

CHILDREN AND FAMILY RELATIONSHIPS BILL

REGULATORY IMPACT ANALYSIS

5 FEBRUARY 2015

SUMMARY

Department / Office: Department of Justice and Equality	Title of Legislation: Children and Family Relationships Bill 2015
Stage: Publication of Bill	Date: February 2015
Related publications: <ul style="list-style-type: none">• Law Reform Commission's Report on the <i>Legal Aspects of Family Relationships</i> (2010)• General Scheme of the Children and Family Relationships Bill (September 2014)• Joint Oireachtas Committee on Justice, Defence and Equality: <i>Report on Hearings in relation to the Scheme of the Children and Family Relationships Bill</i> (May 2014)• <i>Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill</i> (May 2014)• <i>Better Outcomes Brighter Futures, the National Policy Framework for Children and Young People 2014 – 2020</i> (2014)• Draft General Scheme of the Children and Family Relationships Bill (January 2014)• Programme for Government (2011)• <i>Report of the Commission on Assisted Human Reproduction</i> (2005)	
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What are the policy objectives being pursued? <p>The aim of the Children and Family Relationships Bill is to modernise the existing legal framework so as to put in place a legal architecture to underpin diverse parenting situations and to provide legal clarity on parental rights and responsibilities in such situations.</p>	
What policy options have been considered? <ol style="list-style-type: none">1. Status quo2. Publish the Bill as drafted.	
Preferred option: Option 2	

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POLICY CONTEXT

The Government committed in the Programme for Government that ‘We will reform and modernise aspects of family law’.

The Government’s Statement of Priorities for 2014-2016 commits the Government to modernise family law by means of the Children and Family Relationships Bill:

‘In advance of a referendum on same-sex marriage in the first half of 2015, we will reform and modernise family law through the Children and Family Relationships Bill. It will safeguard the best interests of children and recognise that many children live in families which do not have constitutional recognition.’

The Government’s commitment arises in a context where demographic data confirms that more children than ever are living in non-marital families. Census 2011 has indicated that Irish families are increasingly diverse and that an increasing percentage of children are living in family types other than those headed by married parents.

The census data indicated that:

- There were 215,315 lone parent households in 2011.
- 17,378 lone parents were living in multi-family households.
- There were 4,042 same-sex couples living together in 2011.
- 66% of the 115,046 divorced or separated women were living with their children.
- There were 49,005 households of cohabiting couples with children under 15.
- The number of children living in households headed by cohabiting couples increased by 41% between 2006 and 2011.

The Central Statistics Office’s *Vital Statistics* data also confirms that the number of children being born outside marriage or civil partnership is

- 25,190 children were born outside marriage or civil partnership in 2011.
- 25,344 were born outside marriage or civil partnership in 2012. .

The UN Convention on the Rights of the Child places an obligation on states to protect the families in which children are living:

‘Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community’

The majority of families in Ireland are families based on marriage which attracts the protection of Article 41 of the Constitution. However, the current legislative framework does not address the following needs of children of diverse families:

- There is no mechanism for the female partner of a birth mother to become a parent or guardian of a child born to the couple jointly through assisted human reproduction. As a result, she has no rights to take decisions on behalf of the child even in an emergency.
- The husband or male partner of a birth mother can, if he registers as the child's father, be the parent or guardian of a child born to the couple through sperm donation. However, his paternity is rebuttable in case of any later dispute. As a result, his legal relationship with the child is not secured. He may also, in registering as the father, be committing an offence
- The lack of legal clarity is increasingly problematic as increasing numbers of children are being born to opposite-sex and same-sex couples using donated gametes.
- There is no mechanism to enable a donor-conceived child to trace his or her genetic identity even though this is international best practice, underpinned by the UN Convention on the Rights of the Child.
- There is no mechanism for a step-parent or for the parent's partner to be a guardian of a child even if that person is co-parenting the child. The only exception to this is where s/he becomes a testamentary guardian after the parent's death. As a result, the person has no legal right to take decisions on behalf of the child, even of a routine nature.
- The only option currently available to a judge to ascertain a child's views in proceedings on guardianship, custody and access is by directly interviewing the child. It may be traumatic for some children to have to participate in a court-based process. Equally, judges may not have the necessary training to interview children on issues with such profound consequences for them. If Article 42A stands part of the Constitution, it will be vital to provide appropriate mechanisms to ensure the child's views can be conveyed to the court where the child is not of an age and understanding to give them directly.
- There is no mechanism to enable a parent to determine who can take responsibility for his or her children if that parent is so seriously ill or suffers such a serious injury that he or she cannot do so.
- There is no possibility for a civil partnered or cohabiting couple to adopt a child jointly, even where the adoption is manifestly in the best interests of the child concerned.
- A child has no right to maintenance from a parent's civil partner or cohabiting partner even if that child has lived with the adult for many years. As a result, a child may be seriously financially disadvantaged if the relationship between the parent and the parent's partner breaks down.

It is recognised that new legislation is urgently needed to provide legislative clarity for diverse families in terms of their rights with regard to parentage, guardianship,

custody and access, and, in particular, to recognise and support the children living in families which are not Constitutionally recognised.

The Law Reform Commission highlighted the importance of legislation to address the needs of children living in diverse families in its 2010 report on the *Legal Aspects of Family Relationships*. The report recommended that a Children and Parental Responsibility Act be enacted which would consolidate the Guardianship of Infants Act 1964 and make the reforms recommended by the LRC.

The Children and Family Relationships Bill 2015 incorporates the following recommendations of that report:

- It provides, as recommended, for a married woman to be able to rebut the presumption of paternity of her husband where she provides evidence that she has not had contact with her husband for a period of 10 months. This provision is complementary to and consistent with the provisions made in the Civil Registration (Amendment) Act 2014. [recommendation 4.14]
- The Bill will remove the two-stage process whereby a relative of the child has to seek the leave of the court to apply for access to the child. Under the Bill's provisions, the relative will be able to apply directly to the court for access to the child. [recommendation 4.16]
- The Bill introduces a mechanism by which the court may appoint an expert to ascertain a child's views in proceedings concerning guardianship, custody and access. [recommendation 4.18] This provision also implements the obligation arising from Article 42A (which will be inserted into the Constitution if the Children Referendum is upheld) to ascertain a child's views in such proceedings. This is in addition to, not in substitution for, existing provisions which allow the court to ascertain a child's views directly if the child is of an age and understanding which make this appropriate.
- It enables a step-parent, civil partner or the parent's cohabiting partner to apply to become a guardian of a child if s/he has lived with the child's parent for 3 years and shared parenting responsibilities in respect of the child for 2 years. [recommendation 4.20]
- It makes the child's best interests the paramount consideration for the court in decisions on guardianship, custody and access and requires the court to seek the views of all existing guardians when appointing a guardian. [recommendation 4.22]
- It proposes that the following can apply for custody of a child: (1) a relative of the child, (2) a person who has cohabited with the child's parent for 3 years and shared parenting responsibilities for 2 years, or (3) a person who has undertaken parenting responsibilities for the child for a year where there is no parent or guardian willing to assume the rights and responsibilities of guardianship. [recommendation 4.23]

"Better Outcomes Brighter Futures, the National Policy Framework for Children and Young People 2014 - 2020", also includes a commitment that the Government should 'reform aspects of family law, including the law on guardianship, to create a legal structure to underpin diverse parenting situations and provide legal clarity on parental rights and duties in diverse family forms'. The Children and Family Relationships Bill will provide a vehicle to fulfil that commitment.

The Children and Family Relationships Bill will also address some of the recommendations of the *Report of the Commission on Assisted Human Reproduction* (2005) relating to the consent of donors, the right to identity and the right to clarity in terms of parentage.¹

OBJECTIVES

The aim of the Children and Family Relationships Bill is to put in place a legal architecture to underpin diverse parenting situations and to provide legal clarity on parental rights and responsibilities in such situations.

