for stability having regard to the child’s age and stage of development’ and in the view of the Children’s Rights Alliance is largely in line with UN Convention on the Rights of the Child standards. Head 32(1) of the Bill sets out:

Where in any proceedings before any court the guardianship, custody or upbringing of or access to a child or the administration of any property belonging to or held on trust for a child or the application of the income thereof, is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.

This aspect of the Bill is very welcome and complies with standards laid out the UN Convention on the Rights of the Child which states the best interests should be paramount in adoption, guardianship, access and protection cases.⁸

The list provided in Head 32(3) is reflective of the rights enshrined in the UN Convention on the Rights of the Child. For ease of reference we have set out the corresponding Article of the Convention in the table below. The proposed factors that the court should consider when determining the best interests of the child include:

Head 32(3)	UNCRC Article
a) the benefit to the child of having a meaningful relationship with both of the child’s parents	Article 18 (Parental responsibilities)
b) the ascertainable views of the child concerned, giving due weight to such views having regard to the age and maturity of the child	Article 12 (The child’s opinion)
c) the physical, psychological and emotional needs of the child including the child’s need for continuity and stability, taking into consideration the child’s age and stage of development and the likely effect on him of any change of circumstances	Articles 5 (Parental guidance and the child’s evolving capacities) and 18 (Parental responsibilities)
d) the history of the child’s upbringing and care, including the nature of the relationship between the child and each of his parents and with other relatives and the desirability of preserving and strengthening such relationships	Article 18 (Parental responsibilities)
e) the child’s religious, spiritual, cultural and linguistic upbringing and needs	Article 14 (Freedom of thought, conscience and religion)

⁸ UN Convention on the Rights of the Child, A/RES/44/25 (20 November 1989), Article 3.

f) the child's social, intellectual and educational upbringing and needs	Articles 4 (Implementation of rights) and Article 28 (Education)
g) the child's age and any special characteristics	Article 5 (Parental guidance and the child's evolving capacities)
h) any harm which the child suffered or is at risk of suffering and the protection of the child's safety and psychological wellbeing;	Article 19 (Protection from abuse and neglect)
i) any plans proposed for the child's custody, care, development and upbringing and for access to and contact with the child having regard to the desirability of the child's guardians and parents agreeing to such arrangements and co-operating with each other	Article 18 (Parental responsibilities)
j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and other parent and to maintain and foster relationships between the child and relatives of the child	Article 18 (Parental responsibilities)
k) the capacity of each person in respect of whom an application is made under this part: (i) to care for and meet the needs of the child; (ii) to communicate and co-operate on issues relating to the child; and to exercise the relevant powers, responsibilities entitlements to which the application relates	Article 18 (Parental responsibilities)
l) Any other fact or circumstance that the court regards as relevant	

While the above provision is very welcome, the Justice Oireachtas Committee needs to consider the application of this principle in relation to mediation and arbitration aimed at resolving family law disputes. The Alliance is of the view that the best interests must extend to all decisions made in relation to children relating to their care and wellbeing and not only to decisions of the court in relation to guardianship, custody and access. Head 53 indicates that the intention is to reproduce provisions of section 20 of the 1964 Guardianship Act which provides a legal obligation on solicitors to inform applicants of various possible alternatives to legal proceedings. It is unclear whether the best interests of the child will apply here particularly in relation to the drawing up of agreements within parties.

2.4 Key Issues

- The Committee should ensure that the current standard included in Head 32(1) which calls for the best interests of a child to be the paramount consideration in decisions involving guardianship, custody and access should be retained as it complies with the standard contained in the UN Convention on the Rights of the Child.
- The draft bill should be amended to ensure that the best interests of the child in relation to guardianship, custody and access proceedings are extended to cases where the family engages in alternative dispute resolution to ensure that it is not necessary to go to court.

