



Health (Assisted Human Reproduction) Bill 2022

**Follow-up observations by the
Ombudsman for Children's Office**

May 2024

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1. Introduction

The Ombudsman for Children's Office (OCO) is an independent statutory body, which was established in 2004 under the Ombudsman for Children Act 2002 (2002 Act). Under the 2002 Act, as amended, the OCO has two core statutory functions:

- to promote the rights and welfare of children up to 18 years of age; and
- to examine and investigate complaints made by or for children about the administrative actions of public bodies, schools and voluntary hospitals that have, or may have, adversely affected a child.

The OCO has previously expressed the view, and continues to hold the view, that provision should be made in law for the rights of all children born through surrogacy.¹ We therefore welcomed the publication of the Health (Assisted Human Reproduction) Bill 2022 as a significant opportunity to provide clarity for children who will be, and have been, born through domestic and international surrogacy. However, the OCO was of the view that the Bill did not have sufficient regard to children's rights, and published observations in May 2022 that set out a number of issues requiring further consideration to ensure that the Bill is child-centred and rights-based.² We submitted these observations to the Minister for Health, Minister for Children, Equality, Disability, Integration and Youth and Minister for Justice. The OCO was also invited to meet the Oireachtas Joint Committee on International Surrogacy on 12 May 2022, following its establishment in February 2022.³

The OCO welcomed the Minister for Health's announcement on 12 December 2023 of the Government decision to approve Committee Stage amendments to the Bill, which the Minister stated will protect the rights and safety of children.⁴ The Oireachtas Joint Committee on Health commenced Committee Stage consideration of the Bill on 24 January 2024 and concluded its consideration on 6 March 2024.

The OCO welcomes the following amendments to the Bill that were accepted during Committee Stage:

- provision for the granting of parental orders in respect of children born through international surrogacy arrangements and the recording of information in the National Surrogacy Register on the child's origins;
- provision for the granting of parental orders in respect of children born through past surrogacy arrangements and the recording of information in the National Surrogacy Register on the child's origins;
- provision for a list of factors to which the court must have regard when determining what is in the best interests of the child in proceedings concerning parental orders;
- provision for the views of the child to be ascertained and given due weight by the court in proceedings concerning parental orders;

¹ Ombudsman for Children's Office (2014), [Advice on the General Scheme of the Children and Family Relationships Bill 2014](#); Ombudsman for Children's Office, [Ombudsman for Children's Office responds to Supreme Court's Surrogacy Judgment](#), 7 November 2014; Ombudsman for Children's Office (2022), [Provisions of the Health \(Assisted Human Reproduction\) Bill 2022 relating to surrogacy: Observations of the Ombudsman for Children's Office](#).

² Ombudsman for Children's Office (2022), [Provisions of the Health \(Assisted Human Reproduction\) Bill 2022 relating to surrogacy: Observations of the Ombudsman for Children's Office](#).

³ Ombudsman for Children's Office, [Ombudsman for Children opening statement to the Oireachtas Joint Committee on International Surrogacy](#), 12 May 2022.

⁴ Department of Health, [Government approves Committee Stage Amendments to the Health \(Assisted Human Reproduction\) Bill 2022](#), 12 December 2023.

- provision for retrospective declarations of parentage for children conceived by a known-donor and following donor-assisted human reproduction (DAHR) in a non-clinical setting prior to May 2020; and
- provision for ensuring the Irish Citizenship of children born as a result of donor assisted human reproduction procedures under the Children and Family Relationships Act 2015, or permitted surrogacy agreements, both domestic and international.

However, the OCO believes that there are a number of outstanding issues outlined in our initial observations from May 2022 that have not been sufficiently addressed in the amendments to the Bill. We have therefore prepared these follow-up observations to highlight the gaps and deficits in the Bill that could be further addressed to ensure the Bill fully upholds the rights of children born through surrogacy. The observations are prepared pursuant to the Ombudsman for Children's duty under section 7(4) of the 2002 Act to advise a Minister of Government on any matter concerning the rights and welfare of children.