It aims to:

- modernise the law regarding the parental rights of children living in diverse family forms;
- establish that the best interests of the child are paramount in decisions on custody, guardianship and access;
- set out how parentage is to be assigned in cases of assisted reproduction;
- extend automatic guardianship to non-marital fathers who have lived with the child's mother for at least 12 months, including 3 months following the child's birth;
- enable civil partnered or cohabiting couples to be eligible jointly to adopt a child;
- allow civil partners, step-parents, those cohabiting with the biological parent and those acting in loco parentis for a specified period to apply for guardianship and custody;
- enable members of the wider family to apply for access to the child;
- put in place a series of provisions on making parenting work;
- establish a maintenance liability for a civil partner or cohabiting partner of a child's parent where the partner is a guardian of the child.

¹ It is the intention of the Minister for Health to bring forward legislation to address the regulation of assisted human reproduction more broadly.

3. IDENTIFICATION OF OPTIONS

Option One: Status quo.

If no legislation were enacted, a child living in one of following family types would continue to be disadvantaged:

- A child living with a civil partnered couple: as the non-biological partner would have no means of becoming the child's guardian, the child would be unable to enjoy the protections of that partner being her or his guardian. If the child had been born to the couple through donor-assisted reproduction, the child would also have no possibility of having a second (guardian) parent able to assume parental responsibilities.
- A child living with a parent and the parent's cohabiting partner: as the non-biological partner would have no means of becoming the child's guardian, the child would be unable to enjoy the protections of that partner being her or his guardian. If the child had been born to the couple through donor-assisted reproduction, the child would also have no possibility of having a second parent able to assume parental responsibilities and obtain guardianship.
- There would be no mechanism to secure the rights of a child born through assisted human reproduction to know his or her genetic identity. Knowing one's genetic identity is recognised as best practice in the context of the right of a child to his or her identity under the UN Convention on the Rights of the Child.
- It would be more difficult to comply with the Article 42A obligation (if it stands part of the Constitution) to ascertain a child's views in proceedings on guardianship, custody and access.

Option Two: Make the legislative provisions contained in the Children and Family Relationships Bill.

This option will address the needs of children of diverse families while seeking to avoid or reduce costs where possible.

Costs

It is anticipated that the Bill will give rise to costs for some families as there will be costs attached to seeking court applications for guardianship, custody or access or for the enforcement of court orders. An application to the Circuit Court costs €130 while a copy of a Circuit Court document costs €15. An application to the District Court costs €80 while a copy of a document costs €15. Families may also incur legal costs, particularly when court proceedings are disputed.

It is anticipated that there will be additional demands on the Civil Legal Aid budget, where families qualify for assistance under the existing means test, as there will be new categories of application that can be made to the courts:

- A step-parent, civil partner or cohabiting partner will be able to apply to become a guardian;
- A person chosen by a parent will be able to apply to become a temporary guardian.

In addition, the court will be able to appoint an expert to ascertain the views of the child. Where such an expert is necessary, the families concerned will have to pay those costs.

As these are new options that have not previously been available to families, it is not possible to anticipate at this stage how many applications will be made for these categories of guardian.

There may also be additional costs arising from the establishment of the national donor-conceived person register.

A number of actions have been taken to reduce costs for the State and for the parties concerned:

- A person seeking to be recognised as the second parent of a donor-conceived child no longer has to go to court to seek a declaration of parentage but can now be registered directly as the child's parent by the General Register Office on the child's birth certificate, subject to certain proofs.
- The provision whereby a judge can appoint an expert to ascertain the views of a child includes provisions for regulations to be made by the Minister to set the fees of such experts. It is intended that the Minister will issue regulations aimed at keeping such fees at a reasonable level and preventing fee escalation.
- The provisions concerning costs for court actions have been specifically drafted to indicate that the costs will be borne by the parties to the actions. This is to ensure that a State body will not have any liability in terms of costs. Where costs arise, it is intended that they will be borne by the parties themselves. Costs will accrue to the State only where such parties qualify for legal aid.