3. Protecting a Child's Right to Family Life

3.1 Introduction

Parents and families are central to a child's life and the rights of parents and children are inextricably linked. The term 'parent' is interpreted to mean genetic, birth and psychological parent, the latter referring to a person who is not biologically related to the child but cares for the child for significant periods of their childhood as they are 'intimately bound up in children's identity' and identity rights.⁹ In most cases, a child relies on his or her parents or guardians to vindicate his or her rights. From a children's rights perspective, children are recognised as individuals with their own rights which must be respected, protected and promoted. The UN Convention on the Rights of the Child clearly highlights the important relationship between children's rights and those of their family and focuses on the substance of family relationships rather than the form. The Convention:

- Recognises the family as the 'fundamental group of society and the natural environment for the growth and wellbeing of...children' (Preamble).
- Acknowledges that parents have the 'primary responsibility' for their child's upbringing and development (Article 18).
- Affirms that the family itself requires protection and assistance to fulfil its responsibilities and places a duty on States to support parents in rearing their children (Article 18).
- States that children have a right to know, and be cared for by, their parents (Article 7).
- Explicitly discourages the separation of children from their families (Article 9).
- Provides that where children are separated from their parents, the State has an obligation to try to ensure contact between them is maintained in accordance with the best interests of the child (Article 9).
- Provides for the principle of evolving capacity which means that the State must respect the rights of parents to exercise the rights of young children on their behalf and that this responsibility is gradually transferred to the child as their capacity develops. It also provides for parents to guide their children in the exercise of their rights (Article 5).

Children also have a right to be protected from discrimination irrespective of the child's parents/guardians' marital status or sexual orientation (Article 2). General Comment No. 7 on implementing child rights in early childhood recognises that,

[...] young children may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values... States parties have a responsibility to monitor and combat discrimination in whatever forms it takes and wherever it occurs - within families, communities, schools or other institutions.

⁹ UNICEF (2007) Implementation handbook for the *UN Convention on the Rights of the Child, Fully Revised third Edition*, Geneva: United Nations Children's Fund, pp.104-5.

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) also prohibits discrimination:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In addition to the principles outlined in the UN Convention on the Rights of the Child, Article 8 of the European Convention on Human Rights (ECHR) provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Section 3 of the ECHR Act 2003, places a legal obligation on every organ of the State to perform its functions in a manner compatible with the State's obligations under the Convention provisions, including its case law. In more recent cases Article 8 has been shown to provide considerable protection for the rights of children, both with respect to the family and in other contexts. An important development in the jurisprudence of the European Court of Human Rights has been its interpretation of Article 8 to include procedural and participation rights as an 'add-on' to the determination of substantive ECHR rights.¹⁰ Although this began with the Court protecting the procedural rights of parents as part of their respect for family life under Article 8, steps have been taken in recent years to recognise the importance of the views of children in proceedings that affect them 'in accordance to the age and maturity of the child concerned' in family law decision-making.¹¹ The Grand Chamber of the Court, while stopping short of requiring that all children should be heard in every case, treats cases subjectively with regard to the specific circumstances of the case.

The European Court of Human Rights has also recognised the right to family life in cases where there are close personal ties between the parties rather than looking at the format of the non-married family unit or whether or not the parents of the child live together.¹² The Court has also determined that Article 8 further extends its protection of family life¹³ to relationships between children and grandparents,¹⁴ siblings,¹⁵ and also aunts and uncles.¹⁶

¹⁰ Kil Kelly, "Article 8: the Right to Respect for Private and Family Life, Home and Correspondence" in DJ Harris and others (eds), *Harris O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) 361-424.

¹¹ *Sahin v Germany* [GC] [2003] 36 EHRR 765 and *Sommerfeld v Germany* [GC] [2004] 38 EHRR 35.

¹² *Johnston v Ireland* (1986) 8 E.H.R.R. 214 and *Keegan v Ireland* (1994) 18 E.H.R.R. 342. Article 8 of the ECHR guarantees respect for private and family life, home and correspondence. The general principle applied by the European Court of Human Rights in deciding if family life exists for the purpose of art.8 is whether there are close personal ties between the parties. The family based on marriage comes within art.8, and the court has also recognised family life in the context of a cohabiting heterosexual couple with children in *Johnston*. Co-habitation is not necessary though and in *Keegan* family life was found where the couple were not living together.