2. Best interests of the child

We are disappointed that the amendment put forward on 21 February 2024 to provide that the best interests of the child shall be the paramount consideration in any proceedings before the courts in relation to domestic surrogacy was not accepted.⁵

Pursuant to the State's obligations under Article 3 of the UN Convention on the Rights of the Child (UNCRC), the UN Committee on the Rights of the Child (the Committee) has repeatedly recommended that Ireland ensure that the best interests principle is fully integrated and consistently interpreted in all relevant legislative, administrative and judicial proceedings and decisions.⁶ In this regard, the OCO's observations on the Bill recommended that provision should be made for the best interests of the child to be treated as the paramount consideration in respect of all relevant proceedings and processes within the scope of the Bill. The Department of Health (the Department) will also be aware that the former Special Rapporteur on Child Protection, Professor Conor O'Mahony, made the same recommendation,⁷ as have the Law Commission of England and Wales and the Scottish Law Commission,⁸ and the New Zealand Law Commission,⁹ in respect of surrogacy law reform in those jurisdictions.

The Minister for Health expressed concern that inserting such a provision would undermine the protections for children born through surrogacy that the Department provides for in other parts of

⁵ Houses of the Oireachtas, Select Committee on Health debate, [Health \(Assisted Human Reproduction\) Bill 2022: Committee Stage \(Resumed\)](#), 21 February 2024.

⁶ UN Committee on the Rights of the Child (2006), [Concluding observations: Ireland](#), CRC/C/IRL/CO/2, para. 23; UN Committee on the Rights of the Child (2016), [Concluding observations on the combined third and fourth periodic reports of Ireland](#), CRC/C/IRL/CO/3-4, para. 30; UN Committee on the Rights of the Child (2023), [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6, para. 16.

⁷ Professor Conor O'Mahony, Special Rapporteur on Child Protection (2020), [A Review of Children's Rights and Best Interests in the Context of Donor Assisted Human Reproduction and Surrogacy in Irish Law](#).

⁸ Law Commission of England and Wales and Scottish Law Commission (2023), [Building families through surrogacy: a new law Volume II: Full Report](#).

⁹ Law Commission (New Zealand) (2022), [Review of Surrogacy](#).

the Bill.¹⁰ However, we believe that to take this view is to misunderstand the nature of the best interests principle.

First, [Article 42A.4.1°](#) of the Constitution requires provision to be made in law that in all proceedings concerning adoption, guardianship or custody of, or access to, any child, the best interests of the child must be the paramount consideration. In this regard, the best interests of the child has been given paramouncy in other domestic legislation.¹¹ As currently drafted, the Bill only partially incorporates the best interests principle, which makes it out of step with existing domestic law affecting children.

Second, the best interests of the child principle does not mean that the child's interests trump all other interests. A key example of an area in which the paramouncy of the child's best interests operates in tandem with the application of important safeguards for children can be found in the [Adoption Act 2010](#) (2010 Act), as amended. The 2010 Act sets out the steps that must be taken and the criteria that must be met before an adoption order can be granted, while simultaneously providing in section 19 of the 2010 Act that the best interests of the child must be the paramount consideration in any matter, application or proceedings under the 2010 Act. As stated by MacMenamin J in the judgment of *Re JB and KB (Minors)*, in the context of adoption, "the best interests guarantee contained in Article 42A is not to be seen as some form of interpretive Trojan horse which can undermine the intent of the 2010 Act."¹² Thus, the best interests principle does require that discretion is given to the judiciary to enable them to make a decision that always gives priority to what serves the child's best interests when carefully balancing the interests of all parties and other considerations in a given case, without undermining the intent of the legislation concerned. The Bill, which in its current form places children's best interests on a par with other considerations, precludes the judiciary from making a decision that can ensure that, in every surrogacy arrangement that comes before the court, a decision can be made that provides certainty for each child and places children's best interests at the centre.