Benefits

The Bill is anticipated to bring the following benefits (1) to families and (2) to children.

Benefits to the child

- A child will have legal clarity in terms of his / her parentage.
- A donor-conceived child will be able to enjoy rights of succession to a non-biological parent if the latter is recognised as the child's parent.
- A donor-conceived child will have the right to trace his / her genetic identity by means of the national donor-conceived person register.

- Key decisions on a child's life will not be delayed if a parent is seriously ill or injured or if the parent is unable to undertake the responsibilities of guardianship.
- A parent will be able to obtain child maintenance for a child from the parent's civil partner, if the child has been dependent on the couple, or from the parent's cohabiting partner where that person is or has been the child's guardian. This will help to ensure that a child's standard of living is not seriously disadvantaged by the breakup of a relationship between the parent and his / her partner.

Benefits to families

- A greater number of couples will be able to be recognised as parents jointly either by means of adoption or when having a donor-conceived child;
- A greater number of unmarried fathers will become guardians of their children automatically and will be able to participate in important decisions regarding their children's lives.
- A person parenting a child on a daily basis will be able to apply to the court to become a guardian of that child. This will enable a step-parent, for instance, to take routine decisions on the child's life such as giving permission for a school trip.
- A parent who is being prevented from having access to a child will be able to apply to the court to impose measures to improve compliance by the other parent with the access order.
- Grandparents and other relatives will be more readily able to maintain relationships with the child as it will be easier for relatives to apply for access to the child.

IMPACTS

It is anticipated that the Bill will have a positive impact on some socially excluded and vulnerable groups.

Provisions have been included which will enable a person to seek custody of a child where s/he has undertaken parental responsibility for a child for over 12 months where that child has no other parent or guardian willing to assume the rights and responsibilities of guardianship. That will enable a grandparent, for instance, to have legal rights in respect of a grandchild where the parent has left the child in the grandparent's care because the parent is unable to take care of him / her.

A provision has also been included whereby a parent can appoint a temporary guardian to take responsibility for the child where the parent is experiencing serious illness or injury. This provision will enable a parent to ensure that decisions are taken on behalf of a child even if the parent is unable to do so. The provision requires Tusla to be put on notice of the appointment of the temporary guardian so that any concerns in terms of child protection or child welfare can be considered.

There are no compliance burdens arising. No impact is envisaged on national competitiveness, on economic markets, including consumer and competition impacts, on the environment or on North-South or East-West relations. However, there will be a positive reputational impact for Ireland internationally in terms of having an up-to-date corpus of family law which caters for the diversity of modern family forms.

CONSULTATION

The LRC undertook a consultation process in 2009 prior to producing its report on *Legal Aspects of Family Relationships* report on the *Legal Aspects of Family Relationships*.

The draft General Scheme was forwarded to the Joint Oireachtas Committee on Justice, Defence and Equality on 30 January 2014, requesting the Committee to undertake a public consultation on the Bill. It was also forwarded to the Ombudsman for Children on 30 January 2014 for consideration. The Joint Committee held public hearings on the draft General Scheme on 9 April 2014. Its pre-legislative scrutiny report was received on 29 May 2014. The advice of the Ombudsman for Children was received on 28 May 2014. The advice of the Joint Oireachtas Committee and of the Ombudsman for Children informed the refinement of the General Scheme.

The Department of Justice and Equality convened an informal working group involving the Department of Health, the Department of Social Protection, the Department of Foreign Affairs and Trade, the Department of Children and Youth Affairs and the Office of the Attorney General (AGO) which met on 27 February, 13 March and 18 June 2014 to examine the key concerns highlighted in relation to the draft General Scheme. It also reconvened the inter-departmental working group on 27 October, 3 November and 14 November 2014, following Government approval to draft the Bill. The group advised on issues arising in the drafting of the Bill. The Department also engaged bilaterally with relevant Departments and with the AGO on during the drafting process.

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