¹³ As noted by Kil Kelly, "Child Law and the ECHR: Issues of Family Life, Adoption and Contact" in Kil Kelly, *ECHR and Irish Law*, 2nd edn (Bristol: Jordans, 2009) at 135.

¹⁴ *Marckx v Belgium* (1979-1980) 2 E.H.R.R. 330.

Article 14 of the ECHR also prohibits discrimination, for example on grounds of birth, when ECHR rights are engaged.

3.2 Current Context

The Irish Constitution places great importance on the family and defines it as ‘the natural, primary and fundamental unit group of society’ (Art. 41). However, the Courts have narrowly interpreted the constitutional family as only including marital families.¹⁷ Cohabiting couples, lone parents, unmarried fathers and grandparents are all excluded from this definition. While unmarried mothers are recognised as the automatic guardians of their children, the same rights do not flow to unmarried fathers. Currently in Ireland under section 22(2)(a) of the Civil Registration Act 2004, where a child is born to unmarried parents, they must make a written request to the Registrar for joint registration of the birth. The man must sign a declaration that he is the father of the child. Both the mother and the father must attend at the Registrar’s office to sign the register. Alternatively, it is also possible to register both names of non-marital parents on the birth certificate if an application is made by the mother or the father and accompanied by a written declaration by the applicant that the man is the father of the child and a statutory declaration by the mother that the man is the father of the child.¹⁸

As stated previously an increasing number of children are being cared for by stepparents, civil partners and others in loco parentis. Nonetheless, the law does not provide a mechanism whereby their relationship with the child is recognised. This can impact on their day-to-day parenting role, for example, such as consenting to medical treatment or granting permission for school trips. However, this lack of legal clarity can be particularly detrimental to a child in the context of family breakdown. These issues have become especially acute in recent times due to the increase in cohabiting parents and children born outside marriage.

Cohabiting opposite-sex and same-sex couples or civil partners cannot apply to adopt a child together. Only married couples have this right. However, individuals can adopt a child on their own. This has resulted in situations where adopted children are being raised by two parents but only one has the legal relationship to the child.

In 2009, the Ombudsman for Children in her advice on the Civil Partnership Bill 2009 recommended that “provision should be made in law for the special guardianship orders” for being parented by a civil partner who is not their biological parent as well “adequate protection... in the areas of shared home protection, maintenance, succession, dissolution”. More recently the Law Reform Commission recommended that parental responsibility should be extended to civil partners and step-parents. This would emulate the law in England and Wales,¹⁹ Scotland²⁰ and New Zealand,²¹ where provisions are in place to ensure legal recognition of the parental roles of non-biological parents. This would facilitate the lived realities of children in Irish society today and help to ensure that their best

¹⁵ *Boughanemi v France* (1996) 22 E.H.R.R. 228.

¹⁶ *Boyle v United Kingdom* Comm. Rep. 9 February 1993

¹⁷ *The State (Nicolaou) v An Bord Uchtala & The Attorney General* [1966] IR 567; *N & Anor v HSE & Others* [2006] 4 IR 374

¹⁸ Sections 22(2)(b) and 22(2)(c) of the Civil Registration Act 2004.

¹⁹ Section 4A of the Children Act 1989, as inserted by s.112 of the Adoption and Children Act 2002, provides for the appointment of special guardians.

²⁰ Section 11 of the Children (Scotland) Act 1995 provides that a court may make an order granting parental responsibility, and applications for such orders are not limited to the parents of the child.