Third, the purpose of the best interests principle is to ensure the full and effective enjoyment by children of the other rights they have under the UNCRC, such that the Committee states that, when assessing and determining the best interests of a child, the State's obligation to protect the child must be among the considerations to take into account.¹³ The authorities would thus be required to take into account all relevant considerations and associated legislative provisions that aim to protect the child when deciding what is in the best interests of each child born through surrogacy.

Finally, though we welcome the Minister's statement on 6 March 2024 that he intends to change the Bill to provide for the best interests of the child to be of paramount importance in the provisions relating to past surrogacies,¹⁴ the best interests of the child is a right held by every child and its selective application in the Bill would, in the OCO's view, not be in compliance with the State's

¹⁰ Houses of the Oireachtas, Select Committee on Health debate, [Health \(Assisted Human Reproduction\) Bill 2022: Committee Stage \(Resumed\)](#), 21 February 2024.

¹¹ [Adoption Act 2010 \(as amended\), s 19](#); [Guardianship of Infants Act 1964 \(as amended\), s 3](#); [Child Care Act 1991 \(as amended\), s 24](#).

¹² [2019] 1 IR 270, para. 271.

¹³ UN Committee on the Rights of the Child (2013), [General comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration](#), CRC/C/GC/14.

¹⁴ Houses of the Oireachtas, Select Committee on Health debate, [Health \(Assisted Human Reproduction\) Bill 2022: Committee Stage \(Resumed\)](#), 6 March 2024.

obligations concerning the best interests of the child under Article 42A.4.1° of the Constitution and the UNCRC.

We recommend that the Department reconsider the decision not to fully incorporate the best interests principle in this Bill.

3. Children’s access to information on their origins

The Committee has recommended that Ireland ensures that all children born through surrogacy have access to information on their origins, including by revising the Bill.¹⁵ The Committee, and Verona Principles,¹⁶ underline that every child should be facilitated to access information on their origins, a right which is not dependent on the child attaining a certain age.

We welcome provision in the Bill for information to be recorded in the National Surrogacy Register relating to children born through past surrogacies and international surrogacies. However, we are disappointed that the amendment put forward on 24 January 2024 to reduce the age at which a child can apply to access information from 16 to 12 years of age,¹⁷ as recommended by the Joint Committee on International Surrogacy,¹⁸ and former Special Rapporteur on Child Protection, Professor Conor O’Mahony,¹⁹ was not accepted. We welcome that the Minister for Health stated he is open to a review of Government policy on children’s access to identity information across relevant legislation.²⁰ In the OCO’s engagement with the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) on the [Birth Information and Tracing Act 2022](#) (the 2022 Act), the DCEDIY stated that it was committed to advancing work as quickly as possible on provisions for children under 16 to access identity information.²¹ **We therefore strongly encourage the Department of Health, together with the DCEDIY, to consider reviewing legislative provisions relating to children’s access to identity information and to ensure that any such review has regard to the OCO’s observations on the Bill and is fully in line with children’s rights standards under the UNCRC.**

We note that the Bill still defines a child aged 16 and 17 as an “adult (AHR)” for the purposes of accessing information on their origins and defines a child up to 15 years of age as a “child (AHR)”. **We encourage the Department to consider our previous observations on the Bill, in which we recommended that any children, whether aged 16 and 17, or below 16 years of age, should be referred to as a child and not as an adult, in keeping with the definition of a child in the UNCRC as a person under 18 years of age.**

¹⁵ UN Committee on the Rights of the Child (2016), [Concluding observations on the combined third and fourth periodic reports of Ireland](#), CRC/C/IRL/CO/3-4, para. 34(a); UN Committee on the Rights of the Child (2023), [Concluding observations on the combined fifth and sixth periodic reports of Ireland](#), CRC/C/IRL/CO/5-6, para. 20(a).

¹⁶ International Social Service (2021), [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), para. 11.2.

¹⁷ Houses of the Oireachtas, Select Committee on Health debate, [Health \(Assisted Human Reproduction\) Bill 2022: Committee Stage](#), 24 January 2024.

¹⁸ Houses of the Oireachtas, Joint Committee on International Surrogacy (2022), [Final Report of the Joint Committee on International Surrogacy](#).

¹⁹ Professor Conor O’Mahony, Special Rapporteur on Child Protection (2020), [A Review of Children’s Rights and Best Interests in the Context of Donor Assisted Human Reproduction and Surrogacy in Irish Law](#).

²⁰ Houses of the Oireachtas, Select Committee on Health debate, [Health \(Assisted Human Reproduction\) Bill 2022: Committee Stage](#), 24 January 2024.

²¹ Information provided in a letter from the DCEDIY to the OCO, 12 January 2022.

Our previous observations also recommended that consideration be given to making provision in the Bill for child-specific supports to be made available to any child under the age of 18 who requests access to information on their origins. Such a provision would recognise that while children, like adults, have a right to access information on their origins, children are entitled to specific support in the enjoyment of these rights. Making specific provision for children within the part of the Bill concerning access to information would be consistent with the approach taken in [Part 2 of the Birth Information and Tracing Act 2022](#). This was something that the OCO recommended that the DCEDIY do and we welcomed its inclusion. **We encourage the Department to consider making specific provision in the Bill for child-specific supports to be made available to any child under the age of 18 who requests access to information on their origins. We also encourage the Department to make appropriate supports available to intending parents to assist them with further supporting their children to understand the process for applying for information and to understand the information they are provided with.**

4. Citizenship

Among the rights of particular relevance to children born through surrogacy is Article 7 of the UNCRC, which provides that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents. The UN Committee on the Rights of the Child has recommended that States ensure that children born through international surrogacy can obtain nationality through a clear process.²² The UN Special Rapporteur has highlighted that, while the child's right to a nationality should not be affected by the method of the child's birth, in the case of international surrogacy there is a real risk that a child will be unable to receive the nationality of either of their parents or the State in which they were born.²³ The State of the intending parents is therefore responsible for ensuring statelessness does not occur and providing the necessary assistance to ensure the child obtains the nationality of the intending parent.²⁴

Although we welcome the amendments made in relation to ensuring the Irish citizenship of children born as a result of DAHR and permitted surrogacy, the amendments brought forward only cover intending Irish parents *residing in Ireland*. In light of the judgment in *A and Ors. v. The Minister for Foreign Affairs and Trade*,²⁵ in which the Supreme Court found that a child born in the UK via a surrogacy arrangement was not entitled to Irish citizenship based on his non-biological father's Irish citizenship, **we would welcome clarity through the legislation for the citizenship entitlements of all children born to Irish parents through surrogacy.**

²² UN Committee on the Rights of the Child (2019), [Concluding observations on the combined fifth and sixth periodic reports of Australia](#), CRC/C/AUS/CO/5-6, para. 23(c).

²³ Maud de Boer-Buquicchio (2019), [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), A/74/162, para. 28 and para. 32.

²⁴ Maud de Boer-Buquicchio (2018), [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), A/HRC/37/60, para. 70 and para. 77(j); International Social Service (2021), [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), para. 13.4.

²⁵ [2023] IESC 10.

5. Legal status of intending parents post-birth

We note with disappointment that the provisions of the Bill that provide for a post-birth framework for granting parentage and guardianship to the intending parents have not been changed, despite recommendations in this regard being made by the OCO and other stakeholders.

The Committee Stage consideration of the amendments to the Bill frequently brought up the issue of legal parentage and guardianship of the child post-birth, particularly during the interim period between when the child is born and a parental order is granted.