²¹ The Care of Children Act 2004 provides for the appointment of an eligible spouse or partner of a parent as an additional guardian of a child. To be eligible, the spouse or partner must have shared responsibility for the day-to-day care of the child for at least one year, although there are some other exclusions, such as the requirement that the person never have been the respondent in domestic violence proceedings or never have been convicted of an offence involving harm to a child. Generally speaking, the appointment of an additional guardian is by agreement of all parties having guardianship and with the consent of the biological father if he is not a guardian.

interests are met. The benefits of legal recognition include: legal clarity, promoting legal stability, greater relational stability and security, and reduced stigma.²²

In cases of relationship breakdown, the child still has a right to maintain contact with both parents. In this context, it is useful to note a pilot project run by One Family and Barnardos²³ which aimed to provide a support service for children whose parents had separated and found it difficult to come to agreement around contact or access arrangements. From 2011 to 2013, Barnardos and One Family ran two child contact centres which provided safe, neutral and child-focused venues for facilitated visits and changeovers to occur between children and their parents and other significant persons in the child's life.²⁴ Children's Contact Services work with families to encourage positive interaction between children and their parents, and to support the strengthening of these relationships. Over time, and where possible, parents are encouraged to move to self-management of their arrangements for spending time with the child. Such centres could ensure that children maintain a relationship with their non-resident parent in a way which considers their best interests as well as ensuring that their voice can be heard.

3.3 The Proposed Legislation

Part 7 of the General Scheme of the Children and Family Relationships Bill 2014 seeks to address these anomalies. For example, it extends automatic guardianship to unmarried fathers who are cohabiting with the mother of the child or were cohabiting for 12 consecutive months not more than 10 months prior to the child's birth. This is a very welcome development. The legislation does not propose any mechanism or procedure which would require evidence of cohabitation.

Automatic guardianship does not extend to unmarried fathers who do not live with or have never lived with the mother of their child. The rights of the unmarried father should be balanced with what would be in the best interests of the child. However, we would also urge caution as to how this may be achieved as there are also concerns in relation to cases where the mother has been a victim of domestic violence and/or women who become pregnant through rape. According to statistics issued by the Rape Crisis Network of Ireland, in 2011 there were 90 female girls and women who became pregnant as a result of rape.²⁵ Of these 90 survivors of rape, 48 women gave birth and parented the child themselves while 12 survivors had the baby and placed him or her for adoption or fostering. When balancing the rights of unmarried fathers who are not living with the mother, and situations where children have been born from rape, the Committee needs to make sure that proposals in this area do not endanger the children and mothers in anyway nor interfere with their privacy.

Part 7 also extends the right to apply to become guardians to those who are acting in loco parentis including step-parents and grandparents. This is a welcome development as the child will have a legal link with those acting in a parenting role.

²² American Psychological Association (28 Mar., 2008), Proof Brief of the American Psychological Association as Amicus Curiae in support of Plaintiff-Appellees, Supreme Court Case No. 07–1499 *Katherine Varnum et al. v. Timothy J. Brien*

²³ Barnardos, 'Barnardos and One Family launch much needed Service for Children and Separated Parents in Ireland', 2 April 2012, [press release], <http://www.barnardos.ie/media-centre/news/latest-news/barnardos-and-one-family-launch-much-needed-service-for-children-and-separated-parents-in-ireland.html> (accessed 28 February 2014).

²⁴ For further information on Child Contact Centres see: <http://www.onefamily.ie/uncategorized/child-contact-centres/>.

²⁵ Rape Crisis Network Ireland, 'What does RCNI National Data Collection tell us about rape survivors and termination of pregnancy', January 2013, RCNI: Galway, <http://www.rcni.ie/wp-content/uploads/RangeOfOutcomesOfSurvivorsOfRapeWhoArePregnantAsAResultOfRape2011.pdf>.

Head 68 extends maintenance liabilities for a child to certain persons who are not biological or adoptive parents of the child. This recognises the real and substantial link that these persons have with the child.

Part 12 of the Bill which will amend Section 3 of the Adoption Act 2010 to insert a definition of civil partners so that references to civil partners can be inserted throughout the Act where the term married couple appears in order to allow same-sex couples who are civil partnered to jointly adopt. This will ensure that a child has a legal connection to both of his or her same-sex adoptive parents.