The Bill explicitly states that the legal mother of the child post-birth will be the surrogate mother, and provides that the intending parents will not be the parents of the child until a parental order is granted. This approach is based on the premise that the surrogate mother is the mother of the child at birth, irrespective of the surrogate mother's genetic link to the child and intentions relating to the surrogacy agreement. This reflects the common law presumption that the birth mother is the mother of the child (*mater semper certa est*), which was discussed in the Supreme Court judgment of *MR and DR v An t-Ard-Chláraitheoir (MR)*.²⁶ However, this leaves the child in a vulnerable position vis-à-vis who is responsible for decisions relating to their care. As the intending parents will not have automatic legal rights and responsibilities towards the child, and the surrogate mother may not want to be involved in any decisions concerning the child post-birth, having consented prior to entering the surrogacy agreement to guardianship being transferred to the parents after the birth, this will give rise to challenges in practice in determining who is responsible for decisions relating to the child, such as consent for matters relating to the child's healthcare.

The debates during Committee Stage surrounding the interpretation of the *MR* judgement as the basis for the post-birth parental order framework highlight the lack of consensus in relation to the consequences of this judgement in to the context of the legal parentage of surrogate children. Denham CJ held in the *MR* case that historically, "[t]he words [*mater semper certa est*] simply recognise a fact, which existed in times gone by and up until recently, that a birth mother was the mother: both gestational and genetic."²⁷ However, surrogacy concerns the splitting of the genetic and gestational elements of motherhood, which was not contemplated by the legislature when drafting the existing framework for birth registration.²⁸ Despite this, the birth mother has been recognised as the legal mother of the child in the context of DAHR. The Minister for Health stated during the deliberations on the 21 February 2024 that a detailed legal note on the Department's interpretation of the *MR* case would be provided to the Committee.²⁹ This was provided to the Committee as acknowledged on the 6 March.³⁰ However, differing interpretations of the note provided, as mentioned during the debates, highlights the need for further analysis of the judgment, taking into account legal advice where necessary. **We encourage the Department to make the note provided to the Committee publically available, in order to provide further clarity on the basis for the position in the Bill, as it is currently drafted, that the surrogate mother is the legal parent following the birth of the child.**

²⁶ [2014] IESC 60.

²⁷ [2014] IESC 60, para. 115.

²⁸ For a further analysis of the *MR* judgment see: Claire O'Connell (2024), "The Mother in Irish Law - Part 1", *Irish Journal of Family Law*, Vol. 27, No. 1.

²⁹ Houses of the Oireachtas, Select Committee on Health debate, [Health \(Assisted Human Reproduction\) Bill 2022: Committee Stage \(Resumed\)](#), 21 February 2024.

³⁰ Houses of the Oireachtas, Select Committee on Health debate, [Health \(Assisted Human Reproduction\) Bill 2022: Committee Stage \(Resumed\)](#), 6 March 2024.

The Bill establishes a set of obligatory pre-surrogacy arrangements with which the surrogate mother, intending parent(s), relevant donors and intermediaries must comply. The Verona Principles state that, where adequate pre-surrogacy protections have been put in place, the intending parent(s) may be provided with exclusive legal parentage and parental responsibility by operation of law at birth, provided that the surrogate mother has the opportunity to confirm or revoke her consent post-birth and that there are no circumstances that require a post-birth determination of the best interests of the child. In circumstances where the current provisions of the Bill require that a domestic surrogacy must have been pre-approved on the basis of compliance with a set of pre-surrogacy protections, it may be useful to consider whether provision should be made for a pre-conception model of allocating legal parentage to the intending parents on the birth of the child, subject to similar criteria set out in section 63 of the Bill being met.

The Law Commission of England and Wales and Scottish Law Commission's final report on surrogacy published in 2023 recommended a new pathway for surrogacy be introduced, which will enable intending parents to be the legal parents at birth. The reason that the report found that reform is necessary is as follows: "The current law, which makes the surrogate the legal parent at birth, does not reflect the intentions of surrogates or intended parents. The law creates a degree of uncertainty and stress for the parties, which is not in the best interests of the child, in the period from the birth of the child to the recognition of the intended parents as the legal parents through the grant of a parental order. It can typically be six months to a year after the birth of the child before a parental order is made."³¹ A similar recommendation was made by the New Zealand Law Commission in its final report in 2022.³²

We strongly encourage the Department to consider the adverse impacts of the proposed post-birth framework, including any delay involved in granting guardianship and parental orders, on the child and their rights. As outlined in our 2022 observations, we encourage the Department to consider establishing a pre-birth framework of legal parentage in domestic surrogacy cases that satisfy the criteria for a permitted surrogacy, in light of the comprehensive pre-birth surrogacy agreement provided for in the Bill, ensuring that provision is also made for judicial oversight in cases where:

- **the surrogate mother confirms or revokes her consent following the birth of the child**
- **the surrogate mother has consented to parentage being granted to the intending parents, but the latter refuse to accept legal parentage or parental responsibility following the birth of the child**
- **legal parentage or parental responsibility is disputed, where concerns arise as to the adequacy of pre-surrogacy arrangements or where concerns arise as to whether illicit practices were associated with the arrangement, including the sale of the child.**

6. Criminalisation of non-permitted surrogacy

We also wish to raise a concern about the Bill's silence on the potential effect that the criminalisation of those who engage in non-permitted surrogacy under the Bill will have on the child. Concerns were raised in the Committee's deliberations on the 21 February 2024 about the severity of the offences contained within the Bill.

³¹ Law Commission of England and Wales and Scottish Law Commission (2023), [Building families through surrogacy: a new law Volume II: Full Report](#).

³² Law Commission (New Zealand) (2022), [Review of Surrogacy](#).

The Verona Principles apply regardless of whether surrogacy is permitted or prohibited, and state that if illicit practices are linked to surrogacy arrangements, the child's best interests should be the paramount consideration in determining legal parentage and/or parental responsibility and, if there is evidence of involvement by any party in illicit practice(s), such involvement, including its possible long-term consequences, should be taken into account. In addition, the principles state that "When the child's sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration."

The Joint Committee on International Surrogacy stated in its Final Report that any criminal sanctions within the Bill do not bar parental orders being granted. However, from our reading of the Bill, a parental order cannot be applied for by the intending parents in respect of a child born as a result of non-permitted surrogacy. Thus, it remains unclear in the Bill what position the child is left in post-birth if both the surrogate mother and the intending parents are found to have engaged in a non-permitted surrogacy and are subsequently charged with an offence. For example, in *Paradiso and Campanelli v Italy*,³³ a child was removed from his intended parents and placed into care as a result of them engaging in non-permitted surrogacy. The Grand Chamber of the European Court of Human Rights held, upon referral from the European Court of Human Rights, that, though the child's removal constituted an interference with the intending parents' right to respect for private life under Article 8, the State's interests in preventing illegality and protecting public order prevailed over the applicants' rights under Article 8 in the circumstances of this case. Although it is within the State's remit to criminalise non-permitted surrogacy, the parentage of the child born as a result of non-permitted surrogacy post-birth in Ireland lacks clarity. Will the child be brought into care in this event? If only the surrogate mother is imprisoned post-birth, can the intending parents act as legal guardians?

As outlined in our observations in 2022, we encourage the Department to provide clarity through the Bill on the consequences for children born through non-permitted surrogacy arrangements. As explored in more detail above, the Department should reconsider the decision not to provide for the paramountcy of the best interests of the child, including in these circumstances, to ensure that children born as a result of both permitted and non-permitted surrogacy are adequately protected.

³³ *Paradiso and Campanelli v Italy* (25358/12, 24 January 2017).