3.4 Key Issues

- The proposed legislation will not extend the right of automatic guardianship to unmarried fathers who are not or have not been cohabiting with the child's mother prior to the birth. The Committee needs to give some consideration to this in this area while at the same time ensuring that children born from rape are protected.
- It is not clear how a father will have to demonstrate cohabitation for the purposes of automatic guardianship.
- Consider the use of Child Contact Centres as a cost-effective and holistic way of ensuring that a child can maintain contact with a non-resident parent in a way that is in his or her best interests.

4. Participation of Children in Judicial Decision-Making

4.1 Introduction

Article 12 of the UN Convention on the Rights of the Child makes clear that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The UN Committee on the Rights of the Child emphasises that Article 12 imposes no age limit on the right of the child to express her or his views, and discourages States from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:

- First, in its recommendations following the day of general discussion on implementing child rights in early childhood in 2004, the Committee underlined that the concept of the child as rights holder is:

“... anchored in the child’s daily life from the earliest stage”.²⁶ Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally.²⁷ Consequently, full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.

- Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter.
- Third, States Parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language.
- Lastly, States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.²⁸

The Thirty-First Amendment to the Constitution expressly provides for the procedural right of the child to express their views in accordance with their capacity. Article 42A.4.2° provides that:

Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

4.2 Current Context

The purpose of the proposed Children and Family Relationship Bill 2014 is to give effect to the constitutional commitment to enact legislation in this regard. However, the passage of the Constitutional Amendment is frozen pending an appeal to the Supreme Court.

While the Special Rapporteur on Child Protection in his sixth annual report highlighted that the Guardianship of Infants Act 1964 as amended by Section 11 of the Children’s Act 1997 provides for the child’s wishes to be taken into account if the court deems it ‘appropriate and practicable having regard to the age and understanding of the child’, this provision was never commenced.

In practice, there are however, various mechanisms for hearing the voice of the child in proceedings. In certain circumstances the judge will interview the child, in his or her chambers or *in camera* to

²⁶ CRC/C/GC/7/Rev.1, para. 14.

²⁷ Innocenti Research Centre, Cf. Lansdown G., (2005) *The evolving capacities of the child*, Florence: UNICEF/Save the Children.

²⁸ Para 16 (CRC/C/GC/12).

determine the views of the child and then relay that to the legal representatives of the parties to the proceedings. Also a psychologist or social worker may conduct an interview, especially with younger children, and pass on this information to the court.

4.3 The Proposed Legislation

Currently the right of the child to have his or her voice heard in decisions affecting him or her is presented as one of the factors to be considered when assessing what course of action is in the best interests of child in guardianship, access or custody proceedings. Head 32(3)(b) states that the court should have regard to:

[...] the ascertainable views of the child concerned, giving due weight to such views having regard to the age and maturity of the child.

It is welcome that the voice of the child is included in the proposed legislation. However, in order to comply with Article 12, this should be a stand-alone provision rather than one factor in a long list. The views of the child should be sought by the decision-maker and should be properly considered. This does not mean that the child gets to decide what is best for him or her, but instead gets to properly participate in and contribute to the decision-making process.

Head 60 gives the Court the power to appoint a guardian ad litem (GAL). Currently a GAL may be appointed to a child involved in a family law case as a means of expert third party involvement to give a written report and/or potentially give oral evidence regarding the child's views. However, this is at the discretion of the Court. The Special Rapporteur on Child Protection, citing Durcan,²⁹ has noted that GALs have been used more in relation to public law proceedings rather than private family law proceedings due to costs. However, the *Interim Report of the Child Law Reporting Project* when reviewing a number of cases involving children found that the inclusion of the voice of the child in court proceedings affecting them is inconsistent across courts in Ireland.³⁰ It is not systematic and is ultimately dependant on judicial discretion.

It must be noted that the Department of Children and Youth Affairs is currently reviewing the operation of the Guardian ad Litem system so this legislation should not pre-empt the outcome of that review.

4.4 Key Issues

- As currently drafted, the views of the child are considered as only one factor in determining best interests and not as a stand-alone right which falls short of the standard set out in Article 12 of the UN Convention on the Rights of the Child.
- It is not clear how the court will hear the views of the child or how it will ensure that there is no undue influence exerted on the child by any of the parties to the proceeding. The legislation will need to set out clear safeguards and mechanisms to ensure that the child can express his or her views freely.

²⁹ Gerard Durcan (2012) "Hearing the Voice of the Child" 18(1) *Medico-Legal Journal of Ireland* p.21.

³⁰ <http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>

- The review of the GAL system should be taken into consideration when the legislative provisions in appointing GALs are being further developed. The cost of providing a child with a guardian ad litem should not be a deterrent to ensuring that the child's views are heard in family law proceedings.
- The proposed Heads refer to the age and capacity of a child but it is not clear who will decide when a child is capable of forming views. As outlined in the guidance provided by the UN Committee on the Rights of the Child, it is important to point out that being capable of forming views and expressing views are two entirely different things. As already observed, the legislation cannot contain an age limit since the weight to be given to the views of the child must be looked at in accordance with both age and maturity. Each case must be looked at on an individual basis. In such cases, those who are required to elicit the views of the child must be appropriately trained to do so.
- Any mechanism that is put in place to elicit the views of the child should be accessible and child-friendly. Children should be provided with information on their right to participate and how they can assert this right in legal proceedings. They should also be provided with a complaints mechanism where they feel their views were not properly considered.

5. Rights of Children in Relation to Assisted Human Reproduction (AHR) and Surrogacy

5.1 Introduction

The right of a child to an identity and to the preservation of his or her identity is contained in expressly provided for in the UN Convention on the Rights of the Child.

Article 7 of the Convention sets out a child's right to a name and nationality and provided that every child has the right to know and be cared for by his or her parents, as far is possible. Article 8 states that:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

The right to an identity has been interpreted by the Committee on the Rights of the Child as requiring States to take all measures necessary to allow all children, irrespective of the circumstances of their birth, to obtain such information on the identity of their parents, to the fullest extent possible.³¹ Apart from the psychological need to trace one's roots to establish a sense of identity, there may also be a need to discover one's genetic health for medical reasons.

³¹ Concluding Observations of the Committee on the Rights of the Child, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CRC/C/15/Add.188 (2002) para 32.

Article 8 of the European Convention on Human Rights provides a right to respect for private and family life which has been determined to include an individual's right to establish his or her identity. In the English case of *Rose and another v Secretary for Health, HFEA*³² it was held by Scott Baker J., in interpreting Article 8 that:

[...] respect for private and family life requires that everyone should be able to establish details of their identity as individual human beings. This includes their origins and the opportunity to understand them. It also embraces their physical and social identity and psychological integrity.

Following a consultation process by the Department of Health in England, the British Government announced plans in January 2004 to change the law to enable children born as a result of sperm, eggs or embryos donated after April 2005 to access the identity of their donor when they reach the age of 18. The earliest 18 year olds will be able to do this will be in 2023.

5.2 Current Context

At present there is no statute law regulating the Assisted Human Reproduction in Ireland and the lack of legal clarity has resulted in several legal challenges. In 2005, the Commission on Assisted Human Reproduction recommended that any child born through use of donated genetic material should, on maturity, be able to identify the donor(s) involved in his/her conception. The Commission recommended that the process of consent for donors could include an option that their identity be kept on record and that a child may be given access to the records on request. The Commission was clear that legislation should clearly provide that no legal responsibility would arise on the part of donors from the ability of the child to access his or her own records.³³

In most countries where it is permissible to use donated genetic material, accessing of identifying information is either prohibited or restricted.³⁴ However, some jurisdictions, most notably Sweden, have legislated for the child's right to access the identity of biological parents. Section 4 of the Swedish Insemination Law³⁵ provides when a child is born using donated sperm and is sufficiently mature they shall be entitled to information on the sperm donor which is recorded in the hospital's special register. The Health and Welfare Committee shall be under a duty to assist the child in obtaining this information if the child so requests. Under the Regulations and General Recommendations No. 6 of 27 March 1987 on insemination, issued by the National Board of Health and Welfare, the physician must inform the donor that the resultant child is entitled to learn who the donor is.

There is currently no statute law regulating surrogacy in Ireland resulting in several legal challenges. As a result, an ad hoc system of dealing with relationships arising out of surrogacy has developed. Currently, if a child is born to a surrogate in Ireland, the surrogate is legally considered the mother of the child, irrespective of any genetic link. If the surrogate mother is married, then under Section 46 of the Status of Children Act 1987, the surrogate mother's husband is presumed by law to be the father of the child, unless the contrary is proven. If she is not married, she is the sole guardian. Some intending parents have adopted the child in order to have a legal relationship with it. If the child is being adopted, this must be done through the Adoption Authority of Ireland, and there is no guarantee that the child of a surrogate mother would be placed with the intending parents as private adoptions are prohibited in Ireland.

³² [2002] EWHC 1593

³³ Department of Health and Children (2005) *Report of the Commission on Assisted Reproduction*, Dublin:DOHC, p. 46

³⁴ For more information see: Department of Health, *Report of the Commission on Assisted Human Reproduction*, 2005, p. 129

³⁵ No. 1140/1984

In the High Court case of *MR & Anor v An tArd Chlaraitheoir*, the Court ruled that the intended mother in a domestic surrogacy agreement should be named as the legal mother of the children born subsequent to the surrogacy agreement and that the birth register should be amended accordingly.³⁶ The original entry in the birth register recorded the surrogate mother and the intended genetic father as the legal parents, which was supported by the surrogate mother. When the intended parents subsequently asked for the entry to be amended to name the intended mother, the Chief Registrar refused to do so on the basis of the *mater semper certa est* (motherhood is always certain) principle. The intended parents then applied for a declaration of parentage under the Children Act 1987, presenting evidence of the intended mother's genetic relationship with the child.

The Court concluded that there was nothing in Irish law affirming the principle that the birth mother is the legal mother. In so doing the court focused on the genetic link between the intending mother and the child, concluding that the importance 'blood tie'. This case is under appeal to the Supreme Court and judgment has been reserved on the case to a later date.³⁷

When children are born through surrogacy outside of the State there are difficulties in obtaining travel documents and bringing the child into the state. This has been dealt with in an ad hoc manner with the Department Justice and Equality issuing travel document on a discretionary basis. When a child has arrived in the state, an intending father can apply for guardianship of the child in the Circuit Court under the Guardianship of Infants Act 1964 if he is the genetic or biological father of the child.³⁸ However, his partner would not have any right to make such an application.

The Department of Justice and Equality have issued a guidance document on citizenship, parentage, guardianship and travel document issues in relation to children born as a result of surrogacy arrangements entered into outside the state.³⁹ The document outlines that the authorities are to take a child-centred approach when making decisions in this area. The consent of a surrogate mother is necessary for any application, unless her consent is dispensed with by an Order from the Irish Courts. The guidance sets out that in issuing of emergency travel documents to children born outside the state the intending parents will be required to provide a written undertaking that they will notify their local health centre of the child's presence within two working days of their arrival in the State. Further, the guidance outlines that the genetic father is required to provide an undertaking that he will apply to the Court for a declaration of parentage. This undertaking must specify that he will begin the application process within 10 working days of the child arriving in the state. The guidance also requires that before the issuing of any travel documents to a child likely to be an Irish citizen, the person claiming to be the genetic father of the child needs to provide DNA evidence to support his claim. Where a DNA test is being carried out in the country of the child's birth it must be from an independent source that has no connection to any provider of surrogacy services.

³⁶ *MR & Anor v An tArd Chlaraitheoir & Ors* [2013] IEHC 91.

³⁷ Mary Carolan, *The Irish Times*, 6 February 2014 <http://www.irishtimes.com/news/crime-and-law/supreme-court-reserves-judgment-in-surrogacy-case-1.1682158>

³⁸ For example see Mary Carolan, *The Irish Times*, 17 January 2014, <http://www.irishtimes.com/news/crime-and-law/genetic-father-gets-custody-of-infants-born-abroad-to-surrogate-1.1658044>

³⁹ Department of Justice and Equality Guidance Document on Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children born as a Result of Surrogacy Arrangements entered into outside the State <http://www.justice.ie/en/JELR/20120221%20Guidance%20Document.pdf/Files/20120221%20Guidance%20Document.pdf>

5.3 The Proposed Legislation

The proposals in the Bill (Head 10) aim to provide much-needed legal clarity in relation to parentage for children born through assisted human reproduction. In cases of married couples or couples in a civil partnership, the person who is 'married to or in a civil partnership with or cohabiting in an intimate and committed relationship' with the birth mother is determined to be the child's second parent if he or she consents to this prior to the child's conception.

This Bill will also provide for retrospective effect where the other parent's consent was not withdrawn before the time of conception. This will provide that children of lesbian couples will have a legal relationship with both of their mothers from birth (Article 7 of the UNCRC).

The rationale for the proposed Heads of Bill expressly states that the intention of Head 10 is to 'secure the best interests of the child by ensuring that he or she has legal links with his or her parents which cannot be undermined either by the parents in the event of a dispute, or by any other person'. This is reflective of a rights-based approach to establishing parentage as Article 2(2) of the UN Convention on the Rights of the Child states have an obligation to take all appropriate measures to ensure that children are treated equally and not discriminated against on the basis of the status of their parents. Further it will help the State to comply with Article 18 which requires States to 'use their best efforts to ensure recognition of the principle that both parents have common responsibility for the upbringing and development of the child'.

However, the current Heads of Bill as they stand do not provide any clarity around a child asserting his or her right to identity enshrined in Article 7 (right to know) when an anonymous donor has provided genetic material. The Commission on Assisted Human Reproduction recommended that upon reaching the age of maturity, a child born through the use of donated genetic material should be entitled to identify the donors.⁴⁰

The proposed Bill also provides clarity as to the parentage of children born through surrogacy. For parentage to be assigned, at least one of the intending parents must have a genetic connection to the child. The use of the surrogate's genetic material is prohibited under head two of the Bill. However, similarly to the situation in relation to assisted human reproduction outlined above, the heads of Bill does not provide any clarity around a child asserting his or her right to identity enshrined in Article 7 (right to know) when an anonymous donor has provided genetic material. The Commission on Assisted Human Reproduction recommended that a child should be entitled to access the identity of both the surrogate and any person who donated genetic material that led to their birth upon reaching the age of maturity.⁴¹

Another area of concern is the possibility of child-trafficking. Head 13(14) provides that the court can make a declaration of parentage where a child is born through surrogacy where a child is born in the state or where the intending parents are ordinarily resident in the state or are citizens of the state. This allows for declarations of parentage to be made in cases where a child is born of a surrogacy arrangement outside of the state. There is no mechanism in the Bill for DNA testing of children who are born through a surrogacy arrangement outside of the state.

The Alliance is of the view that without a DNA test as part of the declaration process for children born through surrogacy abroad, there is a possibility that this procedure could be exploited to traffic children into the country. Given that assignment of parentage under the proposed surrogacy laws

⁴⁰ Department of Health, Commission on Assisted Human Reproduction, 2005, p. 46

⁴¹ *Ibid.*, 2005, p. 51

requires that at least one commissioning parent be genetically connected to the child, the DNA test should be possible.

5.4 Key Issues

- The Bill must make provision for the identity rights of children in cases of AHR and surrogacy to be vindicated as a matter of priority. This is a key gap in the proposed legislation which must be addressed.
- There is no guidance contained in the proposed Heads of Bill to clarify how retrospective recognition will be implemented. From a practical point of view it needs to be clear how the presumptions of parentage as set out in Head 10 will be applied retrospectively on the birth certificate of a child.
- Proper safeguards in the form of DNA testing should take place before travel documents are issued when a child is presented at an Embassy or Consulate to ensure that he or she has a genetic link to the presumed father. This will safeguard against child trafficking.